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Immigration Consequences of Georgia Crimes



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OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-4-1	Attempt	Yes, if substantive offense is AF ¹	Yes, if substantive offense is CIMT ²	Yes, if substantive offense is firearm or controlled substance offense	If possible, plead to attempt to commit an offense that does not involve fraud or trigger other immigration consequences
16-4-8	Conspiracy	Yes, if substantive offense is AF ³	Yes, if substantive offense is CIMT	Yes, if substantive offense is firearm offense or controlled substance offense ⁴	If possible, plead to conspiracy to commit an offense that does not involve fraud or trigger other immigration consequences.
16-4-7	Criminal solicitation	Possibly, if substantive offense is AF ⁵	Probably, if substantive offense is CIMT	Probably, if substantive offense is firearm offense or controlled substance offense. ⁶	
16-5-1	Murder	Yes	Yes		

¹ 8 U.S.C. 1101(a)(43)(U); *Kamagate v. Ashcroft*, 385 F.3d 144 (2nd Cir. 2004). In *Matter of Onyido*, 22 I. & N. Dec. 552 (BIA 1999), the Board held that a noncitizen who received nothing for his attempted fraud was still deportable where the amount sought exceeded \$10,000.

² *Matter of Katsansis*, 14 I. & N. Dec. 266 (BIA 1973)

³ *Kamagate v. Ashcroft*, 385 F.3d 144 (2nd Cir. 2004)

⁴ See, e.g., *Kuhali v. Reno*, 266 F.3d 93 (2nd Cir. 2001) (holding that conviction for conspiracy to export firearms is a firearm offense because it involves a conspiracy to commit a firearm offense)

⁵ *Matter of Guerrero* clarifies that solicitation offenses are not included in the aggravated felony ground covering attempts and conspiracies, 8 U.S.C. 1101(a)(43)(U), but may be considered aggravated felonies under substantive grounds, such as crime of violence. 25 I. & N. Dec. 631 (BIA 2011)(holding that solicitation to commit a “crime of violence” is itself a crime of violence AF under 8 U.S.C. 1101(a)(43)(F)).

⁶ Outside of the 9th Circuit, the BIA treats a conviction for solicitation of a controlled substance as a deportable offense under the controlled substance ground of deportability. *Matter of Zorilla-Vidal*, 24 I&N Dec. 768(BIA 2009). In the 9th Circuit, see e.g. *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001), recently affirmed by *Sandoval v. Yates* (9th Cir. 2017).

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-5-2	Voluntary manslaughter	Yes, COV if sentence of 1yr or more ⁷	Yes ⁸		
16-5-3	Involuntary manslaughter	If sentence of 1yr or more, subsection (a) is possibly COV if underlying unlawful act proven is COV. Subsection (b) is probably not COV. ⁹	Subsection (a) is probably CIMT if underlying unlawful act is CIMT. Unlikely for subsection (b) ¹⁰		If possible, plead to subsection (b) to avoid CIMT or AF.
16-5-20	Simple assault	If sentence of 1yr or more, both (a)(1) and (a)(2) are probably COV ¹¹	(a)(1) is probably CIMT ¹² , and (a)(2) is not CIMT ¹³	If COV and victim is family member, will be "crime of domestic violence"	If possible, plead to disorderly conduct.
16-5-21	Aggravated assault	Probably COV if sentence of 1yr or more ¹⁴	Probably ¹⁵	If COV and victim is family member, will be "crime of domestic violence." Firearms offense if a gun was used.	Keep record clear of any domestic relationship

⁷ 8 U.S.C. 1101(a)(43)(F)

⁸ *Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994)

⁹ See e.g. *Francis v. Reno*, 269 F.3d 162(3rd Cir. 2001)

¹⁰ Because the statute does not require any kind of mens rea, this should not be a CIMT, although DHS may try to charge as CIMT b/c offense involves death.

¹¹ 8 U.S.C. 1101(a)(43)(F). See endnote on COV.

¹² ICE charges this offense as a CIMT. See *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007)

¹³ Since (a)(2) involves no specific intent to injure, this is not a CIMT. See endnote on CIMTs.

¹⁴ U.S.C. 1101(a)(43)(F). See endnote on COV.

¹⁵ See endnote on CIMTs.

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-5-23	Simple battery	(a)(1) is not COV ¹⁶ . With sentence of 1yr, (a)(2) is COV ¹⁷	(a)(1) is not a CIMT ¹⁸ (a)(2) probably is a CIMT ¹⁹	If COV and victim is family member, will be "crime of domestic violence"	Plead to disorderly conduct to avoid CIMT and AF If not possible, plead to (a)(1) to avoid CIMT and AF. Keep record clear of any domestic relationship.
16-5-23.1	Battery	If sentence of 1yr, is COV ²⁰	Yes ²¹	If COV and victim is family member, will be "crime of domestic violence"	Plead to disorderly conduct to avoid CIMT and AF Keep record clear of any domestic relationship.
16-5-24	Aggravated battery	COV if sentence of 1yr or more ²²	Yes	If victim is family member, may be "crime of domestic violence"	Keep record clear of any domestic relationship
16-5-40	Kidnapping	Probably not ²³	Probably ²⁴		
16-5-41	False imprisonment	No	Probably not ²⁵	(c) is possibly child abuse	

¹⁶ (a)(1) should not be COV because it covers insulting or provoking touching that does not result in injury, and under *Johnson v. U.S.*, 130 S. Ct. 1265 (2010), mere offensive touching, spitting or de minimis force is insufficient. (force means "violenceviolent force... capable of causing physical pain or injury to another person.") *U.S. v. Griffith*, 455 F.3d 1339 (11th Cir. 2006) found that (a)(1) was COV, but this case has been abrogated by Johnson. See endnote on COV.

