Understanding the Intricacies of Immigration Law

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Shifting Sands of Immigration

- Over the last thirty years attorneys have learned to deal with the impact that state law has on litigants who are not US Citizens and the impact that federal immigration laws and policy have on an attorney's trial strategy, litigation tactics and negotiations with opposing counsel.
- Immigration law and enforcement policies are ever changing which makes the litigation attorney's job more difficult.
- This presentation will discuss the litigation issues that arise in the criminal, civil and domestic relations context.

Immigration Policy

- Established at the founding of the Nation to limit number of Aliens admitted into United States.
- Rooted in concepts of Race and Whiteness. The Naturalization Act of 1790 declared that only people of white descent were eligible for naturalization.
- The first Chinese Exclusion Law, passed in 1882 (22 Stat. 58), barred all Chinese laborers from entry into the United States, thus becoming the first immigration law to exclude people based on their nationality and race. Abolished in 1943.
- Immigration Act of 1924 established that prevented immigration from many Asian countries and established quotas for immigrants from Eastern Europe.
- U.S. Attorney General Webb, in support of racial exclusion, stated, "This Government as founded…was then a Government of and for the white race, and it was, I think, with the thought and hope of its founders that it would continue to be the Government of the whites…. [W]e want to be protected in our enjoyment of it."

Impact on People of Color

- Origin and policy of US immigration laws contribute to notions of "White Privilege" and racial inequities in the application of laws and access to justice that you as litigators and lawyers and judges faces today.
- Non-white people are overrepresented in the current criminal justice system.
- Criminal charges and disposition have a disproportionate impact on non-white aliens thus resulting in removal, exclusion and inadmissibility.

The Language of Immigration

- Immigration law uses many terms of art to describe the status of non-United States Citizens who are present in the country.

Alien

- An alien is any person who is not a National or a citizen of the United States.

LPR Lawful permanent resident.

- An LPR is a person lawfully in the United States.
- An LPR may remain in the United States indefinitely and enjoys many rights of United States Citizen except the right to vote and serve on a jury.
- Must register with the Selective Service.
- Must pay taxes.
- May own firearms.
- May abandon status by remaining outside the US for more than six months.
- May lose status if convicted of certain crimes.

Admission

- An Admission is a Lawful Entry into U.S. by an Alien who presents at the border for inspection and authorization to enter is given by an immigration officer.
- Section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A)

Unlawful Presence-Not Authorized

- Any person who enters without inspection and is present in the United States.
- Any person who overstays a non-immigrant Visa after admission.
- Any person who is ordered removed from the United States and fails to leave or returns after lawful removal.
- Unlawful presence may lead to 3 years, 10 year or permanent ban from the United States.
- Complicated area of immigration law.
- INA Section 212(a)(9)(B)(ii); 8 USCA §1182(B)(i)(I)-(ii)

Removed and Removal

- Expulsion of an alien from the United States.
- Based on grounds of inadmissibility.
- Based on violations of state or federal laws.
- Based on EWI.

Inadmissible and Inadmissibility

- An alien seeking admission at a port of entry who does not meet the criteria in the INA for admission.
- The noncitizen may be placed in removal proceedings or, under certain circumstances, allowed to withdraw their application for admission.
- Aliens who are inadmissible may be removable but not always.
- Alien not permitted to lawfully enter the United States or obtain a visa abroad based on acts or conduct that is listed as an inadmissibility ground in section 212 of the Immigration and Nationality Act.

Categories of lawfully present aliens

- Lawful Permanent Residents
- DACA (deferred action)
- Temporary Protected Status
- Parolees
- Asylee
- Refugee
- SJIS (Special Juvenile Immigrant Status
- Aliens granted withholding of removal

Good Moral Character

- GMC means character which measures up to the standards of average citizens of the community in which the applicant resides.
- Many forms of relief, adjustment of status and naturalization require aliens to show Good Moral Character.
- Certain crimes (Agg felonies) are a permanent bar to establishing good moral character.
- Some offenses require a minimum term of imprisonment of 1 year to qualify as an aggravated felony. The term of imprisonment is the period of confinement ordered by the court regardless of whether the court suspended the sentence.
- Bar to good moral character if alien was confined, as a result of conviction, in jail for an aggregate period of 180 days or more.

What is a conviction?

- Any admission of guilt and a "punishment" 8 U.S.C. § 1101(a)(48)(A).
- A conviction for immigration purposes also exists in cases where the adjudication of guilt is withheld if the following conditions are met:
- A judge or jury has found the alien guilty or the alien entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and
- The judge has ordered some form of punishment, penalty, or imposed a restraint on the alien's liberty.

What Qualifies as an Admission

- Stipulation to evidence
- Stipulation to facts sufficient
- Confession given to LEO (maybe)

What is Punishment?

- Any sanction including fines or restitution
- General Good Behavior
- Supervised Probation
- Community Service
- Any penalty or restraint on the alien

Deferred Findings, Suspended Imposition of Sentence

- Even if the charge is dismissed pursuant to Virginia law the immigration court may find the charge to be a conviction in immigration court resulting in removal or a reason for inadmissibility into the United States.

Charges and Convictions that have immigration consequences

- Aggravated Felonies
- Crimes Involving Moral Turpitude
- Crimes of Violence
- Narcotic Offense

Aggravated Felony (AF).

- Conviction for AF causes removability for which there are only a limited defense that can be raised in removal proceedings.
- AF makes an alien excludable and inadmissible to enter the United States.
- Bar to adjustment of status to LPR.
- Bar to Naturalization.

The AF definition at 8 USC § 1101(a)(43).

- Includes twenty-one provisions that describe hundreds of offenses, including some misdemeanors.
- Important that counsel researches each case as needed.

Sentence Imposed

- Some, but not all offenses, require a sentence imposed of a year or more in order to be an AF.
- The sentence need not be an active sentence.
- The term or an active sentence is important for the analysis of Good Moral Character and accruing Unlawful Presence.

Consequences of AF Conviction

- Aggravated felons are deportable and ineligible to apply for most forms of discretionary relief from deportation, including asylum, voluntary departure, and cancellation of removal, and may be subject to mandatory detention without bond.
- Aggravated Felons are inadmissible and excludable from the United States.
- Aggravated Felons are not eligible to adjust status or become a naturalized citizen.
- A conviction for illegal reentry after removal carries a higher federal prison term based on a prior AF conviction, per 8 USC § 1326(a), (b)(2).
- See CAIR Coalition Chart included with materials.

Consequences Crime of Violence (COV)

- A conviction of a COV has two potential immigration penalties.
- If committed against a person protected under the state's domestic violence laws, a COV is a deportable Crime of Domestic Violence. 8 USC § 1227(a)(2)(E). Virginia domestic violence law not COV. Matter of Valasquez, 25 I&N Dec. 278 (BIA 2010) not categorically a COV as defined by US code.
- If a sentence of a year or more is imposed, a COV is an aggravated felony, regardless of the type of victim. 8 USC § 1101(a)(43)(F).
- Could impact naturalization and admission.

Federal Definition of COV

- The statute incorporates the two-pronged COV definition found in 18 U.S.C. § 16:
  - (a) [A]n offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
  - (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 any offense.

Supreme Court Decisions

- Recent Supreme Court precedent has changed the legal landscape for that definition, so that some felonies that used to be COVs no longer are COV.
- See Johnson v. United States --- S. Ct. ---, 2015 WL 2473450 (June 26, 2015), overruling James v. United States, 550 U.S. 192 (2007) and Sykes v. United States, 564 U.S. 1 (2011).
- United States v. Davis, 588 U.S. ___ (2019), held that the residual clause of the "crime of violence" definition found in 18 U.S.C. § 924(c) is unconstitutionally vague.
- Do your research.
- Review CAIR Coalition tables included in materials.

Crime Involving Moral Turpitude (CIMT).

- Whether an offense involves moral turpitude is defined according to federal immigration case law, not state case law or statute.
- CIMT is notoriously vaguely defined and subject to much litigation. Includes crimes with elements:
  - intent to defraud
  - intent to cause great bodily injury
  - theft with intent to deprive permanently
  - includes some offenses involving lewdness, recklessness, or malice. Beware of destruction of property by burning and DOS while suspended for DWI.
  - Prostitution, bawdy house, obscenity, indecent exposure
  - Contributing to the delinquency of a minor, reckless endangerment

Length of Time in U.S. and status of alien-CIMT

- A noncitizen is deportable:
  - who is convicted of at least two CIMT's that did not arise out of the same incident, at any time after being admitted to the U.S., or
  - Is convicted of one CIMT, committed within five years of admission to the U.S. (or if there was no admission, within five years of adjustment to LPR status), if the offense carries a potential sentence of at least one year. 8 USC § 1227(a)(2)(A). VA maximum possible sentence for a Class 1 Misdemeanor is 1 year or 365 days, any plea to a single misdemeanor CIMT could trigger the deportation ground regardless of the sentence imposed.

CIMT and Admissibility

- A noncitizen is inadmissible to U.S. if convicted of a CIMT.
- Possible LPR who has been present in the United States for more than five years and is convicted of a CIMT in years six. LPR leaves U.S. for visit and returns and presents for admission.
- This person is inadmissible to the United States.
- Exception(s):
  - Petty offense--the person must have committed only one CIMT, which carries a potential sentence of not more than a year, and a sentence of not more than six months must have been imposed.
  - Youthful offender exception--the person must have committed only one CIMT, while under age 18, and the conviction (in adult criminal court) or release from imprisonment occurred at least five years ago. 8 USC § 1182(a)(2)(A)(ii).

Convictions for Controlled Substances.

- Removable under INA and probably Aggravated felony.
- Inadmissible to the United States.

Narcotics Distribution and Possession

- Distribution, PWID, Accommodation are removable offenses. 8 U.S.C. § 1227(a)(2)(B).
- Marijuana distribution sec 18.2-248.1. Removable under 8 U.S.C. § 1227(a)(2)(B).
- Simple schedule drugs possession is removable 8 U.S.C. § 1227(a)(2)(B).
- Prescription fraud. CIMT, Agg Felony and drug offense.
- Possession of controlled paraphernalia CIMT, and removable offense 1227(a)(2)(B) and agg fel 8 U.S.C. § 1101(a)(43)(B).
- See CAIR Coalition Chart included in materials.

