

# RIAC2



CRIMINAL LAW

FAMILY LAW



IMMIGRATION LAW

June 2020

Volume 4, Number 6



## In This Issue:

**Aggravated Felonies:  
Trafficking in Firearms or  
Destructive Devices or  
Explosive Materials**

## UPCOMING EVENTS

**June 11, 2020**

### IMMIGRATION ISSUES IN FAMILY COURT

RIAC: Tompkins County  
Assigned Counsel Program  
Online

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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.*

Wearing our masks, we continue delving in to the category of “aggravated felonies”...

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

(C) illicit **trafficking in firearms or destructive devices** (as defined in section 921 of Title 18) or in **explosive materials** (as defined in section 841(c) of that title);

- “Illicit trafficking” is not defined by statute but has been held to comprise “illegally ‘trading, selling or dealing’ in specified goods.” *Kuhali v. Reno*, 266 F.3d 93, 107 (2d Cir.2001).
- “Firearms” and “destructive devices” are defined in 18 USC 921, but do NOT include “antique firearms.”
- “Explosive materials” are defined in 18 USC 841 (c)–(f).

### NY Penal Law Offenses That **Are** or **Might Be** AFs Under This Category:

- §265.13 Crim. sale of a firearm 1<sup>st</sup> (B felony)
- §265.12 Crim. sale of a firearm 2<sup>nd</sup> (C felony)
- §265.11 Crim. sale of a firearm 3<sup>rd</sup> (D felony)
- §265.10 Manufacture, transport, disposition and defacement of weapons and dangerous instruments and appliances (D fel., E fel., and A Misd)
- §265.50 Crim. manuf., sale, or transport of an undetectable firearm, rifle or shotgun (D felony)
- §265.16 Crim. Sale of a firearm to a minor (C felony)
- §265.14 Crim. sale of a firearm with the aid of a minor (C felony)

### Other Considerations:

- Under PL §265.30, convictions for noncitizens under Articles 265 and 400 are required to be “certified” to the U.S. government by the county DA where the conviction was entered. Just in case ICE



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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!

is not already aware of your client’s conviction, this is just one more way to bring your client to ICE’s attention.

- Even if you avoid the AF conviction, your client may still be deportable for a Firearms Offense (INA §237(a)(2)(C)).
- Subdivisions matter!
- The nature of the weapon matters (e.g. a machine gun is more likely to be associated with firearms trafficking).
- As always, if post-indictment plea restrictions will apply, contact the RIAC as soon as possible after the initial arraignment.

Strategies to Avoid these Aggravated Felony Grounds of Removal:

- Get a plea to an immigration-safe non-weapons charge.
- Get a plea to an immigration-safe “weapon” charge rather than a “firearm” charge and make sure the record is clean of any mention of a firearm.
- As a last resort, get a plea to a simple possession “firearm” charge that does not involve “trading, selling or dealing” in firearms.

There is precedent for the argument that NY’s statutes involving “firearms” are not, under federal law, “firearms offenses” for purposes of removal. See *U.S. v. Aguilera-Rios*, 754 F.3d 1105, 1112 (9th Cir. 2014) (California statute, like New York, includes “antique” firearm, which is not included in the federal definition of “firearm” and therefore is not a “firearms offense”). While the 9<sup>th</sup> Circuit also requires proof of a “realistic probability” that someone would actually be prosecuted under the antique firearms statute, the 2d Circuit recently held that such proof is not necessary. In *Williams v. Barr*, No. 18-2535 (2d Cir. 2020), decided **May 27, 2020**, the Second Circuit held that a conviction under a Connecticut statute for possession of a pistol or revolver without a license did not constitute a “firearms” offense because the CT statute included, as does NY, a loaded antique firearms. The Court also held that the “realistic probability” test did not apply. Under NY PL §265.00(3) and (14), only unloaded antique firearms are excluded from the definition of a firearm, so the reasoning in *Williams v. Barr* would also apply to certain NY convictions.

While the legal arguments above are solid, the objective is to avoid having to make them in the first place, i.e. get a disposition that is as “immigration-safe” as possible to avoid your client being placed in removal proceedings.

As courts begin to open and we again adjust to new procedures and policies in the next phase of this pandemic, we hope you are continuing to take precautions and that continue to be safe and healthy.

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