¹⁷ 8 U.S.C. 1101(a)(43)(F). *Hernandez v. US*, 513 F.3d 1336 (11th Cir. 2008)(holding that (a)(2) requires physical contact that inflicts pain or injury). See endnote on COV.

¹⁸ *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006)(offense is not CIMT where it covers only insulting touching with no injury)

¹⁹ *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007)(where statute requires intentional conduct and results in physical injury, offense is CIMT). See endnote on CIMTs.

²⁰ *US v. Yanes-Cruz*, 634 F.App'x 247 (11th Cir 2015). See endnote on COV.

²¹ See endnote on CIMTs.

²² 8 U.S.C. 1101(a)(43)(F). See endnote on COV.

²³ Not a COV, because there is no requirement of violent force. See endnote on COV.

²⁴ *Matter of P*, 5 I&N Dec. 444(BIA 1953)

²⁵ See *Turijan v. Holder*, 744 F.3d 617(9th Cir. 2014)(holding that CA statute of felony false imprisonment is not CIMT because it does not require intent to injury, actual injury, or a protected class of victim); See also *Fajardo v. Att'y Gen.*, 659 F.3d 1303(11th Cir. 2011)

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-5-44.1	Hijacking a motor vehicle	Probably a theft offense if sentence of 1yr or more ²⁶ . May also be a COV if record shows "by force and violence" and sentence of 1yr or more. ²⁷	Probably ²⁸	Firearms offense if record shows that firearm was used ²⁹	
16-5-60(b)	Reckless conduct	No ³⁰	Yes ³¹		Plead to disorderly conduct to avoid CIMT
16-5-70	Cruelty to children	<u>Possibly as COV under (b)³² if sentence of 1yr or more</u>	Yes under (a) or (b); probably not under (c) or (d) ³³	Yes, under (a),(b),or (c) as child abuse ³⁴	If necessary to plead to this offense, plead to (d) for best argument of avoiding child abuse ground.

Deleted: No

²⁶ 8 U.S.C. 1101(a)(43)(G). Because property is stolen without consent, this is a theft offense. See *Vassell v. Att’y Gen*, supra.

²⁷ See endnote on COV.

²⁸ *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847(BIA 2016). A taking without consent is inherently turpitudinous, regardless of whether the taking is permanent or not.

²⁹ 8 U.S.C. 1227(a)(2)(C). This is a very broad ground of deportability: "...purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry..."

³⁰ Misdemeanor offenses can only constitute a COV under 18 U.S.C. 16(a), which requires more than a reckless use of force; force must be "violent." *Johnson v. U.S.*, 130 S. Ct. 1265(2010). See endnote on COV.

³¹ *Keungne v. Att’y Gen*, 561 F.3d 1281 (11th Cir. 2009); *Matter of Hernandez*, 26 I&N Dec. 464 (BIA 2015)

³² [US v. Lopez-Patino, 391 F.3d 1034 \(9th Cir. 2004\)\(using modified categorical approach to find that AZ statute with similar wording to GA statute is not categorically COV but was COV when transcript and plea revealed use of physical force\)](#)

³³ *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007)(where statute requires intentional conduct and results in physical injury, offense is CIMT)

³⁴ 8 U.S.C. 1227(a)(2)(E). Child abuse ground of deportability is very broad. See *Matter of Velazquez-Herrera*, 24 I&N Dec. 503(BIA 2008)(holding that child abuse broadly means "any offense involving an intentional, knowing, reckless or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being") See also *In re Osorio*, 26 I&N Dec. 703(BIA 2016).

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-5-90	Stalking	No	Probably ³⁵	Yes, as stalking ³⁶ ; possibly, under (a)(2), as violation of protective order ³⁷	
16-5-91	Aggravated stalking	No	Probably ³⁸	Yes, as stalking ³⁹ and as violation of protective order	
16-5-95	Violation of family violence order	No	Probably not	Yes, for violation of protective order ⁴⁰	
16-6-1	Rape	Yes, as rape, regardless of sentence ⁴¹	Yes		
16-6-4(a)	Child molestation	Yes, as sex abuse of a minor, regardless of sentence ⁴²	Yes	Yes, as child abuse ⁴³	If possible, plead to battery (a)(1), but may still be deportable for child abuse

³⁵ *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999)(holding that agg stalking conviction which involves willful embarkation on a course of conduct which causes another to feel great fear is CIMT)

³⁶ 8 U.S.C. 1227(a)(2)(E)(i). See also *Arriaga v. Mukasey*, 521 F.3d 219 (2nd Cir. 2008)(holding that INA stalking provision is not unconstitutionally vague and that stalking is generally “following another individual with the intent of causing him or her harm or to fear harm”)

³⁷ 8 U.S.C. 1227(a)(2)(E)(ii)

³⁸ See *Matter of Ajami*, *supra*.