Marijuana Cases

- Marijuana is not on the schedule of controlled substances in Virginia, and the definition is found at § 54.1-3401. Active substance is THC.
- BUT THC is a Federal Controlled substance Schedule 1 21 USC 801 et sec.
  - Simple possession of MJ is removable 8 USC 1227(a)(2)(B). First offense waiver for under 28 grams for personal use. One time exception to avoid removal still inadmissible. U.S.C. § 1182(a)(2)(A).

Litigation Strategies

- Avoid entering a plea of guilty, no contest, Alford Plea.
- If you must plead enter Crespo plea. Crespo v. Holder, 631 F.3d 130 (4th Cir. 2011). Enter plea of Not Guilty, CW proffers the facts, inform the judge that you DO NOT Stipulate. Judge can then enter a deferred finding, section 251 etc. Not a conviction because no admission or finding of guilt.
- Plead to legal fiction charges that don't have immigration consequences. Review the laws that you are trying to avoid. i.e. Agg Fel, CIMT, COV.

Know Immigration Status of Defendant

- Lawful Status
- EWI, Unlawful Status, Out of Status
- When person entered U.S. and manner of entry.
- When did person adjust status to LPR.
- TPS-Two misdemeanors or one felony conviction cannot renew TPR.
- DACA- Serious Misdemeanors, felonies revoke DACA.

Additional Considerations

- Weigh risks in difficult cases. CW may offer a good plea but it may involve short period of incarceration. The impact of this plea MAY be better than the alternatives offered.
- MUST review CAIR charts included in materials.
- BE AWARE of impact on Good Moral Character. 8 CFR 316.10 which include, gambling, 2 or more DWIs, prostitution, conviction of two of more offenses with agg sentence of five years or more.
- Consult with Immigration lawyer or call CAIR Coalition.

Ethical Considerations

- Virginia Rules of Professional Responsibility. Rule 1.1 A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- Padilla v. Kentucky, 559 U.S. 356 (2010), It is our responsibility under the Constitution to ensure that no criminal defendant--whether a citizen or not--is left to the "mercies of incompetent counsel." . . . . . To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, **the seriousness of deportation as a consequence of a criminal plea**, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Role of Prosecutor

- Prosecutor Obligation under Padilla LEGAL ETHICS OPINION 1876.

Special Immigrant Juvenile Status

Special Immigrant Juvenile Status

- An immigration status that was created by Congress and was intended to provide a refuge for who have been the victim of abuse, abandonment, or neglect by one or more parents.
  - 8 U.S.C. § 1101(a)(27)(J)(i)
  - United States Citizenship and Immigration Services Memorandum, Donald Nuefeld and Pearl Chang, "Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions" HQOPS 79, 8.5 (Mar. 24, 2009)

General Eligibility Requirements

- Physically present in the US
- Unmarried
- Under age 21 at the time of filing the petition (I-360)
- Juvenile court order that meets specific requirements
- Consent of DHS (and HHS if applicable)

Juvenile Court Order

- "Predicate Order"
- The Court must have the authority to make determinations about dependency and/or custody and care of the petitioner as a juvenile under state law at the time the order was issued.

1. Dependency or Custody;
2. Parental Reunification not viable due to abuse, neglect, abandonment, or a similar basis under state law; and
3. Best Interests not to be returned to the petitioner's, or his or her parents', country of nationality or last habitual residence.

Legal Updates 2017-present

- Canales v. Torres-Orellana, 800 S.E.2d 208 (Va. Ct. App. 2017)

- 2019 creation of section 16.1-241(A1) gave JDR courts the authority to make "specific findings of fact required by state or federal law to enable a child to apply for or receive a state or federal benefit."
- 2021 Special Session SB 1181 extends jurisdiction to 21 years old in some circumstances

Virginia Driver Privilege Cards

Driver Privilege Cards

- Driving credential for non-US citizens in Virginia. Became effective on Jan. 21, 2021 (VA SB34).
- This card confers the same privileges that a drivers license, and drivers permit provides to their holders.
  - Additionally, allows the issuance of a limited-duration driver's license and special identification card to an applicant presenting valid documentary evidence that a federal court or federal agency having jurisdiction over immigration has authorized the applicant to be in the United States for a period of at least 30 days from the date of application.
- The card does not confer the following benefits:
  - voting privileges;
  - permit an individual to waive any part of the driver examination;
  - have their issuance be contingent upon the applicant's ability to produce proof of legal presence in the United States;
  - Entering a federal building; or
  - Allowing individual to use the card to fly.

Driver Privilege Card: Eligibility

- To be eligible an individual must:
  - 1) be a non-US citizen who is a resident of Virginia;
  - 2) reported income from Virginia sources or are claimed as a dependent on a tax return filed in Virginia in the past 12 months; and
  - 3) driving privilege is not currently suspended or revoked in Virginia or any other state, to include insurance-related infractions.
- The individual must provide: two proofs of identity, two proofs of Virginia residency, proof of social security number or taxpayer identification number; and tax return identification.
- Tests involved:
  - Vision test
  - Two part road knowledge and driving test
    - Tests are in English and translators will be provided to assist.

Questions

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
Maiming, etc., of another resulting from driving while	18.2-51.4	Probably not[2]	No[3]	Possibly considered a controlled substance offense if person is intoxicated by a	If driving under the influence of controlled substance(s), keep reference to particular controlled substance(s) out of

[1] Including, but not limited to: controlled substance offense, prostitution offense, commercialized vice offense, firearm offense, crimes of domestic violence, crimes of stalking, and crimes against children.

[2] In *Sotnikau v. Lynch*, No. 15-2073, 2017 WL 2709572 (4th Cir. Jan. 24, 2017) the Fourth Circuit held that Virginia involuntary manslaughter is categorically overbroad and therefore not a CIMT because it extends to punishing conduct committed through "criminal negligence," which is a *mens rea* lower than specific intent or recklessness and therefore insufficient for a CIMT finding. A conviction for maiming caused by DUI can also be supported by a *mens rea* of criminal negligence and therefore there are strong arguments that it is not categorically a CIMT by this logic. The Fourth Circuit distinguished the VA involuntary manslaughter statute from the Missouri statute examined by the BIA in *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994). In *Matter of Franklin*, the BIA held that the Missouri involuntary manslaughter statute involved moral turpitude because it punished only the reckless causation of death. *See* 20 I&N Dec. 867 (BIA 1994). By contrast, the Virginia definition of involuntary manslaughter is founded in common law and includes a "reckless" **or** "indifferent disregard" standard, which does not require a conscious disregard of known risks.

[3] *See Bejarano-Urrutia v. Gonzales,* 413 F.3d 444 (4th Cir. 2005). In *Bejarano-Gonzales*, the Fourth Circuit held that involuntary manslaughter is not a crime of violence aggravated felony under the reasoning in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) despite the fact that involuntary manslaughter requires reckless disregard for human life. Va. Code 18.2-51.4 contains a *mens rea* of recklessness similar to that required for an involuntary manslaughter conviction and, therefore, under *Bejarano-Urrutia* would not be considered an aggravated felony crime of violence.

This chart only analyzes whether convictions may fall within the primary categories of removability set forth in the Immigration and Nationality Act. Defenders should remember that it is also important to analyze whether a conviction leads to other immigration consequences, such as ineligibility for certain forms of relief from removal, Temporary Protected Status, naturalization, or the two deferred action programs announced in November 2014 (expanded Deferred Action for Childhood Arrivals and Deferred Action for Parental Accountability). Please review the Cover Memorandum and relevant Practice Advisories on our website.

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
intoxicated				federally prohibited controlled substance and established in record of conviction[4]	record of conviction
Driving motor vehicle, engine, etc., while intoxicated, etc. (simple DUI)	18.2-266	No	No	Possibly considered a controlled substance offense if person is intoxicated by a federally prohibited controlled substance and established in record of conviction	Note that any DUI greatly increases the risk that ICE will take enforcement action against an undocumented person If driving under the influence of controlled substance(s), keep reference to particular

[4] Virginia Code § 18.2-51.4 prohibits a person from driving while intoxicated in violation of Virginia Code § 18.2-266, which includes driving while such person is under the influence of alcohol or while such person is under the influence of any narcotic drug, among other offenses. As the statute can be violated by driving while under the influence of alcohol, an immigration attorney may argue that the statute is overbroad and therefore categorically not a crime related to a controlled substance.

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				(see FN 4)	controlled substance(s) out of record of conviction
Driving a commercial motor vehicle while intoxicated, etc.	46.2-341.24	No	No	Possibly considered a controlled substance offense if person is intoxicated by a federally prohibited controlled substance and established in record of conviction (see FN 4)	Note that any DUI greatly increases the risk that ICE will take enforcement action against an undocumented person If driving under the influence of controlled substance(s), keep reference to particular controlled substance(s) out of record of conviction
Refusal of tests	18.2-268.3	No	No	No	
Subsequent offense DUI	18.2-270	No	No	Possibly considered a controlled substance offense if person is	Note that any DUI greatly increases the risk that ICE will take enforcement action

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				intoxicated by a federally prohibited controlled substance and established in record of conviction (see FN 4)	against an undocumented person If driving under the influence of controlled substance(s), keep reference to particular controlled substance(s) out of record of conviction
Driving after forfeiture of license	18.2-272	No	No	No	
Driving without a license	46.2-300	No	No	No	
Drinking while driving; possession of	18.2-323.1	No	No	No	Note any DUI greatly increases the risk that ICE will take enforcement action

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open container while operating a motor vehicle					against an undocumented person
Driving while habitual offender	46.2-357(B)(1)	No	No	No	Note that any DUI greatly increases the risk that ICE will take enforcement action against an undocumented person If driving under the influence of controlled substance(s), keep reference to particular controlled substance(s) out of record of conviction; for (B)(2) convictions that involve violations of §§ 18.2-36.1, 18.2-51.4, 18.2-266 or §
	46.2-357(B)(2)	Possibly, but only if person was driving under the influence in the course of the offense (§§ 18.2-36.1, 18.2-51.4, 18.2-266 or § 46.2-341.24 offenses), and the record of	No	Possibly considered a controlled substance offense if person is intoxicated by a federally prohibited controlled substance and established in record of conviction (see FN 4)	

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		conviction establishes that[5]			46.2-341.24, keep out reference to those offenses in record of conviction
Disregarding	46.2-817(A)	Probably not[6]	No.[7]	No	Consider alternative plea to

[5] In *In re Lopez-Meza*, 22 I. & N. Dec. 1188, 1996 (1999), the BIA found that an Arizona aggravated DUI offense constituted a CIMT based on the reasoning that "a person who drives while under the influence, knowing that he or she is absolutely prohibited from driving, commits a crime so base and so contrary to the currently accepted duties that persons owe to one another and to society in general that it involves moral turpitude." Because this offense appears to be divisible, those who are also committing DUI offenses in the course of this offense (and established in the record) would fall within this category and their convictions would be CIMTs. Those whose driving endangers the life, limb, or property of another but are *not* also committing DUI offenses would not have CIMT offenses.

