§ N.7 Crimes Involving Moral Turpitude

(For more information, see Defending Immigrants in the Ninth Circuit, Chapter 4, including Appendix 4-A, Annotations and Chart of Crimes Involving Moral Turpitude under California Law)

Overview: Crimes Involving Moral Turpitude. Because many offenses come within the immigration category of crimes involving moral turpitude ("CIMT"), criminal defense counsel must always keep this category in mind. There are two steps to analyzing CIMTs.

First, determine whether an offense is or might be a CIMT. Generally this requires *intent* to cause great bodily harm, defraud, or permanently deprive an owner of property, or in some cases to act with lewd intent or recklessness. See Part A below.

Second, if the offense is or may be a CIMT, see if according to the immigration statute formulae for CIMTs – based on number of convictions, when committed, sentence - the conviction would actually make this defendant inadmissible and/or deportable under the CIMT grounds. In some cases a single CIMT conviction will *not* make a noncitizen inadmissible and/or deportable. See Parts B and C below for these rules.

An administrative decision, *Matter of Silva-Trevino*, has made it impossible to tell whether certain offenses will be held CIMT's. Often the best course is to conservatively assume that a borderline offense is a CIMT, do the analysis to see if it will make the noncitizen defendant deportable and/or inadmissible, and warn the defendant accordingly. A waiver or some other defense strategy might be available. Hopefully the Ninth Circuit will overturn *Silva-Trevino*.

As always, remember that a single conviction might come within multiple immigration categories. For example, a CIMT offense might or might not also be an aggravated felony. Look up the section in the *California Quick Reference Chart* to check all categories.

A. Is the Offense a Crime Involving Moral Turpitude? (including *Matter of Silva-Trevino)*

A crime involving moral turpitude ("CIMT") has been vaguely defined as a depraved or immoral act, or a violation of the basic duties owed to fellow man, or recently as a "reprehensible act" with a *mens rea* of at least recklessness. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). Traditionally a CIMT involves intent to commit fraud, commit theft with intent to permanently deprive the owner, or inflict great bodily harm, as well as some reckless or malicious offenses and some offenses with lewd intent.

For criminal defenders, the first step to see if an offense is a CIMT is to consult the *California Quick Reference Chart.* However, because this area of the law is in flux, you also *must* be aware of the points in this Note. Note also that whether a particular offense constitutes a CIMT for immigration purposes is determined by federal immigration caselaw, not state rulings for purposes of witness impeachment or license limitations.

How Matter of Silva-Trevino makes it harder to guarantee a conviction will not be a CIMT. To make a long story short,[1] currently it can be hard to determine if a conviction will be held to be a CIMT because of the administrative case, *Matter of Silva-Trevino,* 24 I&N Dec. 687 (A.G. 2008). Under *Silva-Trevino,* in some cases an immigration judge will be able to go beyond the record of conviction and hold a hearing on the *facts* about the defendant's conduct, to see if the defendant committed a crime involving moral turpitude. The judge can take testimony from the defendant, review police reports, etc., and may even consider facts not required to prove an element of the offense. Therefore, while counsel should strive to protect the defendant from a CIMT conviction by choosing the right plea or controlling the record of conviction, as long as *Silva-Trevino* remains in effect, the defendant might end up with a CIMT conviction.

How to protect a client despite Silva-Trevino. There are two defense strategies that will protect a client from a CIMT conviction despite *Silva-Trevino*. ***If you succeed in negotiating a disposition according to these strategies, give the client a copy of the legal summary that appears at Appendix I following this Note.***

1. With a divisible statute, plead specifically to conduct that is not a CIMT

A "divisible statute" reaches conduct that is and is not a CIMT. It is clear that if the record of conviction specifically identifies elements that do not involve CIMT, the immigration judge may not go beyond that and may not conduct a fact-based inquiry under *Silva-Trevino*.[2] Thus for CIMT purposes, instead of creating a vague record of conviction, where possible one should plead to a specific offense that does not involve moral turpitude.