³⁹ 8 U.S.C. 1227(a)(2)(E)(i). See also *Arriaga v. Mukasey*, *supra*.

⁴⁰ 8 U.S.C. 1227(a)(2)(E)(ii)

⁴¹ 8 U.S.C. 1101(a)(43)(A)

⁴² 8 U.S.C. 1101(a)(43)(A)

⁴³ 8 U.S.C. 1227(a)(2)(E)(i). See also *Matter of Velazquez-Herrera*, *supra*.

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-6-5	Enticing a child for indecent purposes	Yes, as sex abuse of a minor ⁴⁴	Yes	Yes, as child abuse ⁴⁵	
16-6-8(a)	Public indecency	Possibly sex abuse of a minor, if victim is minor ⁴⁶	Yes ⁴⁷		Keep record clear of child victim.
16-6-9	Prostitution	No	Yes	Engaging in prostitution is ground of inadmissibility	Plead to disorderly conduct to avoid immigration consequences
16-6-10	Keeping a place of prostitution	Possibly, under managing a prostitution business ground, regardless of sentence ⁴⁸	Probably ⁴⁹		
16-6-22.1	Sexual battery	Yes, as sexual abuse of a minor under (d); no, if victim is not a minor	Yes	Yes, as child abuse under (d)	

⁴⁴ *U.S. v. Ramirez-Gonzalez*, 755 F.3d 1267(11th Cir. 2014)

⁴⁵ 8 U.S.C. 1227(a)(2)(E)(i). See also *Matter of Velazquez-Herrera*, *supra*.

⁴⁶ Under categorical approach, a conviction under an age-neutral statute like GA's should not be sexual abuse of a minor, since the courts should not be able to look to the record of conviction. However, older cases found that an age-neutral statute if committed against a minor could be sexual abuse of a minor. See, e.g. *Gattem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005)

⁴⁷ *In re Medina*, 26 I&N Dec 79 (BIA 2013)

⁴⁸ 8 U.S.C. 1101(a)(43)(K)(i). Because GA law defines prostitution to include conduct outside of sexual intercourse and thus more broadly than federal immigration law, there is an argument that OCGA 16-6-10 is not a "managing prostitution business" AF. See *Prus v. Holder*, 660 F.3d 144(2011)(New York promoting prostitution in the 3rd degree is not an AF b/c it punishes conduct outside of sexual intercourse).

⁴⁹ *Matter of P*, 3 I&N Dec. 20(BIA 1947)

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-7-1	Burglary	Yes, if convicted of breaking into a building, and sentence of 1yr. However, even if not burglary, this can be a theft or attempted theft offense with sentence of 1yr. ⁵⁰	Yes, if record of conviction shows intent to commit theft or offense that is CIMT ⁵¹		Plead to criminal trespass subsection (b) instead. If nothing else possible, plead to committing a non-CIMT felony in the course of burglary
16-7-5	Home invasion	Yes as burglary if sentence of 1yr ⁵²	Yes, if record of conviction shows intent to commit theft or offense that is CIMT ⁵³	Firearms offense if weapon is a firearm	
16-7-20	Possession of tools for commission of crime	No	No ⁵⁴		A good plea alternative to burglary or theft offenses.

⁵⁰ 8 U.S.C. 1101(a)(43)(G). This offense is not an AF burglary if a vessel or vehicle is broken into, but a vehicle/vessel burglary will be a theft offense if committed “with intent to commit a theft therein.” *Matter of Perez*, 22 I&N Dec. 1325(BIA 2000). The federal courts have generally reached the same conclusion. See e.g., *U.S. v. Martinez-Garcia*, 268 F.3d 460(7th Cir. 2001); *Lopez-Elias v. Reno*, 209 F.3d 788(5th Cir. 2000); *Bunty Ngaeth v. Mukasey*, 545 F.3d 796(9th Cir. 2008).

⁵¹ *Matter of M*, 2 I&N Dec. 721(BIA 1946)

⁵² 8 U.S.C. 1101(a)(43)(G)

⁵³ *Matter of M*, 2 I&N Dec. 721(BIA 1946)

⁵⁴ *Matter of S*, 6 I&N Dec. 769(BIA 1955)(holding that conviction is not CIMT unless record affirmatively shows that crime intended to commit with the tools was a CIMT). Since this statute includes only intent to commit “a crime” and doesn’t specify, it is not a CIMT.

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-7-21	Criminal trespass	If sentence of 1yr, (a) is possibly COV, but (b) is not COV	Probably under (a) b/c of intentional damage element ⁵⁵ , but no under (b)		Plead to (b) to avoid adverse immigration consequences.
16-7-22	Criminal damage to property in the first degree	Probably not COV under (a)(1). ⁵⁶ Probably COV under (a)(2) if sentence of 1yr ⁵⁷	Probably under (a)(1); possibly under (a)(2) ⁵⁸		
16-7-23	Criminal damage to property in the 2 nd degree	If sentence of 1yr, (a)(1) is probably COV, and (a)(2) is probably COV if record shows intentional conduct ⁵⁹	Probably under (a)(1) and probably under (a)(2) if record shows intentional conduct ⁶⁰		Plead instead to criminal trespass (b)
16-7-24	Interference with government property	Is possibly a COV with a sentence of 1yr; (b) is not COV	Probably not under (a) or (b) ⁶¹		

⁵⁵ *Matter of Ruiz-Lopez*, 25 I&N Dec. 551(BIA 2011)

⁵⁶ Since statute does not specify the kind of force used, there is a good argument this is not COV. See *Johnson, supra*.