[6] This statute is almost certainly divisible, with subsection (B) and (C) likely to be crimes involving moral turpitude. *In Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011), the BIA found that a Washington statute criminalizing the attempt to elude a police officer was categorically a crime of moral turpitude where the elements for the statute required that the driver willfully failed to bring his vehicle to a stop despite knowledge of a police signal to do so, and that in eluding the police officer the driver drove his vehicle in in a manner indicating "wanton or willful disregard for the lives or property of others." *Id* at 555. Under the BIA's logic in *Ruiz-Lopez*, subsection (A) of 46.2-817 is likely overbroad and not a CIMT, because it requires only the wanton disregard of the police officer's signal; however, subsections (B) and (C) could be CIMTs, as they require driving in willful and wanton disregard of a police officer's signal so as to endanger a person (and, in the case of subsection (C), with the result that a law enforcement officer is killed).

[7] Class 2 misdemeanor with maximum possible sentence of 6 months.

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signal by law-enforcement officer to stop; eluding police	46.2-817(B)	No.[8]	Possibly, but probably not under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year.[9] Possibly, under 8 U.S.C. § 1101(a)(43)(F) if the sentence	No	reckless driving to avoid CIMT or aggravated felony Plead to subsection (A) rather than (B) or (C) to decrease chances that offense will be considered CIMT or aggravated felony Keep sentence under one year including suspended time to

[8] Unpublished BIA decision holds that eluding under Va. Code Ann. 46.2-817(B) is not a CIMT because it only requires a mens rea of negligence. Special thanks to IRAC. (*Matter of Ramirez Moz*, 9/19/19)

[9] This is a class 6 felony in VA punishable by up to 12 months. In *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999) and *Matter of Vallenzuela-Gallardo*, 25 I&N Dec. 838 (BIA 2012), the BIA found that a crime relates to obstruction of justice where it includes the critical element of an intentional attempt, motivated by a specific intent, to interfere with the process of justice. These cases are split on the question of whether such an attempt requires there to be an ongoing criminal proceeding, but it seems evident that the "willful and wanton disregard" of a law enforcement officer's signal to stop required by 46.2-817 goes beyond the "specific intent to interfere with the process of justice." Therefore all subsections of 46.2-817 are overbroad and not crimes relating to obstruction of justice under 8 U.S.C. §1101(a)(43)(S).

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
			imposed is at least one year		avoid aggravated felony
	46.2-817(C)	Probably (see FN 6)	Possibly, but probably not under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year (see FN 9) Possibly, under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year	No	

This chart only analyzes whether convictions may fall within the primary categories of removability set forth in the Immigration and Nationality Act. Defenders should remember that it is also important to analyze whether a conviction leads to other immigration consequences, such as ineligibility for certain forms of relief from removal, Temporary Protected Status, naturalization, or the two deferred action programs announced in November 2014 (expanded Deferred Action for Childhood Arrivals and Deferred Action for Parental Accountability). Please review the Cover Memorandum and relevant Practice Advisories on our website.

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
Reckless driving	46.2-852	No (see FN 2)	No		
Driving vehicle that is not under control	46.2-853	No	No	No	
Duty of driver to stop, etc., in event of accident involving injury or death or damage to attended property ("hit and run")	46.2-894 (failure to report after bodily injury and/or property damage)	No[10]	No	No	

[10] *Nunez-Vasquez v. Barr*, No. 19-1841 (4th 2020).

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
Duty of certain persons accompanying driver to report accidents involving injury, death, or damage to attended property	46.2-895 (failure to report after bodily injury and/or property damage)	Possibly (see FN 8)	No	No	If applicable, make explicit in record that offense involved only damage to property, not bodily injury, to decrease likelihood that offense is considered a CIMT If offense involved injury to person or death, keep out reference to personal injury/death in record of conviction

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CAPITAL AREA IMMIGRANTS' RIGHTS (CAIR) COALITION
IMMIGRATION CONSEQUENCES OF COMMON VIRGINIA OFFENSES
SECTION IV – CONTROLLED SUBSTANCE OFFENSES

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
Manufacture, sell, give, distribute or possess w/intent to manufacture, sell, give,	18.2-248	Yes	Yes[2]	Yes, a crime related to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a *not guilty* plea to avoid determination that 251 plea will be considered a "conviction." [See FN 8].

[1] Including, but not limited to: controlled substance offense, prostitution offense, commercialized vice offense, firearm offense, crimes of domestic violence, crimes of stalking, and crimes against children.

[2] An offense under Virginia Code § 18.2-248 is likely to be charged as an aggravated felony under 8 U.S.C. § 1101(a)(43) (B) (illicit trafficking in a controlled substance) and a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). However, an immigration attorney could argue that the Virginia statute is overbroad under both the aggravated felony trafficking ground and the controlled substance removability ground because it criminalizes offenses involving controlled substances in the Virginia schedules that are not included in the federal drug schedules found at 21 U.S.C. § 802 and, therefore, cannot trigger immigration consequences. *See Mellouli v. Lynch,* 135 S. Ct. 1980 (2015); *Descamps v. United States*, 133 S. Ct. 2276 (2013). For example, salvia and numerous other substances are included in the Virginia drug schedules and not in the federal drug schedules. However, there is no binding decision on the overbreadth of the Virginia controlled substance schedules and such an argument is relatively untested and presents many legal hurdles. These include needing to prove that there is a "realistic probability" that the state government prosecutes people based on controlled substances that are not included on the federal schedules. *See Matter of Mendoza Osorio,* 26 I&N Dec. 703 (BIA 2016); *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014). Furthermore, if the statute of conviction (Virginia Code § 18.2-248 or Virginia Code § 18.2-250) is considered to be "divisible," the Immigration Judge may look at the record of conviction to determine whether the defendant was convicted of possessing a particular federally controlled substance. See Practice Tips for ways to preserve relevant defenses for your non-citizen client. For more practice tips regarding immigration consequences of Virginia drug offenses, see CAIR Coalition practice advisory on this issue at http://www.caircoalition.org/wp-content/uploads/2015/07/CSA-Practice-Advisory-Final-20150720.pdf.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
distribute controlled subst. or imitation controlled substance					Keep reference to particular controlled substance(s) out of record of conviction.[3] However, if controlled substance that serves as the basis for conviction is *not* in the federal drug schedules, emphasize that fact in the record.
Transporting controlled substances into the Comm.	18.2-248.01	Yes	Probably, under 8 U.S.C. § 1101(a)(43)(B) [but see FN 2]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a *not guilty* plea to avoid determination that 251 plea will be considered a "conviction." [See FN 8]. Keep reference to particular controlled substance(s) out of record of conviction

[3] For immigration purposes, the "record of conviction" includes the statutory definition of the offense, the charging document, the written plea agreement, the transcript of the plea colloquy and any explicit factual finding by the trial judge to which the defendant consented. *See Shepard v. United States*, 544 U.S. 13 (2005). Immigration practitioners argue that the lab report or certificate should *not* be included in this record. For more practice tips regarding immigration consequences of Virginia drug offenses, see CAIR Coalition practice advisory on this issue at http://www.caircoalition.org/wp-content/uploads/2015/07/CSA-Practice-Advisory-Final-20150720.pdf.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
					[see FN 3 for discussion of what documents are considered to be within the record of conviction]. However, if controlled substance that serves as the basis for conviction is *not* in the federal drug schedules, emphasize that fact in the record. Seek alternative plea to 18.2-248.1(a)(1), 18.2-248.1(b), 18.2-250 or 18.2-250.1 to decrease likelihood that conviction will be deemed an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) (*note:* although none of these are likely to be entirely without immigration consequences).

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
Sale, gift, distribution or possession with intent to sell, give or distribute marijuana	18.2-248.1(a)	Yes	Probably not if conviction under 248.1(a)(1); Possibly not if conviction under 248.1(a)(2); Yes if conviction under 248.1(a)(3), under 8 U.S.C. § 1101(a)(43)(B)[4]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)[5]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a *not guilty* plea to avoid determination that 251 plea will be considered a "conviction." [See FN 8]. Keep reference to remuneration out of record of conviction (alternatively, make it clear that there was no intent to profit, if applicable) [see FN 3 regarding what constitutes the record].

[4] There is a strong argument that a conviction under Va. Code § 18.2-248.1(a)(1) is not an aggravated felony because the Supreme Court held in *Moncrieffe v. Holder* that if "a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA." 133 S.Ct. 1678, 1693-94 (2013). Under Va. Code § 18.2-248.1(a)(1) and (2), a person can be convicted for distributing a small amount of marijuana without remuneration. Therefore, under *Moncrieffe* it is probably not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). On the other hand, convictions under Va. Code § 18.2-248.1(a)(3) are more likely to be considered aggravated felonies.