Example: Calif. Veh. Code § 10851 is divisible as a CIMT, because it covers both auto theft with intent to permanently deprive the owner of property (a CIMT), and joyriding

[1] For further discussion of *Silva-Trevino* see Brady et al, *Defending Immigrants in the Ninth Circuit* (2011, www.ilrc.org) or see Tooby, Kesselbrenner, "Living with Silva-Trevino" at www.nortontooby.com.
[2] *Matter of Alfaro,* 25 I&N Dec. 417 (BIA 2011); *Matter of Silva-Trevino*, 24 I&N Dec. 687, 699 (AG 2008).

with temporary intent (not a CIMT). If the defendant specifically pleads to taking with temporary intent, then the conviction is not a CIMT. But if the record is vague between temporary and permanent taking, the immigration judge may conduct to determine the intent. She might take testimony from the immigrant, examine the probation report, etc.

Another commonly charged divisible statute is P.C. § 243(e). The offense is a CIMT if it involved use of actual violent force, but not if it involved offensive touching or other *de minimus* force. A specific plea to the latter prevents the offense from being a CIMT, even under *Silva-Trevino*.

2. Plead to an offense that requires intent of negligence or less

An offense involving negligence or less is not a CIMT. For example, it has long been held that simple drunk driving, even with injury or as a repeat offense, is not a CIMT.[3] See other offenses in the Chart that also should not be held to involve moral turpitude under any circumstances. *Caveat:* Because there are reports that some immigration judges may blur this rule under *Silva-Trevino*, a conviction for drunk driving coupled with a conviction for driving on a suspended license in the same incident might be held to be a CIMT, if the immigration judge were to (wrongly) combine the two offenses.

The adverse Silva-Trevino rule only applies to CIMT determinations. If the immigration court does conduct a broad factual inquiry under *Silva-Trevino*, it may use the information only to determine if the offense involves moral turpitude, and not to determine if the conviction comes within other grounds of inadmissibility or deportability. [4]

Example: Mike pleads guilty to P.C. § 243(e), spousal battery. If this offense is committed with "offensive touching," it is neither a CIMT nor a deportable "crime of domestic violence." If instead it is committed with actual violence, it will be held a CIMT and a deportable crime of domestic violence.[5] Mike's defender creates a vague record of conviction in which Mike pleads to the language of the statute, which does not establish whether the offense involved actual violence or an offensive touching.

Under *Silva-Trevino*, for CIMT inquiries only, an immigration judge may make a factual inquiry into Mike's conduct. Based on this inquiry she might find that real violence was involved and the offense is a CIMT.

The judge may *not* use this information to hold that the offense is a deportable crime of domestic violence. Here the regular evidentiary rules known as the categorical approach apply, and the judge must base her decision only upon the reviewable record of conviction. Since the vague record does not establish that the offense involved actual

[3] *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).
[4] "This opinion does not, of course, extend beyond the moral turpitude issue--an issue that justifies a departure from the Taylor/Shepard framework because moral turpitude is a non-element aggravating factor that 'stands apart from the elements of the [underlying criminal] offense.'" *Matter of Silva-Trevino*, 24 I&N Dec. at 699.
[5] See discussion of Calif. P.C. § 243(e) and *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006), in *§ N. 9 Domestic Violence*. A crime of domestic violence is defined at 8 USC § 1227(a)(2)(E)(i).

violence, she must find that Mike is not deportable under the domestic violence ground. *Note, however, that best practice is to identify "minimum touching" rather than leave the record vague.* Not only will it avoid a CIMT, but some immigration judges might make a mistake and apply the *Silva-Trevino* rule outside of CIMTs.

Even if the offense is a CIMT it may not be an immigration catastrophe, depending on the individual case! Many immigrants have survived conviction of one or more CIMTs. In some cases, conviction of a single CIMT will not cause the person to be deportable and/or inadmissible. See Parts B and C. In other cases, a discretionary pardon ("waiver") for CIMT might be available. Finally, it is quite possible that the Ninth Circuit will overturn *Silva-Trevino*.

B. The CIMT Deportation Ground, 8 USC § 1227(a)(2)(A)(i), (ii)

Who needs to avoid a deportable conviction? Permanent residents, refugees, F-1 students and other noncitizens with lawful status want to avoid being deportable, because they could lose their status. In contrast, most undocumented persons are not harmed by a deportable (as opposed to inadmissible) conviction, with these exceptions: persons who will apply for any form of non-LPR cancellation, or who have or will apply for Temporary Protected Status, want to avoid a deportable conviction, because it is a bar to such status. See discussion in *Note 1: Overview*.

To make a noncitizen deportable under the CIMT ground, the conviction must come within at least one of the following two categories.