⁵⁷ 18 U.S.C. §16(a)(defining COV as “any offense that has as an element of the use or attempted use or threatened use of physical force against the person or property of another”)

⁵⁸ See *Neto v. Holder*, 680 F.3d 25(1st Cir. 2012)(holding that “malicious” destruction of property is CIMT)

⁵⁹ 18 U.S.C. §16(a)(defining COV as “any offense that has as an element of the use or attempted use or threatened use of physical force against the person or property of another”)

⁶⁰ See *Neto v. Holder, supra*. There is an argument that “intentional” is not the same as “malicious” and therefore should not be CIMT.

⁶¹ Since there is no mens rea for (a), this should not be CIMT. (b) is probably not CIMT b/c there is no damage to property.

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-7-60	Arson in 1 st degree	If sentence of 1yr, probably COV. ⁶² Possibly federal arson offense ⁶³	Probably under (a)(5); possibly under other sections ⁶⁴		To avoid AF, plead to 2 nd degree criminal damage or reckless conduct. Otherwise keep record clear of evidence that damaged property belonged to someone other than defendant. ⁶⁵
16-7-60	Arson in the 2 nd degree	If sentence of 1yr, probably COV. ⁶⁶ Possibly federal arson offense ⁶⁷	Possibly		
16-8-2	Theft by taking	Not a theft offense; may be fraud offense if loss of >\$10k ⁶⁸	Yes ⁶⁹		
16-8-7	Theft by receiving	Yes, as theft if sentence of 1yr or more ⁷⁰	Yes		

⁶² *Matter of Palacios-Pinera*, 22 I&N Dec. 434(BIA 1998)(AK statute defining arson as “intentionally damages any property by starting a fire or causing an explosion and by that act recklessly places another person in danger of serious physical injury” is COV; and citing cases from other jurisdictions also finding that arson is COV)

⁶³ 8 U.S.C. 1101(a)(43)(E)(i) refers to federal arson crime, 18 USC 844(i), which defines arson as “maliciously damage or destroy, or attempt to damage or destroy, by means of fire or an explosive, any building or vehicle.” There is an argument that OCGA 16-7-60 does not constitute federal arson offense, which requires malicious intent. *Matter of Bautista*, 25 I&N Dec. 616(BIA 2011).

⁶⁴ See *Matter of Ruiz-Lopez*, 25 I&N Dec. 551(BIA 2011)(wanton or willful disregard for lives of property or others is a CIMT)

⁶⁵ There is an argument that burning of one’s own property is not a COV. *Jordison v. Gonzalez*, 501 F.3d 1134(9th Cir. 2007)

⁶⁶ *Matter of Palacios-Pinera*, *supra*.

⁶⁷ 8 U.S.C. 1101(a)(43)(E)(i)

⁶⁸ *Vassell v. Att’y Gen*, 825 F.3d 1252(11th Cir. 2016). The GA statute is not an AF theft offense, b/c statute includes both conduct that is without consent, and with consent; it may be a fraud offense. The difference between theft and fraud is that theft involves taking w/o consent, and fraud does not.

⁶⁹ *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847(BIA 2016). A taking without consent is inherently turpitudinous, regardless of whether the taking is permanent or not.

⁷⁰ 8 U.S.C. 1101(a)(43)(G). Because property is stolen without consent, this is a theft offense. See *Vassell v. Att’y Gen*, *supra*.

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-8-14	Theft by shoplifting	Probably theft, if sentence of 1yr or more ⁷¹	Yes ⁷²		
16-8-18	Entering an auto	Probably, if record shows intent to commit theft and sentence of 1yr. Probably not, if intent to commit non-theft felony. ⁷³	Yes, if record reveals intent to commit offense that is CIMT		Have record reflect intent to commit felony, instead of theft.
16-8-41	Armed robbery	Yes, if sentence of 1yr ⁷⁴	Yes	Yes for firearms ground, if record of conviction establishes that weapon is a firearm	
16-9-1, 16-9-2	Forgery 1 st and 2 nd degree	Yes, as forgery AF if sentence of 1yr. ⁷⁵ Possibly as fraud AF if loss to victim >\$10k ⁷⁶	Yes ⁷⁷		Avoid sentence of a year, even if suspended, and plead to a specific loss finding of \$10k or less

⁷¹ *Ramos v. U.S. Attorney Gen.*, 709 F.3d 1066(11th Cir. 2013), held that O.C.G.A. 16-8-14 was divisible, with “intent to appropriate” qualifying as AF theft offense, and “intent to deprive” as not constituting AF theft. Although there is still a viable argument regarding this distinction, the safer route is to assume that Ramos has been overruled by *Matter of Diaz-Lizarraga*, *supra*.