[5] In *Cespedes v. Holder*, 542 Fed.Appx. 227, 229 (4th Cir. 2013) (unpublished), the Fourth Circuit agreed with the Board of Immigration Appeals that a conviction under Virginia Code § 18.2-248.1 was a crime relating to a controlled substance and could not fall within the exception to the controlled substance grounds of deportability at 8 USC § 1227(a)(2)(B)(i) for a single offense involving mere possession of a small amount of marijuana.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
					Include affirmative statement of small amount of marijuana if applicable; if not, keep record vague.
	18.2-248.1(b)	Yes	Probably not, under 8 U.S.C. § 1101(a)(43)(B) [see FN 4]	Yes, a crime relating to a controlled substance	Plead to 18.2-248.1(a)(1) or 18.2-248.1(b) to have strongest argument that offense is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) (*Note*: such a plea *would still have* immigration consequences under the controlled substances and CIMT grounds of deportability/inadmissibility).
	18.2-248.1(c)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(B) [see FN 4]	Yes, a crime relating to a controlled substance	
Illegal stimulants and steroids	18.2-248.5(A)	Yes	Yes, under 8 U.S.C. §1101(a)(43)(B)	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a *not guilty* plea to avoid determination that 251 plea will be considered a "conviction." [See FN 8].
	18.2-248.5(B)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(B)	Yes, a crime relating to a controlled substance, , 8 U.S.C. § 1227(a)(2)(B)	Seek alternative plea to simple possession under 18.2-250 to avoid aggravated felony conviction (*Note*: such a plea *would still have* immigration

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
					consequences under the controlled substances grounds of deportability/inadmissibility).
Possession of controlled substances	18.2-250	Maybe[6]	No (unless controlled substance is flunitrazepam or offense is explicitly prosecuted as a recidivist offense)[7]	Yes, a crime relating to a controlled substance, , 8 U.S.C. § 1227(a)(2)(B) (*but see* FN2)	Seek sentencing under 18.2-251 first-time offender diversion program; to avoid a "conviction" for immigration purposes ensure that client enters *not guilty* plea and does not admit or stipulate to facts sufficient.[8] Keep reference to particular controlled substance(s) out of record of conviction [see FN 3 for discussion of what

[6] Many simple possession offenses do not constitute crimes involving moral turpitude because they contain no *mens rea* element. *Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968). However, this statute contains the elements of "knowingly" or "intentionally" possessing a controlled substance and therefore may be considered a CIMT. *See, e.g.*, *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997).

[7] Generally, a state offense must have an element of "trafficking" to be deemed an aggravated felony under 8 U.S.C. § 1101(a)(43(B). *See Lopez v. Gonzalez*, 549 U.S. 47 (2006); *Matter of Davis*, 20 I&N 536, 541 (BIA 1992). Virginia Code § 18.2-250 has no such trafficking element and, therefore, it is very unlikely that a conviction under the statute could be charged as an aggravated felony for immigration purposes. However, federal law criminalizes a small number of simple possession offenses as drug trafficking aggravated felonies even without the presence of the element of trafficking. *See Lopez*, 549 U.S. at 55 n. 6, This group includes recidivist offenses where it is clear in the state record of conviction that a criminal penalty is being assessed as a result of recidivism and the defendant has been given an opportunity to contest that determination. *Carachuri-Rosendo*, 130 S. Ct. 2577 (2010).

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					documents constitute the record of conviction]. Keep references to recidivism or previous controlled substance related convictions out of the record of conviction to preserve argument that offense is not an aggravated felony. Avoid any reference to flunitrazepam in the record of conviction to avoid determination that offense is aggravated felony.
Possession of marijuana (first	18.2-250.1	Maybe (see FN6)	No	Yes, a crime relating to a controlled substance, 8 U.S.C. §	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a *not guilty* plea to avoid

Possession of flunitrazepam also falls within the group of offenses that may be prosecuted as a federal drug trafficking offense. *See* 21 U.S.C. § 844(a). Thus, in a very narrow range of cases, simple possession offenses might constitute aggravated felonies.

[8] See CAIR Coalition Practice Advisory, "Avoiding or Withdrawing a 'Conviction' for Immigration Purposes," for more information on the ways in which a first offender disposition can be structured to avoid a "conviction" for immigration purposes: http://www.caircoalition.org/wp-content/uploads/2016/04/4.28.16-PA-Avoiding-or-Withdrawing-Conviction.pdf.

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offense)				1227(a)(2)(B); for the purposes of the grounds of deportability a single offense involving possession for one's own use of 30 grams or less of marijuana under 8 U.S.C. § 1227(a)(2)(B) constitutes an exception; this exception does *not* apply to the controlled substances ground of inadmissibility at U.S.C. § 1182(a)(2)(A)	determination that 251 plea will be considered a "conviction." [See FN 8]. Create affirmative record that amount of marijuana involved was 30 grams or less of marijuana to avoid controlled substance grounds of deportability (*note* that this will only avoid these grounds for first offenses and will not avoid the grounds of inadmissibility). If this is impossible, do not emphasize amount in record. Seek sentencing under 18.2-251 first-time offender diversion program with a *not guilty* plea to avoid determination that 251 plea will be considered a "conviction." [See FN 8.]

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Possession of marijuana (second or subsequent offense)	18.2-250.1	Maybe [see FN6]	Possibly under 8 U.S.C. § 1101(a)(43)(B)[9]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)	Keep any previous record for simple possession out of record of conviction to avoid possible determination that offense is an aggravated felony based on recidivism (See FN7).
Possession and distribution of flunitrazepam	18.2-251.2	Yes	Yes, under 8 U.S.C. §1101(a)(43)(B)	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a *not guilty* plea to avoid determination that 251 plea will be considered a "conviction." [See FN 8]. Seek alternate plea to 18.2-250 and eliminate any reference to flunitrazepam in the record to avoid offense being deemed an aggravated felony (*note:* such a plea *would still have* immigration consequences under the controlled

[9] Recidivist possession offenses can constitute drug trafficking felonies under federal law. 21 U.S.C. § 844(a). However, the Supreme Court has held that a second controlled substances act offense does not correspond to the federal recidivist felony ground unless a prosecutor explicitly charges a defendant as a recidivist. *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577, 2587 (2010). Thus, Va. Code 18.2-250.1 would only be deemed an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) if it was explicitly charged as a recidivism offense under state law..

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					substances ground of deportability).
Defeating drug and alcohol screening tests	18.2-251.4(2)	Probably	No	Probably not a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)	
Distribution of certain drugs to persons under 18	18.2-255(A)	Probably	Probably under 8 U.S.C. § 1101(a)(43)(B) (arguably not if offense is specified as marijuana) [see FN 4]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a *not guilty* plea to avoid determination that 251 plea will be considered a "conviction." [See FN 8]. Keep reference to particular controlled substance(s) distributed out of record of conviction [see FN 3 regarding what constitutes the record]. If offense involved was marijuana, specify as such but do not include amount or whether
	18.2-255(B)	Probably	Possibly, under 8 U.S.C. § 1101(a)(43)(B)[10]	Yes, a crime relating to a controlled substance [but see	

[10] Under 21 U.S.C. § 841(a)(2), distribution of a "counterfeit" substance can constitute a drug trafficking offense but only if the "counterfeit" substance is itself a "controlled substance." *U.S. v. Sampson*, 140 F.3d 585 (4th Cir. 1998). Thus, in order for Va. Code 18.2-255(B) to constitute an aggravated felony

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				FN2]	remuneration was exchanged to preserve defense against aggravated felony designation If conviction under (B), make clear in record that the imitation substance was not itself a "controlled substance" under the federal controlled substances act.
Distribution, sale or advertisement of paraphernalia	18.2-255.1	Possibly[11]	Probably not, under 8 U.S.C. § 1101(a)(43)(B)[12]	Possibly a crime relating to a controlled	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a *not guilty* plea to avoid

under 8 U.S.C. § 1101(a)(43)(B), the "imitation controlled substance" at issue would still need to a controlled substance under federal law. If the imitation substance is not a controlled substance, an immigration practitioner could argue that the statute is overbroad and not a match for a federal drug trafficking aggravated felony. *See Mellouli v. Lynch,* 135 S. Ct. 1980 (2015); FN 2.

[11] While the BIA has held that the knowing distribution of narcotics constitutes a crime involving moral turpitude, *Matter of Khourn*, 211 I. & N. Dec. 1041 (BIA 1997), this statute criminalizes the sale or distribution of written materials concerning the usage of narcotics. An immigration practitioner could therefore argue that this is one step removed from the type of statute addressed in *Matter of Khourn* and should not constitute a crime involving moral turpitude.

[12] An immigration practitioner would have a strong argument that this offense cannot constitute a "drug trafficking aggravated felony" because it does not match the "common sense" definition of drug trafficking, as described by the Supreme Court in *Lopez v. Gonzales*, 549 U.S. 47 (2006). However, under 21 U.S.C. § 863(a), federal law does punish the sale or offering for sale of drug paraphernalia as a felony offense,. Although Va. Code 18.2-255.1

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to minor				substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	determination that 251 plea will be considered a "conviction." [See FN 8]. Keep reference to particular controlled substance(s) out of record of conviction [see FN 3 regarding what constitutes the record] If applicable, create record that printed material contained only small mention of paraphernalia among other items/issues unrelated to controlled substances.
Sale of drugs near certain properties	18.2-255.2	Probably	Possibly, under 8 U.S.C. § 1101(a)(43)(B) [but see FN 2 and 4]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN2]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a *not guilty* plea to avoid determination that 251 plea will be considered a "conviction." [See FN 8]. Keep reference to particular controlled

arguably prohibits the offering for sale of drug paraphernalia, an immigration practitioner could argue that the statute is overbroad because it appears to criminalize the distribution of printed material that may be unrelated to controlled substances other than the presence of a drug paraphernalia-related advertisement.

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					substance(s) out of record of conviction [see FN 3 regarding what constitutes the record] Plead instead to 18.2-248.1(a)(1) or 18.2-248.1(b) to have strongest argument that offense is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) (*Note*: such a plea *would still have* immigration consequences under the controlled substances and CIMT grounds of deportability/inadmissibility).
Keeping drug house	18.2-258	Probably	Possibly (but probably not) under 8 U.S.C. §1101(a)(43)(B[13]	Probably a crime relating to a controlled substance, 8 U.S.C. §	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a *not guilty* plea to avoid determination that 251 plea will be

[13] An immigration practitioner would have a strong argument that this offense cannot constitute a "drug trafficking aggravated felony" because it does not match the "common sense" definition of drug trafficking, as described by the Supreme Court in *Lopez v. Gonzales*, 549 U.S. 47 (2006). However, the federal definition of "drug trafficking crime" is set forth in 8 U.S.C. § 924(c)(2) and includes the federal statute for "Maintaining drug-involved premises" under 21 U.S.C. § 856. That statute makes it a felony to knowingly operate a place for the purpose of "manufacturing, distributing, or using any

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
				1227(a)(2)(B) [but see FN 2]	considered a "conviction." [See FN 8]. Keep reference to particular controlled substance(s) out of record of conviction [see FN 3 regarding what constitutes the record] To avoid aggravated felony, preserve argument (discussed in FN 12) by ensuring that conduct in record does not match that included in related federal offense.
Obtaining drugs by fraud, deceit, or forgery	18.2-258.1(A)	Yes	Possibly under 8 U.S.C. § 1101(a)(43)(B)[14]	Yes, a crime relating to a controlled substance, 8 U.S.C. §	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a *not guilty* plea to avoid

controlled substance," and "managing or controlling" the property while "knowingly and intentionally" making it available for the "unlawful[] manufacturing, storing, distributing, or using a controlled substance." An immigration practitioner could argue that Va. Code 18.2-258 is overbroad and therefore cannot constitute a drug trafficking aggravated felony because it appears to criminalize at least some conduct that is not prohibited by the federal statute, such as an owner having knowledge that his property is "frequented by persons under the influence of illegally obtained controlled substances."