1. Conviction of two CIMTs since admission

A noncitizen is deportable for **two or more convictions** of crimes involving moral turpitude that occur anytime after admission to the U.S. on any visa, or after adjustment of status.

Example: Stan was admitted to the U.S. in 1991. He was convicted of petty theft in 2002 and fraud in 2012. He is deportable for conviction of two CIMTs since admission.

There are two very limited exceptions, for convictions that are "purely political" or that arise in a "single scheme of criminal misconduct" (often interpreted to mean that the charges had to arise from the very same incident).

2. One conviction of a CIMT, committed within five years of admission, that carries a maximum sentence of one year or more

A noncitizen is deportable for **one conviction** of a crime involving moral turpitude ("CIMT") if she committed the offense within five years of her last "admission" to the United States, and if the offense carries a potential sentence of one year.

Avoid Deportability for CIMT by Pleading to a Six-Month Misdemeanor. A single CIMT misdemeanor with a maximum possible sentence of six months will not trigger the CIMT deportation ground, regardless of when the offense was committed. Unfortunately, a CIMT misdemeanor that carries a maximum possible sentence of one year will trigger the CIMT deportation ground if the offense was committed within five years of admission. This includes "wobbler" misdemeanors.

Practice Tip: Plead to ***attempt*** in order to reduce the maximum possible sentence. For example, attempted grand theft, when designated as or reduced to a misdemeanor, has a potential sentence of six months. Immigration will accept a sentence reduction under P.C. § 17, even if the motion is filed after removal proceedings are begun.[6]

Plead to an Offense Committed more than Five Years Since the "Date of Admission." Consider two situations: a person who was admitted to the U.S. with any kind of visa, and a person who entered without inspection, i.e. surreptitiously crossed the border.

Generally, if a noncitizen was admitted into the U.S. under any lawful visa – with a green card, on a tourist visa, with a border crossing card, or other status – that is the admission date that starts the five-year clock. This is true even if the person fell out of lawful status after the admission. [7]

Example: Mabel was admitted to the U.S. as a tourist in 2003. Her permitted time ran out and she lived here unlawfully for a few years. She married a U.S. citizen and through him "adjusted status" to become a lawful permanent resident in 2007. She was convicted of a CIMT that has a potential sentence of a year, for an offense she committed in 2010. Is she deportable under the CIMT ground?

No, she is not. To avoid being deportable for CIMT, Mabel needs five years between her admission date and the date she committed the offense. Her admission was in 2003, and she committed the CIMT in 2010. The fact that she was out of lawful status for some time and then adjusted status does not affect this.[8]

Note: If the person took a trip outside the U.S. for more than six months, or left the U.S. after being convicted, the rules are not yet clear. Consult an immigration expert.

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[6] *La Farga v. INS*, 170 F.3d 1213 (9th Cir. 1999); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003).
[7] Until recently, there was conflict between federal courts and the Board of Immigration Appeals as to what date is the date of admission for this purpose. Fortunately, the Board of Immigration clarified this and adopted the federal court rule, to the benefit of the immigrant, in *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011). For further discussion see Brady, "Practice Advisory: Immigration Authorities Clarify When One Moral Turpitude Conviction Will Make a Lawful Permanent Resident Deportable," at www.ilrc.org/crimes.
[8] *See Matter of Alyazji*, *supra.*

In contrast, if the person *initially entered without inspection*, e.g. surreptitiously waded across the Rio Grande River, and later "adjusted status" to become a lawful permanent resident, the admission date is the date he or she was granted lawful permanent residency. [9]

Example: Bernard entered without inspection in 1999. In 2003 he adjusted status to lawful permanent residence.[10] He was convicted of a CIMT which he had committed in 2008, and which had a potential sentence of a year or more. Bernard is deportable. His "date of admission" is his 2003 adjustment of status date, because he has no prior admission. He committed the CIMT in 2007, within five years after that date.

Practice Tip: Avoid deportability for one CIMT by working with the five years. If there were ongoing offenses, attempt to plead to an offense that happened later in time, after the five years elapsed. For example, if Bernard had committed an ongoing fraud offense, try to plead to an incident that happened outside of the five-year period, in 2008 or later.