⁷² *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847(BIA 2016)(AZ shoplifting offense is categorically a CIMT, because a taking without consent is inherently turpitudinous regardless of whether a taking is permanent or not)

⁷³ 8 U.S.C. 1101(a)(43)(U); *U.S. v. Tirado-Yerena* (N.D. Ga. 2015)(holding that GA statute is divisible). This offense is not an AF burglary, but may be an attempted theft if record shows intent to commit theft. *Matter of Perez*, 22 I&N Dec. 1325(BIA 2000); *Bunty Ngaeth v. Mukasey*, 545 F.3d 796(9th Cir. 2008).

⁷⁴ 8 U.S.C. 1101(a)(43)(F) and (G).

⁷⁵ 8 U.S.C. 1101(a)(43)(R)

⁷⁶ 8 U.S.C. 1101(a)(43)(M)

⁷⁷ *Jordan v. De George*, 341 U.S. 223 (1951)(holding that any offense that has fraud as an element is a crime involving moral turpitude).

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-9-20(a)	Deposit account fraud	Yes, if loss to victim >\$10k ⁷⁸	Yes ⁷⁹		Plead to a specific loss finding of \$10k or less
16-9-31	Financial transaction card theft	(a) If sentence of 1yr, theft offense under (a)(1) ; not theft under (a)(3) ⁸⁰	Yes under (a)(1); probably not under (a)(3)		Avoid sentence of 1yr, or plead to (a)(3)
16-10-24	Obstruction	If sentence of 1yr, (a) is probably obstruction AF. ⁸¹ (b) is probably COV ⁸²	Probably under (a) ⁸³ . Yes under (b) ⁸⁴		
16-10-25	Giving false name, address or birthdate to LEO	Possible as obstruction AF if sentence of 1yr ⁸⁵	Probably ⁸⁶		
16-11-32	Affray	No	No		Plead to this instead of other offenses that have adverse immigration consequences.

⁷⁸ 8 U.S.C. 1101(a)(43)(M)

⁷⁹ *Matter of Bart*, 20 I&N Dec. 436(BIA 1992)

⁸⁰ *United States v. O-Gallegos* (11th Cir. 2016)(unpublished opinion)(holding that GA statute is divisible and that (a)(1) is theft offense, while (a)(3) is not)

⁸¹ 8 U.S.C. 1101(a)(43)(S)

⁸² 8 U.S.C. 1101(a)(43)(F)

⁸³ *Padilla v. Gonzales*, 397 F.3d 1016(7th Cir. 2005)(knowingly providing false info to police officer to prevent apprehension or obstruct prosecution is CIMT)

⁸⁴ *Cano v. Att’y Gen.*, 709 F.3d 1052(11th Cir. 2013)(conviction under FL statute with almost identical language to GA statute is CIMT)

⁸⁵ 8 U.S.C. 1101(a)(43)(S)

⁸⁶ See *Padilla v. Gonzales*, *supra*.

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-11-37	Terroristic threats and acts	Possibly as COV, if sentence of 1yr ⁸⁷	Probably under (a) and (b) ⁸⁸		
16-11-39	Disorderly conduct	Possibly as COV under (1) and (2) if sentence of 1yr. ⁸⁹ No under (3) or (4).	No ⁹⁰		Avoid confinement sentence to avoid <u>any chance of</u> COV for (1) or (2).
16-11-126	Carrying a concealed weapon	No	No	Firearm offense if record of conviction shows that weapon was a gun	If pleading to subsection that covers weapons beyond firearms (such as (a)), keep out of record of conviction that weapon is firearm.
16-11-131	Possession of firearms by convicted felons and first offender probationers	Yes ⁹¹	No	Firearms offense	

⁸⁷ Subsection (a) is probably divisible, since it lists multiple distinct ways to commit an offense. Threatening to commit a COV is likely a COV; the other parts of this paragraph are less likely to be COVs. (b)(1) and (b)(3) should not be COV, but (b)(2) may be.

⁸⁸ See e.g. *Avendano v. Holder*, 770 F.3d 731(8th Cir. 2014); *Javier v. Att’y Gen.* (3rd Cir. 2016)

⁸⁹ See endnote on COV.

⁹⁰ Since there is no specific intent to commit injury, this should not be a CIMT. See endnote on CIMT.

⁹¹ 8 U.S.C. 1101(a)(43)(E)(ii). *Vasquez-Muniz*, 23 I&N Dec. 207(BIA 2002)(holding that CA statute criminalizing firearm possession by felon is the same as the federal firearms statute, 18 U.S.C. 922(g)(1), except for “interstate commerce” element, and therefore is an offense “described in 18 U.S.C. 922(g)(1)”). See also *Nieto Hernandez v. Holder*, 592 F.3d 681(5th Cir. 2009)(same result, with TX statute). This would apply even if person is convicted under first offender, since first offender is a felony conviction under immigration law.