[14] In order to constitute an aggravated felony, the offense elements would likely need to match those in the related federal offense, 21 U.S.C. § 843(a)(3).

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
			Yes, under 8 U.S.C. § 1101(a)(43)(M) if the loss to the victim exceeds $10,000 Possibly, under 8 U.S.C. § 1101(a)(43)(R) if the sentence imposed is at least one year Possibly under (G) if sentence imposed is at least one year	1227(a)(2)(B) [but see FN 2][15]	determination that 251 plea will be considered a "conviction." [See FN 8]. Keep reference to particular controlled substance(s) out of record of conviction [see FN 3 regarding what constitutes the record] unless offense relates to 30 grams or less of marijuana for personal use and is client's first drug offense, which is an exception to the controlled substances act ground of deportability. In that case, make clear that drug was marijuana and amount was 30 grams or less. However, if controlled substance that serves as the basis for conviction is *not* in the federal drug schedules, emphasize

[15] An offense under this statute is most likely a crime relating to a controlled substance offense. However, an immigration attorney could argue that the Virginia statute is overbroad because it criminalizes controlled substances that are not included in the federal drug schedules found at 21 U.S.C. § 802. *See* FN 2; *Mellouli v. Lynch,* 135 S. Ct. 1980 (2015).

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	18.2-258.1(B)	Yes	Probably, under 8 U.S.C. § 1101(a)(43)(B) Probably, under (M) if the loss to the victim exceeds $10,000	Yes, a crime relating to a controlled substance	that fact in the record. Make clear in record of conviction that loss to the victim was less than $10,000 to avoid fraud aggravated felony ground; otherwise, do not emphasize amount of loss in record. Keep sentence under one year to avoid theft aggravated felony ground. To avoid an aggravated felony, consider alternative plea to 18.2-95 grand larceny or 18.2-96 petit larceny with sentence under one year (but note that this will not avoid the CIMT grounds of removability)
	18.2-258.1(C)	Yes	Yes, under 8 U.S.C. § 1101(a)(43) (B) Possibly, under (M) if the loss to the victim exceeds $10,000	Yes, a crime relating to a controlled substance Possibly 8 U.S.C. 1182(a)(2)(C) if reason to believe drug trafficking	
	18.2-258.1(D)	Yes	Possibly, under 8 U.S.C. § 1101(a)(43)(B)	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but	

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
			Possibly, under (M) if the loss to the victim exceeds $10,000	see FN 2]	
	18.2-258.1(E)	Probably	Possibly, under (R) if the sentence imposed is at least one year	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	
	18.2-258.1(F)	Probably	Possibly, under (R) if the sentence imposed is at least one year	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	
Possession of controlled paraphernalia	54.1-3466	Probably	No	Possibly a crime relating to a controlled substance, 8 U.S.C. §	If possession of paraphernalia relates to a single instance of possession for one's own use of less than 30 grams of marijuana, emphasize that fact in record

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				1227(a)(2)(B) [but see FN 2][16]	to preserve argument that the controlled substances ground of deportability is inapplicable. *See Matter of Davey*, 26 I. & N. Dec. 37 (2012). Otherwise, do not specify in the record the type of drug associated with the possession of paraphernalia or the type of paraphernalia [see FN 3 regarding what constitutes the record].
Sale, etc., of drug paraphernalia	18.2-265.3(A)	Probably	Possibly, under 8 U.S.C. § 1101(a)(43)(B) [but see FN 2 and FN 4]	Probably a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but	Plead to 18.2-265.3(C) and keep reference to remuneration out of record of conviction to demonstrate that conviction should not be considered an aggravated felony because it is

[16] In *Mellouli v. Lynch*, the Supreme Court held that in order to trigger deportability under 8 U.S.C. § 1227(a)(2)(B)(i) (crime relating to a controlled substance), the government must prove the connection between a drug paraphernalia conviction and a substance listed in the federal drug schedules at 21 U.S.C. § 802. *Mellouli v. Lynch,* 135 S. Ct. 1980 (2015). The *Mellouli* Court held that a state statue is overbroad if it criminalizes controlled substances that are not criminalized under 21 U.S.C. § 802 and, therefore, cannot trigger immigration consequences. There is currently no binding decision applying *Mellouli* to the Virginia controlled substance schedules. However, an immigration attorney could argue that a conviction under this statute is overbroad as it includes paraphernalia related to controlled substances criminalized in Virginia and not in the federal CSA (see FN 2).

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				see FN 2]	inconsistent with 21 U.S.C. § 863(a), which makes sale of drug paraphernalia a drug trafficking offense under federal law. Keep reference to particular controlled substance(s) related to paraphernalia out of record of conviction [see FN 3 regarding what constitutes the record].
	18.2-265.3(B)	Probably	Possibly, under 8 U.S.C. § 1101(a)(43)(B) [but see FN 2 and FN 4]	Probably a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	
	18.2-265.3(C)	Probably	Probably not under 8 U.S.C. § 1101(a)(43)(B), if record of conviction does not show any evidence of sale of controlled substances or attempted sale (e.g. element of remuneration)	Probably a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	
Advertisement of	18.2-	Possibly (See FN 10)	Probably not,	Probably a crime	Keep reference to particular controlled

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drug paraphernalia	265.5		under 8 U.S.C. § 1101(a)(43)(B) [See FN 12]	relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	substance(s) out of record of conviction [see FN 3 regarding what constitutes the record].

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CAPITAL AREA IMMIGRANTS' RIGHTS (CAIR) COALITION
IMMIGRATION CONSEQUENCES OF COMMON VIRGINIA OFFENSES
SECTION IX – OTHER COMMONLY CHARGED OFFENSES
(Selected Crimes against Peace and Order and Administrative of Justice and Procedural Offenses Involving Arrest and Appearance)

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
Underage possession of alcohol	18.2-305	No	No	No	To preserve any potential arguments against CIMT, consider plea to sub-part 18.2-305(A)
Failing to secure medical attention for injured child	18.2-314	Probably	No	Probably a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)[2]	Plea to simple assault and battery at 18.2-57(A) to avoid aggravated felony and CIMT; if this is not possible consider an alternative plea to 18.2-371(i) contributing to the delinquency of a minor, and

[1] Including, but not limited to: controlled substance offense, prostitution offense, commercialized vice offense, firearm offense, crimes of domestic violence, crimes of stalking, and crimes against children.

[2] The "crime of child abuse" ground of deportability at 8 U.S.C. § 1227(a)(2)(E)(i) has been defined broadly by the Board of Immigration Appeals, requiring the elements of a knowing mental state, coupled with an act or acts of creating a likelihood of harm to a child. *See Matter of Mendoza-Osoria*, 16 I&N Dec. 703(BIA 2016); see also *Matter of Velasquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008) (defining crime of child abuse as "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, including sexual abuse or exploitation.")

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					specify subsection (i) in the record – note that this will likely avoid the CIMT and aggravated felony grounds but may not avoid the crime of child abuse grounds of deportability (see FN 2)
Disorderly conduct in public places	18.2-415	Probably not	No	No	Consider use as an alternative to other offenses that may trigger CIMT or other grounds of removability
Punishment for using abusive language to another	18.2-416	Probably not	No	No	Consider use as an alternative to other offenses that may trigger CIMT or other grounds of removability

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
Use of profane language over public airwaves	18.2-427	Probably not	No	No	Consider use as an alternative to other offenses that may trigger CIMT or other grounds of removability
Causing telephone or pager to ring with intent to annoy	18.2-429	Probably not	No	No	Consider use as an alternative to other offenses that may trigger CIMT or other grounds of removability To preserve any potential arguments against CIMT, consider plea to sub-part 18.2-429(A) and emphasize in record that alleged conduct involved no more than that

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Perjury	18.2-434	Probably[3]	Yes, under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year[4]	No	Specify in record that conduct related to written perjury was not pursuant to a judicial proceeding, as opposed to oral perjury during a judicial proceeding, to preserve argument in immigration court that

[3] The Board of Immigration Appeals has long held that perjury is a crime involving moral turpitude. *See Matter of Martinez-Recinos*, 23 I&N Dec. 175 (BIA 2001). However, the Ninth Circuit disputed this holding with respect to California's perjury law in *Rivera v. Lynch*, 816 F.3d 1064 (9th Cir. 2015). In *Rivera*, the Ninth Circuit ruled that the California perjury statute was divisible into two separate offenses: (1) oral perjury, committed by giving false testimony under oath in a judicial proceeding, which was a CIMT, and (2) written perjury, which the Ninth Circuit found to be a "self-defining crime – whenever a document must be signed under penalty of perjury, the penalty of perjury applies." *Id*. at 1074. For this reason, and because the California perjury statute requires no intent to defraud, the Ninth Circuit found that written perjury was not *malum in se*, and therefore not a CIMT. Similar to the California perjury statute, the Virginia perjury statute also broadly covers both oral and written perjury, and requires no intent to defraud. Therefore, an immigration attorney would have a strong argument to make along the lines of *Rivera v. Lynch* that the Virginia perjury statute is divisible, and that written perjury penalized by the statute is not a CIMT.