C. The CIMT Ground of Inadmissibility, 8 USC § 1182(a)(2)(A)

Who wants to avoid being inadmissible? An undocumented person who wants to apply for relief will want to avoid being inadmissible, because it is a bar to relief. A deportable permanent resident would like to avoid being inadmissible because that could be a bar to relief from removal. An asylee or refugee wants to be admissible in order to apply for LPR status. A permanent resident who is inadmissible for crimes and travel outside the U.S. can lose their status and be barred from returning. In some cases, a waiver of inadmissibility will be available for these persons.

A noncitizen is inadmissible who is convicted of just one crime involving moral turpitude, whether before or after admission. There are two helpful exceptions to the rule.

Petty offense exception.[11] If a noncitizen (a) has committed only one moral turpitude offense ever, (b) the offense carries a potential sentence of a year or less, and (c) the "sentence imposed" was less than six months, the person is automatically *not* inadmissible under the CIMT ground.

[9] *Ibid*, and see Practice Advisory, *supra*, for more information.
[10] How could that happen? It is harder because Bernard entered without inspection. He could have married a U.S. citizen and had a visa petition submitted in 2001 or earlier, so he could adjust specially under INA § 245(i). Or he may have qualified through asylum, cancellation, or other special application.
[11] 8 USC § 1182(a)(2)(A)(ii)(II).

Example: Freia is convicted of felony grand theft, the only CIMT offense she's ever committed. (She also has been convicted of drunk driving, but as a non-CIMT that does not affect this analysis.) The judge gives her three years probation, suspends imposition of sentence, and orders her to spend one month in jail as a condition of probation. She is released after 15 days. The grand theft is reduced to a misdemeanor under PC § 17.[12]

Freia comes within the petty offense exception. She has committed only one CIMT, it has a potential sentence of a year or less, and the sentence imposed was one month. (For more information on sentences, see *§ N.4 Sentencing*.)

Youthful offender exception.[13] This comes up more rarely, but can be useful for young adults. A disposition in juvenile delinquency proceedings is not a conviction and has no relevance to moral turpitude determinations. But persons who were convicted as adults for acts they committed while under the age of 18 can benefit from the youthful offender exception. A noncitizen who committed only one CIMT ever, and while under the age of 18, ceases to be inadmissible as soon as five years have passed since the conviction or the release from resulting imprisonment.

Example: Raoul was convicted as an adult for felony assault with a deadly weapon, based on an incident that took place when he was 17. He was sentenced to eight months and was released from imprisonment when he was 19 years old. He now is 25 years old. This conviction does not make him inadmissible for moral turpitude.

Inadmissible for making a formal admission of a crime involving moral turpitude. This ground does not often come up in practice. A noncitizen who makes a formal admission to officials of all of the elements of a CIMT is inadmissible even if there is no conviction. This does not apply if the case was brought to criminal court but resolved in a disposition that is less than a conviction (e.g., charges dropped, conviction vacated).[14] Counsel should avoid having clients formally admit to offenses that are not charged with.

Resource: If you wish to check other consequences of a CIMT besides being a deportable or inadmissible conviction – e.g. when a CIMT conviction triggers mandatory detention or is a bar to cancellation -- see "All Those Rules About Crimes Involving Moral Turpitude" at www.ilrc.org/crimes.

[12] Reducing a felony to a misdemeanor will give the offense a maximum possible sentence of one year for purposes of the petty offense exception. *La Farga v. INS*, 170 F.3d 1213 (9th Cir. 1999); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003).
[13] 8 USC § 1182(a)(2)(A)(ii)(I).
[14] See, e.g., *Matter of CYC*, 3 I&N Dec. 623 (BIA 1950) (dismissal of charges overcomes independent admission) and discussion in *Defending Immigrants in the Ninth Circuit*, § 4.4 (www.ilrc.org).

Appendix 7 - I

LEGAL SUMMARIES TO HAND TO THE DEFENDANT

The majority of noncitizens are unrepresented in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes, and they might not recognize the defense you have created. This paper may be the only chance for the defendant to benefit from your work.