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-11-134	Discharging firearm	No ⁹²	Probably not ⁹³	Firearms offense	
16-12-23	Keeping a gambling place	No	No ⁹⁴	2 gambling offenses makes person ineligible for GMC	
16-12-100.2	Computer or electronic pornography and child exploitation	Yes, as sexual abuse of a minor ⁹⁵			
16-13-1(b)	Drug related objects	Probably not ⁹⁶	No	Controlled substance offense ⁹⁷	Since this statute refers to selling drug paraphernalia to minors, it's possible that even a conviction related to MJ would not fall within MJ exception. ⁹⁸

⁹² This should not be a COV, since statute does not specify mens rea, and misdemeanor can only be COV if done intentionally or knowingly, not recklessly. *Matter of Chairez-Castrejon*, 26 I&N 478(BIA 2015)

⁹³ Courts have only found discharging a firearm a CIMT where the gun was fired at a building or people. See e.g. *Recio-Prado v. Gonzales*, 456 F.3d 819(8th Cir. 2006)

⁹⁴ *Matter of Gaglioti*, 10 I&N Dec. 719(BIA 1964)

⁹⁵ *Matter of Rodriguez-Rodriguez*, 22 I & N Dec. 991(BIA 1999)(adopting definition in 18 USC 3509(a)(8), which does not require a contact offense—"the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution or other form of sexual exploitation of children, or incest with children.")

⁹⁶ However, because the elements involve sale of paraphernalia, there is a risk that this could be considered a trafficking offense.

⁹⁷ *Martinez-Espinoza*, 25 I&N 118(BIA 2009)(holding that possession of drug paraphernalia which "relates to" a controlled substance is a controlled substance offense, and possession of paraphernalia relating to 30g or less of MJ simple possession falls within MJ exception). However, the substance "related to" must be a controlled substance under federal law. *Mellouli v. Lynch*, 135 S.Ct. 1980(2015).

⁹⁸ "For example, possessing marijuana in a prison or near a school may relate to marijuana possession, but such offenses do not relate to *simple* possession because they are inherently more serious than the basic crime." *Martinez-Espinoza* at 125.

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-13-30(a)	Possession of controlled substance	No, unless drug is flunitrazepam, then drug trafficking ⁹⁹ Possible drug trafficking if prosecuted as recidivist drug offense ¹⁰⁰	No	Controlled substance offense	
16-13-30(b)	Manufacture, deliver, distribute, dispense, administer, sell or possess WID controlled substance	Probably drug trafficking ¹⁰¹	Yes ¹⁰²	Controlled substance offense	Reduce to straight possession to avoid AF If possible, plead to administering, as there is a good argument that this would not constitute drug trafficking ¹⁰³
16-13-30(j)	Possession of marijuana	No, if first drug offense. Possibly drug trafficking if prosecuted as recidivist drug offense ¹⁰⁴	No	Controlled substance offense (exception to deportability for single conviction of possession of <30g of MJ)	Make clear in record that amount of MJ is <30g to avoid deportability on controlled substance ground

⁹⁹ 18 USC 924(c)(2), referenced in 8 USC 1101(a)(43)(B)

¹⁰⁰ 18 USC 924(c)(2), referenced in 8 USC 1101(a)(43)(B)

¹⁰¹ 18 USC 924(c)(2), referenced in 8 USC 1101(a)(43)(B)

¹⁰² *Matter of Khourn*, 21 I&N Dec. 1041(BIA 1997)

¹⁰³ There is no federal offense of administering, and the definition of “trafficking” does not appear to cover administering. See generally *Lopez v. Gonzales*, 549 U.S. 47(2006).

¹⁰⁴ 18 USC 924(c)(2), referenced in 8 USC 1101(a)(43)(B)

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
16-13-30(j)	Manufacture, delivery, dispensing, administering, sale or possess WID marijuana	Probably drug/illicit trafficking ¹⁰⁵	Yes ¹⁰⁶	Controlled substance offense	Reduce to straight possession to avoid AF Leave out of record any evidence that MJ was distributed for remuneration. ¹⁰⁷
40-5-121	Driving while license suspended or revoked	No	No	No	Avoid pleading to this offense and DUI at the same time. ¹⁰⁸
40-6-270	Hit and run	No ¹⁰⁹	Probably under (b) where death or injury is caused ¹¹⁰		
40-6-390	Reckless driving (misd)	No	Probably not ¹¹¹		

¹⁰⁵ 8 USC 1101(a)(43)(B). "Illicit trafficking" is defined as "illegally trading, selling, or dealing." *Urena-Ramirez v. Ashcroft*, 341 F.3d 51(1st Cir. 2003).

¹⁰⁶ *Matter of Khourn*, 21 I&N Dec. 1041(BIA 1997)

¹⁰⁷ The Supreme Court in *Moncrieffe v. Holder*, 133 S.Ct. 1678(2013) found that a conviction under the GA statute was not categorically an AF, since the statute criminalizes conduct that involves a small amount of MJ and that does not involve remuneration, elements which are not criminalized by the federal Controlled Substance Act.

¹⁰⁸ A series of decisions have found that the AZ statute for aggravated DUI, which combines simple DUI with element of knowingly driving with a revoked license, is a CIMT. *Matter of Lopez-Meza*, 22 I&N Dec. 1188(BIA 1999); *Marmolejo-Campos v. Holder*, 558 F.3d 903(9th Cir. 2009)(holding that AZ statute is divisible between offenses that involve driving, and offenses that involve actual physical control, and affirming BIA decision that agg DUI involving driving is a CIMT).