[4] The BIA has found that the expansive "relating to…perjury" language of 8 U.S.C. § 1101(a)(43)(S) broadly encompasses both oral and written perjury, and held that the distinction between oral and written perjury drawn by the Ninth Circuit in *Rivera v. Lynch*, 816 F.3d 1064, 1072 (9th Cir. 2015) for purposes of the crime involving moral turpitude ground does not affect the aggravated felony determination. *See Matter of Alvarado*, 26 I&N Dec. 895, 902 n.12 (BIA 2016).

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
					offense is not a CIMT Keep sentence under one year to avoid obstruction of justice aggravated felony
Contempt	18.2-456	No	No	No	
Obstruction of Justice	18.2-460	Probably, but arguably not[5]	Probably, under 8 U.S.C. § 1101(a)(43)(S) if	No	Keep sentence under one year to avoid obstruction of justice

[5] An immigration court would likely find this statute to be "divisible" and look to the record of conviction to determine which subsection of the section the individual allegedly violated. Some convictions under this statute may be considered a CIMT. *See Padilla v. Gonzalez*, 397 F.3d. 1016 (7th Cir. Feb. 22, 2005). However, an immigration attorney could argue that a conviction under 18.2-460(B) is overbroad with regard to the definition of a CIMT because the offense may be committed by the use of "threats" or "force." The Board of Immigration Appeals has held that crimes that involve the use of threats or force are only CIMTs if the conduct in question is accompanied by aggravating circumstances. *See, e.g.*, *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999). Yet, Va. Code 18.2-460 may be violated merely by making threats without an aggravating factor and regardless of whether a judicial officer is actually placed in fear or apprehension. *See, e.g.*,*Washington v. Commonwealth*, 643 S.E.2d 485, 486 (Va. 2007). Thus, an immigration court may find that the statute is categorically overbroad with regard to the federal definition of a CIMT.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
			the sentence imposed is at least one year[6]		aggravated felony To preserve arguments against CIMT and obstruction-of-justice aggravated felony, consider plea to sub-part 18.2-460(B) and emphasize in record that alleged conduct involved no more than that (see FNs 5 and 6) Consider alternate plea to 18.2-427

[6] As noted above, an immigration court would likely find this statute to be divisible. The generic definition of obstruction of justice requires: (1) "active interference with proceedings of a tribunal or investigations, or action or threat of action against those who would cooperate in the process of justice;" and (2) "specific intent to interference with the process of justice." *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838, 843 (BIA 2012). However, a conviction under subsection (B) can result from empty threats that need not present any real or credible threat for those engaged in the process of justice. Additionally, subsection (B) may be committed without any specific intent or knowledge that the person he allegedly obstructs is involving in the process of justice. Accordingly, an immigration practitioner would have a strong argument that at least a portion of Va. Code 18.2-460 is overbroad with regard to the obstruction of justice aggravated felony ground.

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					(use of profane language) to avoid CIMT and aggravated felony grounds of removability
Falsely summoning or giving false reports to law-enforcement	18.2-461	Probably[7]	Probably, under 8 U.S.C. §1101(a)(43)(S) if the sentence imposed is at least one year[8] (see FN 6)	No	Consider alternate plea to 18.2-427 (use of profane language) to avoid CIMT and aggravated felony grounds of removability Keep sentence under one year to avoid obstruction of justice

[7] An immigration practitioner would have an argument that Va. Code 18.2-460 is overbroad as the *mens rea* of Va. Code 18.2-460(ii) does not include an intent to deprive, defraud, or injure. *See United States v. Esparza-Ponce*, 193 F.3d 1133 (9th Cir. 1999); *Matter of Sanudo,* 23 I. & N. Dec. 968,971 (BIA 2006).

[8] An immigration practitioner would have an argument that at least a portion of Va. Code 18.2-460 is overbroad with regard to the obstruction of justice aggravated felony ground. Va. Code § 18.2-461(ii) does not require "active interference with proceedings of a tribunal or investigations, or action or threat of action against those who would cooperate in the process of justice;" as required by the generic definition for obstruction of justice. *Matter of*

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officials					aggravated felony If possible, plea to sub-part 18.2-461(ii) and emphasize in record that alleged conduct involved no more than intent to interfere to preserve a potential argument that offense does not constitute a CIMT or AF (See FN 6)

Valenzuela Gallardo, 25 I&N Dec. 838, 843 (BIA 2012). A conviction under Va. Code 18.2-460 can result from empty threats that need not present any real or credible threat for those engaged in the process of justice.

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Resisting arrest; fleeing from a law enforcement officer	18.2-479.1	Possibly[9]	No		
Racketeering offenses	18.2-514	Probably	Yes, under 8 U.S.C. § 1101(a)(43)(J) if sentence imposed is at least one year	Possibly, depending on underlying offense, for example controlled substance ground	If possible, make clear in record of conviction that actual and intended loss to the victim did not exceed $10,000 to avoid fraud aggravated felony charge under 8 U.S.C. §

[9] The government has previously charged Va. Code § 18.2-479.1 as a CIMT. However, an immigration attorney would have a strong argument that it is not. Interfering with law enforcement is analogous to assault, which is not considered to be a CIMT. Indeed, resisting arrest is a CIMT only when it results in bodily harm to the victim, or involves the threat of the use of deadly force. *See Matter of Logan, 17 I&N Dec. 367, 368-69 (BIA 1980); Matter of Danesh,* 19 I&N Dec. 669 (BIA 1988); *Matter of Garcia-Lopez,* A38 096 900, 2007 WL 4699842, at *2 (BIA Nov. 2, 2007) (unpublished). Although obstruction of justice offenses that require intent to deceive or fraudulent intent may be considered CIMTs, the only intent required by Va. Code § 18.2-479.1 is the intent to "prevent[] or attempt[] to prevent a law-enforcement officer from lawfully arresting."

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			Possibly, under 8 U.S.C. § 1101(a)(43)(M) and (U) if there are allegations of loss and the actual/intended loss to the victim exceeds $10,000	where record of conviction establishes that underlying conduct involved a controlled substance	1101(a)(43)(M), (U) Keep sentence under one year to avoid theft aggravated felony charge under 8 U.S.C. § 1101(a)(43)(G)
Giving false	19.2-	Yes[10]	Possibly, under 8	No	If at all possible consider plea to

[10] The Board has held other state statutes involving false identity to a police officer with intent to evade or deceive the court or a police officer are CIMTs. *See Matter of Migran Oganyan*, A72 301 718, 2004 WL 1739156 (BIA June 29, 2004) (unpublished); *Matter of Ivon Reyes Morales*, A200 897 761, 2010 WL 4971017 (BIA Nov. 23, 2010) (unpublished). However, an immigration practitioner could make an argument that Va. Code § 19.2-82.1 is not a CIMT because the *mens rea* element is somewhat ambiguous: while it is clear that an intent to deceive law enforcement regarding one's identity is required, the statute does not require a showing that the goal of the deception is to procure something of value to the detriment of another, and the element of knowing misrepresentation itself does not by itself make fraud a necessary element of a crime. *See Blanco v. Mukasaey*, 518 F.3d 714, 718

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
identity to law-enforcement officer	82.1		U.S.C. §1101(a)(43)(S) if the sentence imposed is at least one year (see FN6)[11]		18.2-415 (disorderly conduct) or 18.2-427 (use of profane language) to avoid CIMT Keep sentence under one year to avoid obstruction of justice aggravated felony

(9th Cir. 2008); *Flores-Molina v. Sessions*, _ F.3d _, No. 16-9516 (10th Cir. March 7, 2017). Furthermore, courts have held convictions for false or fraudulent statements are not CIMTs where fraud is not an essential element and the statement is not material. *See, e.g., Matter of Di Filippo*, 10 I&N Dec. 76 (BIA 1962).

[11] An immigration practitioner would have an argument that Va. Code 18.2-460 is overbroad with regard to the obstruction of justice aggravated felony ground as the offense does not involve active interference, action, or threat of action against those who would cooperate in the process of justice. *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838, 843 (BIA 2012).

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
Failure to Appear	19.2-128	Possibly[12]	Yes, under 8 U.S.C. § 1101(a)(43)(Q), if conviction relates to failure to appear for service of sentence and underlying offense is punishable by a term of five years or more Yes, under 8 U.S.C. § 1101(a)(43)(T) if conviction relates to		

[12] Va. Code § 19.2-128 includes a *mens rea* element of "willfully" failing to appear. However, an immigration attorney would have an argument available that Va Code § 19.2-128 is not a CIMT because it does not include an intent to deprive, defraud, or injure. *See United States v. Esparza-Ponce*, 193 F.3d 1133 (9th Cir. 1999); *Matter of Sanudo,* 23 I. & N. Dec. 968,971 (BIA 2006). In addition, a comparable offense – contempt of court – has been found not to be a CIMT where the underlying offense was not a CIMT. *Matter of C-,* 9 I&N Dec. 524 (BIA 1962); *Matter of P-,* 6 I&N Dec. 400, 404 (BIA 1954); *see also Mohamed v. Holder*, 769 F.3d 885 (4th Cir. 2014) (holding the procedural offense of failure to register as a sex offender is not a CIMT because it is not *malum in se* rather than *malum prohibitum*).

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			failure to appear to answer to a felony charge punishable by two years or more		
Cruelty and injuries to children; abandoned	40.1-103	Probably[13]	Possibly, under 8 U.S.C. § 1101(a)(43)(F), if sentence of one year or more is imposed[14]	Probably a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E) (see	Plea to simple assault and battery at 18.2-57(A) to avoid aggravated felony and CIMT; if this is not possible consider an alternative plea to 18.2-371(i) contributing to the delinquency of a minor, and

[13] An immigration practitioner would have a strong argument that this offense is not a CIMT because it includes a *mens rea* of negligence. Generally, offenses involving negligence, strict liability, general intent, or intent to break the law are not CIMTs. *See Matter of Ortega-Lopez*, 26 I&N Dec. 99, 100 (BIA 2013). Furthermore, in *Sotnikau v. Lynch*, 846 F.3d 741 (4th Cir. 2017) the Fourth Circuit held that the Virginia involuntary manslaughter statute was categorically overbroad and therefore not a CIMT when it extended to punishing conduct committed through "criminal negligence," which is a *mens rea* lower than specific intent or recklessness and therefore insufficient for a CIMT finding. The same argument could be applied to 18.2-371.1(A).

