

# RIAC2



CRIMINAL LAW

FAMILY LAW



IMMIGRATION LAW

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*The Regional Immigration Assistance Center provides legal support for attorneys who represent indigent noncitizen clients in criminal and family court. Founded in the wake of Padilla v. Kentucky, there are six centers located in New York State. Region 2 covers sixteen counties in the central part of the state.*

*\*RIAC2 is administered by the Criminal Division of the Oneida County Public Defender.*

## AGGRAVATED FELONIES: “THE LIST” INA 101(a)(43) The term “aggravated felony” means—

In the next series of newsletters, we will be breaking down the various categories of offenses to give you a more clear idea of whether the offenses charged or any plea offered fall into one or more of these categories. At the top of the list are Aggravated Felonies (AF) because these offenses carry the most serious negative immigration consequences such as mandatory removal and next to impossible relief in Immigration Court, mandatory ICE detention, permanent bar to U.S. citizenship. It is important to remember that offenses falling into this category can also include misdemeanors. We begin, naturally, with the letter “A”:

### (A) murder, rape, or sexual abuse of a minor;

Murder: NY offenses that qualify as an AF under this category:

NY PL §§125.25, 125.26, 125.27; NY PL Murder 2d degree, is a categorical match to federal definition of murder (*see Santana-Felix v. Barr*, 924 F.3d 51 (2d Cir. 2019)).

Possible options to avoid the “murder” AF are Criminally Negligent Homicide (125.10) and Manslaughter 2d (125.20). This requires a thorough analysis of the case and the proper plea allocation.

Rape: NY offenses qualifying as “rape” AF:

NY PL §130.35 (Rape 1<sup>st</sup>) (B Felony)  
NY PL §130.30 **Sub (2)** (Rape 2d) (D Felony)  
NY PL §130.25 **Subs (1) and (3)** (Rape 3d) (E Felony)  
NY PL §130.40 **Subs (1) and (3)** (Criminal Sexual Act 3d) (E Felony)  
NY PL §130.45 **Sub (2)** (Criminal Sexual Act 2d) (D Felony)  
NY PL §130.50 **Subs (1) and (2)** (Criminal Sexual Act 1<sup>st</sup>) (B Felony)  
NY PL §130.70 (Aggravated Sexual Abuse 1<sup>st</sup>) (B Felony)  
NY PL §130.67 (Aggravated Sexual Abuse 2d) (C Felony)  
NY PL §130.66 (Aggravated Sexual Abuse 3d) (D Felony)

## In This Issue: Aggravated Felonies: Murder, Rape or Sexual Abuse of a Minor

### UPCOMING EVENTS

**03/07/2020: 9:00 am- 12:00 pm**  
“Crimmigration” Update with  
Cultural Competency/Use of  
Interpreters  
Oneida County Bar Assoc.  
Mohawk Valley Comm. College

**03/27/2020: 12:30 pm – 3:00 pm**  
2020 Padilla Update  
Chenango Co. Public Defender’s  
Office, 20 Conkey Ave., Norwich, NY

**03/31/2020: 12:00 pm – 1:30 pm**  
2020 Padilla and Family Ct. Update  
Tompkins/Schuyler Co  
Tompkins Co. Mental Health  
6th Floor Room  
201 East Green Street  
Ithaca, NY

**04/28/2020 (Tentative):**  
Jefferson/Lewis Co. Bar Association,  
TBD

**May 2020**  
Cortland County,  
Assigned Counsel Program  
TBD

**REGISTRATION FOR CLEs:**  
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Chief Defenders & Assigned  
Counsel Administrators:

Contact the RIAC2 to schedule  
your 2020 training, lunch hour  
or other session in your  
office/county.  
We will provide CLE credit!

NYPL §130.65-a (Aggravated Sexual Abuse 4<sup>th</sup>) (E Felony)  
NYPL §130.20 **Subs (1) and (2)** (Sexual Misconduct) (A Misd) (*see Matter of Keeley*, 27 I&N Dec. 146 (BIA 2017)).

Sexual Abuse of a Minor: NY offenses that are or maybe SAM AF:

NYPL §130.35 (Rape 1<sup>st</sup>) (B Felony)

NY PL §130.30 **Sub (1)** (Rape 2d) (D Felony) (*see Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017)).

NYPL §130.50 **Subs (3) and (4)** (Criminal Sexual Act 1st) (B Felony)

NYPL §130.45 **Sub (1)** (Criminal Sexual Act 2d) (D Felony) (*see Acevedo v. Barr*, 943 F.3d 619 (2d Cir. 2019)).

NYPL §130.65 **Subs (3) and (4)** (Sexual Abuse 1<sup>st</sup>) (D Felony)

NYPL §130.60 **Sub (2)** (Sexual Abuse 2d) (A Misdemeanor) (*see Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017)).

NYPL §130.70 **Sub (1)(c)** (Aggravated Sexual Abuse 1st) (B Felony)

NYPL §130.67 **Sub (1)(c)** (Aggravated Sexual Abuse 2d) (C Felony)

NYPL §130.66 **Sub (1)(c)** (Aggravated Sexual Abuse 3d) (D Felony)

Key considerations when determining whether the offense charged, or offered, is an “aggravated felony:”

1. Subdivisions matter!
2. A class A Misdemeanor can be an AF!
3. Case law is ever evolving in this area.
4. Most if not all of these offenses fall into other categories of

removability, so while avoiding a conviction for an AF is critical, the analysis does not end there!

### **A word about allocutions, court records, subdivisions and the burden of proof:**

In removal proceedings, the Government (DHS/ICE attorneys) must prove that your client is removable. If a statute is divisible, i.e. one subdivision may be an AF while another may not, the **Government** must prove by “clear and convincing evidence” that your client was convicted of the AF subdivision. If your client must enter a plea to, or is otherwise convicted of, an AF, you should make the allocution as “clean” as possible (e.g. no mention of relationship to complainant, age of complainant, no reference to subdivisions, etc.), assuming the DA and the Judge will agree.

On the other hand, if your client is applying for relief in immigration court, or another immigration benefit such as a green card or citizenship, your **client** has the burden of proof to show by a preponderance of the evidence that the client is not ineligible for relief. In that case, if your client pleads to, or is convicted of, a part of the statute that is NOT an AF, it may be wise to put that subdivision explicitly on the record, but not without taking into consideration all of your client’s circumstances. These determinations are highly fact specific, so it is critical to work with the RIAC to determine the best course of action.

**Contact the RIAC at the earliest possible moment in your client’s case!**