¹⁰⁹ Since the statute requires no mens rea for causing the accident, this should not be a COV. See *Francis v. Reno*, 269 F.3d 162(3rd Cir. 2001); Failing to stop or return to scene of vehicle accident under OCGA 40-6-270(a) not a CIMT because it applies to defendants who were merely negligent as to whether the accident resulted in injury or property damage. *M-M-V-*, AXXX XXX 518 (BIA March 30, 2018)(Eli Echols' case).

¹¹⁰ *Garcia-Maldonado v. Gonzales*, 491 F.3d 284(4th Cir. 2007)(failure to render aid after accident causing injury/death is CIMT); *Orosco v. Holder*, (5th Cir. 2010)(failure to report accident involving property damage is not CIMT); *Cerezo v. Mukasey*, 512 F.3d 1163(9th Cir. 2008)(failure to report accident involving death/injury is not categorically CIMT b/c failing to provide any of list of info is still violation of statute).

¹¹¹ Courts generally only have found CIMT where reckless conduct was accompanied by actually causing injury, or by threatening serious bodily injury. See e.g. *Keungne v. US Att'y Gen.*, 561 F.3d 1281 (11th Cir. 2009); *Matter of Leal*, 26 I&N Dec. 20(BIA 2012).

OCGA statute	Offense	AF?	CIMT?	Other grounds?	Comments
40-6-391	Driving under the influence (alcohol)	No	No	No	Avoid pleading to this offense and suspended license at the same time. ¹¹²
40-6-391	Driving under the influence (drugs)	No	No	Controlled substance ¹¹³	If possible, keep controlled substance out of record
40-6-395	Fleeing or attempting to elude officer	Probably not under (a). However, possibly under (b) ¹¹⁴	Probably ¹¹⁵		
42-1-12(n)	Failure to register as a sex offender	No, although the underlying conviction probably is	No ¹¹⁶		

Deleted: Possibly under (a).

Deleted: under (b)

¹¹² See footnote 66.

¹¹³ *Matter of Esqueda*, 20 I&N Dec. 850(BIA 1994)(conviction for being under the influence of a drug, even where no mens rea is required, qualifies as a controlled substance offense under the INA)

¹¹⁴ *Dixon v. U.S. Att’y Gen.*, 768 F.3d 1339(11th Cir. 2014)(holding that FL offense of aggravated fleeing is COV; “fleeing is unique in that it indicates that there is a ‘substantial risk’ that the offender will use physical force.”) But see Johnson, endnote on COV.

¹¹⁵ *Matter of Armando Ruiz-Lopez*, 25 I&N 551(BIA 2011)(holding that WA offense of fleeing and eluding an officer while driving in a manner which indicates wanton and willful disregard for life or property is CIMT) Because (a) does not involve a wanton or reckless element of driving, there is a good argument that it is not a CIMT. But see *Cano-Oyarzabal v. Holder*, 774 F.3d 914(7th Cir. 2014)(violation of WI fleeing/eluding statute is CIMT b/c of “knowing” flight from LEO, irrespective of reckless driving behavior).

¹¹⁶ *Efagene v. Holder*, 642 F.3d 918(10th Cir. 2011)

NOTES ON IMPORTANT CONCEPTS:**CATEGORICAL AND MODIFIED CATEGORICAL ANALYSIS**

1. Does the minimum conduct that has a realistic probability of being prosecuted under the statute, involve moral turpitude/AF?
 - a. If so, it's a CIMT/AF
 - b. If statute includes some crimes that are CIMTS/AF, and others that are not, go to step 2.
2. Is the statute divisible? Statute is divisible if:
 - a. Lists multiple discrete offenses as enumerated alternatives or defines single offense by reference to disjunctive sets of elements, more than one combination of which could support a conviction; and
 - b. At least one, but not all, of those listed offenses/combinations of elements is a categorical match to relevant generic standard (CIMT/AF)
3. If divisible, apply modified categorical approach—look at record of conviction (indictment, plea, verdict, sentence) to determine what specific crime defendant was convicted of.

Matter of Silva-Trevino, 26 I&N Dec. 826 (BIA 2016)

CONFINEMENT AND IMPRISONMENT

8 USC 1101(a)(48)(B): Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

There is a difference between a sentence which is "suspended" or "probated" under Georgia law. Both involve a defendant being excused from prison time. However, a probation officer monitors compliance with probation conditions, while a sentencing court enforces conditions of suspension. Williams v. State, 381 S.E.2d 399 (Ga.App. 1989). O.C.G.A. 17-10-1(a)(1)(judge may suspend or probate all or any part of the sentence); O.C.G.A. 42-8-34.1(procedures for revocation of "probated or suspended sentence")

For immigration purposes:

- (1) A sentence of straight probation, with no attached prison sentence, is not confinement.
- (2) A sentence for a probated term of imprisonment is confinement
- (3) A sentence for a suspended term of imprisonment is confinement
- (4) A sentence which requires that defendant serve any part of the sentence in confinement, is confinement for the entire term of the sentence. (e.g. 2 yrs, serve 6 months, balance probated = 2 yrs confinement)

U.S. v. Ayala-Gomez, 255 F.3d 1314(11th Cir. 2001); In re Estrada, 26 I&N Dec. 749(BIA 2016)

CONVICTION

8 USC 1101(a)(48)(A) defines “conviction” as “a formal judgement of guilt of the alien entered by a court, or if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.”