[14] In order to be a crime of violence under 8 U.S.C. § 1101(a)(43)(F), a conviction must necessarily meet the definition of a crime of violence at 18 U.S.C. § 16(a), including an element of the use, attempted use, or threatened use of physical force against the person or property of another. Under this

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infant				FN2)	specify subsection (i) in the record – note that this will likely avoid the CIMT and aggravated felony grounds but may not avoid the crime of child abuse grounds of deportability (see FN 2)
Trademark Infringement	59.1-92.12	Possibly[15]	Possibly, under 8 U.S.C. § 1101(a)(43)(M) and (U) if there are allegations of loss	No	If possible, make clear in record of conviction that actual and intended loss to the victim did not exceed $10,000 to avoid fraud aggravated

statute, a person can be convicted for negligently permitting the life of a child to be endangered or health injured or to be overworked, not necessarily force. Furthermore, this statute does not require as an element the knowing or willful infliction of harm to a victim. Thus, an argument could be made that at least some convictions under this statute do not constitute crimes of violence. Note the Supreme Court held 18 U.S.C. § 16(b) is unconstitutionally void for vagueness. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

[15] An immigration practitioner would have a strong argument that this offense is not a CIMT because it lacks an element of intent. Generally, offenses involving negligence, strict liability, general intent, or intent to break the law are not CIMTs. *See Matter of Ortega-Lopez*, 26 I&N Dec. 99, 100 (BIA 2013); *Sotnikau v. Lynch*, 846 F.3d 741 (4th Cir. 2017).

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			and the actual/intended loss to the victim exceeds $10,000 Possibly a theft offense under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year[16]		felony charge under 8 U.S.C. § 1101(a)(43)(M), (U) Keep sentence under one year to avoid theft aggravated felony charge under 8 U.S.C. § 1101(a)(43)(G)

[16] The Fourth Circuit held in *Omargharib v. Holder*, 775 F.d 192 (4th Cir 2014), that a conviction for grand larceny under Va. Code § 18.2-95 is categorically overbroad with regard to the aggravated felony theft offense at 8 U.S.C. 1101(a)(43)(G) because it punishes takings with and without consent. The Fourth Circuit's reasoning in *Omargharib* may apply to this statute.

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Violation of provisions of protective orders	16.1-253.2(A)	Maybe[2]	No	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(ii) (protective order violation)[3]	Consider alternate plea to assault and battery (18.2-57(A)) or stalking (18.2-60) to avoid the court determination of a protection order violation that is necessary for 8 U.S.C. § 1227(a)(2)(E)(ii). If applicable, obtain a state court determination that violation was triggered by consensual contact with victim, a criminal offense unrelated to victim, or contacts with family/ household members of the victim (to preserve protective order violation overbreadth argument) Keep reference to a firearm, assault and battery, bodily injury, and entering the protected party's home out of the charging document, written plea
	16.1-253.2(B) (deadly weapon/ firearm)	Maybe[4]	Maybe, under 8 U.S.C. § 1101(a)(43)(E)(firearms)[5]	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(ii) (protective order violation)[3] Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms)[6]	
	16.1-253.2(C) (assault causing injury, stalking, furtive entry,	Maybe[7]	Maybe, under 8 U.S.C. §1101(a)(43)(F) (crime of violence)[8]	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence)[9]	

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	or waiting in victim's home)			Yes, under 8 U.S.C. § 1227(a)(2)(E)(ii) (violation of protective order)	agreement, transcript of plea colloquy, and judicial findings of fact (to preserve CIMT and aggravated felony overbreadth arguments).
Murder	18.2-32 (first degree)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(A) (murder) Yes, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed is at least one year	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	Plead to involuntary manslaughter (18.2-36) (avoids aggravated felony and CIMT) If victim was current or former spouse or similarly situated person, keep reference to relationship out of the charging document, written plea agreement, transcript of plea colloquy, judicial findings of fact, and other documents.

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	18.2-32 (second degree)	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (murder)[11] No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[12]	No	
Voluntary manslaughter	18.2-35	Yes	No, under 8 U.S.C. § 1101 (a)(43)(A) (murder)[13] Yes, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if	Yes, under 8 U.S.C. § 1227(a)(2) (E) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	Plead to involuntary manslaughter (18.2-36) (avoids CIMT and aggravated felony) Keep sentence under one year to avoid crime of violence aggravated felony and domestic violence offense. If victim was current or former spouse or similarly situated person, keep reference to relationship out of the

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			sentence imposed is at least one year		charging document, written plea agreement, transcript of plea colloquy, judicial findings of fact, and other documents.
Involuntary manslaughter	18.2-36	No[14]	No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[15]	No	
Certain conduct punishable as involuntary manslaughter	18.2-36.1(A): vehicular involuntary manslaughter	No[12]	No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[13]	No	If driving under the influence of controlled substance, keep reference to controlled substance out of the charging document, written plea agreement,

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	18.2-36.1(B): aggravated vehicular involuntary manslaughter	Yes	Yes, under 8 (a)(43)(A) (murder)[16] No, under 8 (a)(43)(F) (crime of violence)[17]	No	transcript of plea colloquy, and judicial findings of fact. To avoid CIMT and aggravated felony charges, plead to (A) instead of (B) and ensure the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact reflect such.
Wounding by mob	18.2-41	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if imposed sentence at least one year	No, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)	Consider alternate plea to simple assault under 18.2-57(A) Keep references to gang membership, firearm out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.

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					Keep sentence under one year to avoid crime of violence aggravated felony.
Assault or battery by mob	18.2-42	No[18]	No[19]	No	Keep references to gang membership out of the the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. Plea to simple assault 18.2-57(A) if possible.
Act of violence by mob	18-42.1	Maybe[20]	Maybe[21]	No	Keep references to the act of violence the mob committed out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact unless the act was kidnapping.

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Prohibited criminal street gang participation	18.2-46.2	No[22]	No, under 8 U.S.C. § 1101 (a)(43) (A, B, C, E, F, G, or K)[23]	No	Plea to the predicate offense if it is not a CIMT or aggravated felony to avoid creating a record of gang activity. Minimize any reference to the name of a gang or gang activities in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.
Recruitment of persons for criminal street gang	18.2-46.3(A) (adult)	Maybe[24]	No	No	Minimize any reference to the name of a gang or gang activities in record of conviction.
	18.2-46.3(A) (juvenile)	Maybe[25]	No	No	
	18.2-46.3(B)	Yes[26]	Yes, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if	No	Minimize any reference to the name of a gang or gang activities in record of conviction.

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			sentence imposed is at least one year		Keep sentence under one year to avoid crime of violence aggravated felony
Abduction and kidnapping	18.2-47	Yes[27]	No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[28] No, under 8 U.S.C. § 1101 (a)(43) (H) (ransom)[29]	No	
Violation of court order regarding custody and visitation	18.2-49.1(A)	Maybe[30]	No	No	
	18.2-49.1(B)	Maybe[30]	No	No	

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Unlawful or malicious wounding[31]	18.2-51 (malicious wounding)	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if sentence imposed is one year or more[32]	No, under 8 U.S.C. 1227(a)(2)(C) (firearms) Yes, under 8 U.S.C. § 1227(a)(2) (E)(i) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	Plea to 18.2-57(A) assault and battery to avoid aggravated felony and CIMT Keep sentence under one year to avoid crime of violence aggravated felony and domestic violence offense. If underlying conduct did not involve direct or indirect use of physical force, emphasize this in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. If victim was current or former spouse or similarly situated person, keep reference to relationship out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.
	18.2-51 (unlawful wounding)	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if sentence imposed is	No, under 8 U.S.C. 1227(a)(2)(C) (firearms) Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim	

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			one year or more[33]	was a current or former spouse or similarly situated person[10]	
Aggravated malicious wounding	18.2-51.2(A)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed is one year or more[34]	No, under 8 U.S.C. § 1227(a)(2)(C) (firearms) Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	Plea to 18.2-57(A) assault and battery to avoid aggravated felony and CIMT Keep sentence under one year to avoid crime of violence aggravated felony and domestic violence offense. If underlying conduct did not involve direct or indirect use of physical force, emphasize this in the charging document, written plea agreement,

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	18.2-51.2(B)	Yes	Maybe, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed is one year or more[34]	No, under 8 U.S.C. § 1227(a)(2)(C) (firearms) Maybe, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	transcript of plea colloquy, and judicial findings of fact. If victim was current or former spouse or similarly situated person, keep reference to relationship out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.
Recklessly endangering others by throwing objects from places higher	18.2-51.3	Maybe[35]	Maybe, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed is at	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim was a current or former spouse or	Keep sentence under one year to avoid crime of violence aggravated felony and domestic violence offense. If victim was current or former spouse or similarly situated person, keep reference to relationship out of the charging document, written plea

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than one story			least one year[36]	similarly situated person[10]	agreement, transcript of plea colloquy, and judicial findings of fact.
Strangulation	18.2-51.6	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if sentence imposed is at least one year	Yes, under 8 U.S.C. § 1227(a)(2) (E)(i) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	Keep sentence under one year to avoid aggravated felony and domestic violence offense. If victim was current or former spouse or similarly situated person, keep reference to relationship out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.
Unlawful or Malicious bodily injury by means of caustic	18.2-52 (maliciously)	Maybe[37]	Maybe, under 8 U.S.C. § 1101(a)(43) (F) (crime of violence) if sentence imposed is at	Maybe, under 8 U.S.C. § 1227(a)(2) (C)(firearms) if a firearm was used in commission of crime[39]	Plea to 18.2-57(A) assault and battery to avoid aggravated felony and CIMT. Keep sentence under one year to avoid crime of violence aggravated felony and domestic violence offense.