Please give a copy of the applicable paragraph/s to the Defendant, *with instructions to present it to an immigration defense attorney or the Immigration Judge. Please include a copy of any* ***official documents*** *(e.g. plea form) that will support the defendant's argument.*

Please give or mail a second copy to the defendant's immigration attorney, friend, or relative, or mail it to the defendant's home address*. Authorities at the immigration detention center may confiscate the defendant's documents. This will provide a back-up copy accessible to the defendant.*

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

If the record of conviction specifically identifies elements of an offense that do not involve moral turpitude, the conviction is not of a crime involving moral turpitude and the immigration judge may not go beyond the record to conduct a fact-based inquiry under *Silva-Trevino*. See *Matter of Silva-Trevino*, 24 I&N Dec. 687, 699 (AG 2008); *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011) (evidence outside of the record of conviction may not be considered where the conviction record itself demonstrates whether the noncitizen was convicted of engaging in conduct that constitutes a crime involving moral turpitude).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

A crime with a mens rea of negligence or less does not qualify as a crime involving moral turpitude. See *Matter of Silva-Trevino*, 24 I&N Dec. 687, 697 (AG 2008) (a crime involving moral turpitude requires "both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.").

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Matter of Silva-Trevino permits an immigration judge to go beyond the record of conviction only to determine if the offense of conviction is a crime involving moral turpitude, and not to determine if it is a crime of violence or other category. "This opinion does not, of course, extend beyond the moral turpitude issue--an issue that justifies a departure from the Taylor/Shepard framework because moral turpitude is a non-element aggravating factor that 'stands apart from the elements of the [underlying criminal] offense.'" *Matter of Silva-Trevino*, 24 I&N Dec. 687, 699 (AG 2008).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

When a California felony is designated or reduced to a misdemeanor, the offense has a potential sentence of one year for immigration purposes and can come within the petty offense exception to the moral turpitude inadmissibility ground. This is true regardless of when the offense is reduced, including after initiation of removal proceedings. *La Farga v. INS*, 170 F.3d 1213 (9th Cir. 1999); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Conviction of a crime involving moral turpitude will cause deportability if the offense has a potential sentence of a year or more and was committed within five years of the "date of admission." ***Generally if a noncitizen was admitted into the U.S. under any status, that date is the admission date that begins the five years. This is true even if the person fell out of lawful status after the admission and/or later adjusted status to permanent residence.*** *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011) (overruling *Matter of Shanu*, 23 I&N Dec. 754, 759 (BIA 2005).

APPENDIX 7 - II

CHEAT SHEET – DOES THIS CONVICTION MAKE THIS INDIVIDUAL DEPORTABLE OR INADMISSIBLE UNDER THE MORAL TURPITUDE GROUNDS?

I. DEPORTABLE FOR MORAL TURPITUDE, 8 USC § 1227(a)(2)(A)

Deportable for *One* Conviction of a Crime Involving Moral Turpitude ("CIMT"), if:

a) Convicted
b) Of one CIMT
c) That has a potential sentence of one year or more
d) And was committed within five years after date of admission

To prevent deportability for a single CIMT:

a) Avoid a "conviction" by getting pre-plea diversion or treatment in juvenile proceedings; *or*
b) Plead to an offense that is not a CIMT; *or*
c) Avoid a potential one-year sentence by pleading to a misdo with a six-month maximum sentence. Or in California plead to *attempt* to commit either a one-year misdo or a felony that can be reduced to a misdo, for a maximum possible sentence of six months; *or*
d) Plead to an incident that happened more than five years after the "date of admission." This is usually the date the person was first admitted into the U.S. with any kind of visa or card. Or, *if* the person entered the U.S. without inspection – i.e., never was admitted on any visa – it is the date that the person became a permanent resident by "adjusting status" within the U.S. If the person left the U.S. after becoming inadmissible for crimes, or for more than six months, get more advice.

Deportable for Conviction of *Two* or More CIMTs After Admission

a) Both convictions must be after the person was admitted to the U.S. in some status, or adjusted status
b) The convictions may not spring from the same incident ("single scheme")

II. INADMISSIBLE FOR MORAL TURPITUDE, 8 USC 1182(a)(2)(A)

Inadmissible for One or More Convictions of a CIMT

Petty Offense Exception automatically means the person is not inadmissible for CIMT.
To qualify for the exception:

a) Defendant must have *committed* only one CIMT ever
b) The offense must have a potential sentence of one year or less. Here a one-year misdo, or a felony wobbled down to a misdemeanor, will qualify for the exception.
c) Sentence imposed is six months or less. For example, suspended imposition of sentence, three years probation, six months jail ordered as a condition of probation will qualify.

Youthful Offender Exception applies rarely, but benefits youth who were convicted as adults. Noncitizen is not inadmissible for CIMT if he or she committed only one CIMT ever, while under the age of 18, and the conviction or resulting imprisonment occurred at least five years ago.