First Offender and nolo pleas ARE convictions for immigration purposes. A diversion program may not be, depending on whether or not it requires a judge to make a finding of guilt and order a sentence.

CRIME INVOLVING MORAL TURPITUDE (CIMT)

This is a somewhat nebulous concept, but courts have found CIMTs in these categories of offenses:

1. Crimes which include intent to steal or defraud as an element. *Jordan v. De George*, 341 U.S. 223 (1951)
2. Assault and battery crimes: “[I]n the context of assault crimes, a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of conscious behavior decreases, i.e. from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm. This body of law, then, deems intent to be a crucial element in determining whether a crime involves moral turpitude.” *In re Solon*, 24 I&N Dec. 239 (I&N 2007).

The following crimes are CIMTs:

- Bodily harm is caused by intentional act. *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988)
- Serious bodily harm is caused by reckless act. *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996)
- A simple (general intent) assault which involves aggravating factors, such as use of a weapon, *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976); or commission against a protected class of victim (child, elderly, police officer). *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006).
- Serious bodily harm is *threatened* by a reckless act (specific intent). *In re Hernandez*, 26 I&N 464 (BIA 2015).

The following crimes are not CIMTs:

- Crimes involving only negligence. *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992)
 - Mere offensive touching, regardless of whether victim is member of protected class. *Sanudo, supra*.
 - Simple assaults (which involve only general intent, not specific intent to cause harm) without aggravating factors. *Matter of Danesh, supra; Uppal v. Holder*, 605 F.3d 712 (9th Cir. 2010)(An assault which does not involve specific intent to injure, special trust relationship, or serious bodily injury is not CIMT).
3. Most sex offenses, which involve “lewd intent.” *In re Medina*, 26 I&N Dec 79 (BIA 2013)

CRIME OF VIOLENCE (COV)

18 U.S.C. §16(a) defines a COV as: “any offense that has as an element of the use or attempted use or threatened use of physical force against the person or property of another,” or §16(b) “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

The Board of Immigration Appeal’s definition of COV includes any offense where either: (a) the elements of the offense must be such that the use, attempted use, or threatened use of physical force is an element, or (b) the nature of the crime—as evidenced by the generic elements of the offense—must be such that its commission ordinarily would present a risk that physical force would be used against the person or property of another irrespective of whether the risk develops or harm actually occurs. *Matter of Sweetser*, 22 I&N Dec. 709, 716 (BIA 1999)

However, The Supreme Court in *Johnson v. U.S.*, 130 S. Ct. 1265 (2010) found that physical force necessary to establish COV must be “violent” force, which is force “capable of causing physical pain or injury to another person”. This decision was interpreting the ACCA, 18 USC 924(e)(2)(B)(i), which reads: “has as an element the use, attempted use, or threatened use of physical force against the person of another.” However, the court referenced the “physical force” referred to in 18 USC 16, defining COV, so the same reasoning should apply. Any caselaw regarding 18 USC 16(a) or (b) is therefore overruled to the extent that the court found a COV despite a lack of violent force, but that argument will still have to be made. Johnson did not address COVs against property.

Then in 2015, the Supreme Court in *Johnson v. U.S.*, 135 S. Ct. 2551(2015) found void for vagueness the “residual clause” of ACCA, defining a violent felony as one that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” Five federal circuits (3rd, 6th, 7th, 9th, 10th) subsequently found 18 USC 16(b) void for vagueness based on Johnson. *Baptiste v. Att’y Gen.*, 841 F.3d(3rd Cir. 2016); *Shuti v. Lynch*, 828 F.3d 440(6th Cir. 2016); *U.S. v. Vivas-Ceja*, 808 F.3d 719(7th Cir. 2016); *Dimaya v. Lynch*, 803 F.3d 1110(9th Cir. 2015); *Golicov v. Lynch*, 837 F.3d 1065(10th Cir. 2016). There is no post-Johnson caselaw challenging 16(b) in the 11th Circuit.

DOMESTIC VIOLENCE

In order to be a DV offense, the offense must first be a COV as defined under 18 USC 16. Where crime categorically is crime of violence, ct can use circumstance-specific approach to determine if offense is DV, even if not specifically an element of offense. *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016)

This is a very broad category. The INA defines “crime of domestic violence” as a COV “against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.” 8 USC 1227(a)(2)(E)(i)

JURISDICTIONAL “HOOK”

8 USC 1101(a)(43), defining AFs, includes a list of federal offenses. The US Supreme Court has ruled that a state crime which has every element of the federal crime except for the jurisdictional element (“used in interstate commerce...”) does qualify as an AF, despite the missing element of jurisdiction. *Torres v. Lynch*, 136 S.Ct. 1619(2016). This comes into play with offenses such as arson and firearms.

STANDARD OF REVIEW AND ROLE OF BIA V. FEDERAL COURTS

1. BIA is entitled to Chevron deference (uphold agency interpretation as long as it is reasonable) on its interpretation of the INA (e.g. if a crime is CIMT)