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substance or agent			least one year[38] Maybe, under 8 U.S.C. § 1101(a)(43)(E) (explosives)[39]	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	Keep reference to firearm or any weapon/explosive out of the the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. If underlying conduct did not involve direct or indirect use of physical force, emphasize this in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. If victim was current or former spouse or similarly situated person, keep reference to relationship out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.
	18.2-52 (unlawfully)	Yes[40]	Maybe, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence), if sentence imposed is at least one year.[41]	Maybe, under 8 U.S.C. § 1227(a)(2)(C)(firearms) if a firearm was used in commission of crime[42] Maybe, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim	

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			Maybe, under 8 U.S.C. § 1101(a)(43)(E) (explosives)[42]	was a current or former spouse or similarly situated person[10]	
Bodily injury caused by prisoners	18.2-55	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if sentence imposed is at least one year[43]	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	Plead to 18.2-57(A) assault and battery to avoid aggravated felony and CIMT Keep sentence under one year to avoid crime of violence aggravated felony and domestic violence offense.
Hazing of youth gang members	18.2-55.1	No[44]	No[45]	No	Keep references to bodily injury, intentional action, gang name/activities out of the charging document, written plea agreement, transcript of plea

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
					colloquy, and judicial findings of fact; if possible, create affirmative record that no injuries were caused.
Assault and battery	18.2-57(A)	No[46]	No[47]	No	
Assault and battery (police officer)	18.2-57(C)	No	No[48]	No	
Assault and battery (family member)	18.2-57.2(A)	No[49]	No[50]	No	
Robbery[51]	18.2-58	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(G) (theft) if	No	Plead to 18.2-57(A) assault and battery to avoid aggravated felony and CIMT.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
			sentence imposed is at least one year[52] No, under 8 U.S.C. § 1101 (a)(43) (F) (crime of violence)[53]		Keep sentence under one year to avoid the theft aggravated felony. If possible create affirmative record that robbery was committed by simple assault (rather than other methods provided by statute)[54]
Carjacking[55]	18.2-58.1	Maybe[56]	No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[57] Yes, under 8 U.S.C. § 1101 (a)(43)(G) (theft) if	No	Keep sentence under one year to avoid theft aggravated felony.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
			sentence imposed of at least one year.[58]		
Extorting money by threats	18.2-59	Yes	No, under 8 U.S.C. § 1101 (a)(43)(H) (ransom) Yes, under 8 U.S.C. § 1101 (a)(43)(G) (theft) if sentence imposed is at least one year[59]	No	Keep sentence under one year to avoid theft aggravated felony.
Threats of death or	18.2-60(A)(1)	Yes[60]	Maybe, under 8 U.S.C. §	Maybe, under 8 U.S.C. § 1227(a)(2)	

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
bodily injury to a person or member of his family; threats to commit serious bodily harm to persons on school property			1101(a)(43)(F) (crime of violence) if sentence imposed is at least one year[61]	(E)(i) (domestic violence) if a stence of at least one year is imposed[10]	Plead to misdemeanor under 18.2-416 ("punishment for using abusive language to another") Keep sentence under one year to avoid crime of violence aggravated felony
	18.2-60(A)(2)	Maybe[62]	Maybe, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed is at least one year[63]		
	18.2-60(B)	Maybe[64]	Yes, under 8 U.S.C. § 1101	No	

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
			(a)(43)(F) (crime of violence) if sentence imposed is at least one year.[65]		
Stalking	18.2-60.3	No[66]	No, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence)	No, under 8 U.S.C. § 1227(a)(2)(E)(i) (stalking)[67]	
Violation of protective order	18.2-60.4(A)	No	No	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(ii) (protective order violation)[3]	Consider alternate plea to assault and battery (18.2-57(A)) or stalking (18.2-60) to avoid the court determination of a protection order violation that is

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
	18.2-60.4(B) (deadly weapon/ firearm)	Maybe[4]	Maybe, under 8 U.S.C. § 1101(a)(43)(E)(firearms)[5]	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(ii) (protective order violation)[3] Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms)[6]	necessary for 8 U.S.C. § 1227(a)(2)(E)(ii). If applicable, obtain a state court determination that violation was triggered by consensual contact with victim, a criminal offense unrelated to victim, or contacts with family/household members of the victim (to preserve protective order violation overbreadth argument) Keep reference to a firearm, assault and battery, bodily injury and entering the protected party's home out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact (to preserve CIMT and aggravated felony overbreadth arguments).
	18.2-60.4 (C) (assault, causing injury, stalking, furtive entry, or waiting in victim's home)_	Maybe[7]	Maybe, under 8 U.S.C. §1101(a)(43)(F) (crime of violence) if a sentence of at least one year is imposed[8]	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if a sentence of at least one year is imposed[9] Yes, under 8 U.S.C. § 1227(a)(2)(E)	

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				(ii) (protective order violation)	
Rape	18.2-61(A)(i) (force, threat, intimidation)	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (rape) Maybe, under 8 U.S.C. § 1101(a)(43) (F) (crime of violence) if sentence imposed of at least one year[68]	Maybe, under 8 U.S.C. § 1227(a)(2) (E)(i) (domestic violence)[69]	Plea to simple assault and battery at 18.2-57(A) with a sentence of less than one year to avoid aggravated felony, domestic violence deportation ground, and CIMT. Seek plea to non-aggravated misdemeanor sexual battery, under 18.2-67.4, with sentence under one year to avoid aggravated felony.

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	18.2-61(A)(ii) (mental incapacity or physical helplessness)	Yes	Yes, under 8 U.S.C. § 1101 (a)(43) (A) (rape) No, under 8 U.S.C. § 1101 a)(43)(F) (crime of violence)[70]	No, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence)[70]	Plea to aggravated sexual battery under 18.2-67 to avoid rape aggravated felony (but plea is still a CIMT).
	18.2-61(A)(iii) (child younger than 13)	Maybe[71]	Yes, under 8 U.S.C. § 1101 (a)(43) (A) (sexual abuse of a minor) No, under 8 U.S.C. § 1101 (a)(43)(F)	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (child abuse)	

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			(crime of violence)[72]		
Carnal knowledge of child between 13 and 15 years of age	18.2-63(A)	Maybe[71]	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse of a minor)	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (child abuse)	Plea to assault and battery at 18.2-57(A) to avoid aggravated felony and CIMT Seek plea to non-aggravated misdemeanor sexual battery, under 18.2-67.4, with sentence under one year to avoid aggravated felony and without mention of age of victim in record
	18.2-63(B)	Maybe[71]	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse of a minor)	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (child abuse)	

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Carnal knowledge of certain minors	18.2-64.1	Maybe[71]	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse of minor)	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (child abuse)	

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Forcible sodomy	18.2-67.1(A)(1) (child younger than 13)	Maybe[71]	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse of a minor) No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)**Error! Bookmark not defined.**	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (child abuse)	Plea to assault and battery at 18.2-57(A) to avoid aggravated felony, child abuse, and CIMT Plea to misdemeanor non-aggravated sexual battery, under 18.2-67.4, with sentence under one year to avoid aggravated felony Keep statutory provision and age of victim out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to avoid an immigration judge identify this provision as the offense committed.
	18.2-67.1(A)(2) (force,	Yes	Yes, under 8 U.S.C. § 1101	Maybe, under 8 U.S.C. § 1227(a)(2)	Plea to assault and battery at 18.2-57(A) to avoid aggravated felony and CIMT

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	threat, intimidation)		(a)(43)(A) (rape) Maybe, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed of at least one year[68]	(E)(i) (domestic violence)[69]	Seek plea to misdemeanor non-aggravated sexual battery, under 18.2-67.4, with sentence under one year to avoid aggravated felony
Object sexual penetration	18.2-67.2(A)(1) (child younger 13)	Maybe[71]	Yes, under 8 U.S.C. § 1101(a)(43)(A) (sexual abuse of a minor) No, under 8 U.S.C. § 1101	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (child abuse)	Plea to assault and battery at 18.2-57(A) to avoid aggravated felony and CIMT Seek plea to misdemeanor non-aggravated sexual battery, under 18.2-67.4, with sentence under one year to avoid aggravated felony

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			(a)(43)(F)**Error! Bookmark not defined.**		Keep statutory provision and age of victim out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to avoid an immigration judge identify this provision as the offense committed.
	18.2-67.2(A)(2) (force, threat, intimidation)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(A) (rape) Maybe, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed at least one year[68]	Maybe, under 8 U.S.C. § 1227(a)(2)(E) (domestic violence)[69]	

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Aggravated sexual battery	18.2-67.3(A)(1) (child younger 13)	Maybe[71]	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse of a minor) No, under 8 U.S.C. § 1101 (a)(43) (F) (crime of violence)**Error! Bookmark not defined.**	Yes, under U.S.C. § 1227(a)(2)(E)(i) (child abuse)	Plea to assault and battery at 18.2-57(A) to avoid aggravated felony and CIMT. Plea to aggravated sexual battery mental incapacity (based on age) under 18.2-67.3(A)(2) to avoid aggravated felonies and child abuse deportation ground. Plea to misdemeanor non-aggravated sexual battery, under 18.2-67.4, with sentence under one year to avoid crime of violence and sexual abuse of minor aggravated felonies. Keep age of victim out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact
	18.2-67.3(A)(2) (mental	Yes	No, under 8 U.S.C. § 1101	No, under 8 U.S.C. § 1227(a)(2)(E)(i)	

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	incapacity or physical helplessness)		(a)(43)(A) (rape)[73] No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[70]	(domestic violence)[70]	
	18.2-67.3(A)(3) (child between 13 & 18 years old and offender is a relative)	Maybe[71]	No, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse) (of a minor)[74] No, under 8 U.S.C. § 1101 (a)(43) (A) (rape)[73]	Yes, under 8 U.S.C. § 1227(a)(2)(E) (child abuse)	

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			No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)**Error! Bookmark not defined.**		
	18.2-67.3 (A)(4)(a) (force, threat, intimidation, and child btwn 13-15)	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse of a minor) Maybe, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if sentence	Yes, under 8 U.S.C. § 1227(a)(2)(E) (child abuse)	Keep imposed sentence to less than a year to foreclose a crime of violence aggravated felony. If possible create affirmative record in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact, that act was committed via intimidation. Keep references to force and threat out these documents (to avoid crime of violence aggravated felony)

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			imposed at least one year[68]		
	18.2-67.3(A)(4)(b) (force, threat, or intimidation and serious bodily or mental injury)	Yes	No, under 8 U.S.C. § 1101 (a)(43)(A) (rape)[73] Maybe, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if sentence imposed at least one year[68]	No	Keep imposed sentence to less than a year to foreclose a crime of violence aggravated felony. If possible create affirmative record in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact, that act was committed via intimidation. Keep references to force and threat out these documents (to avoid crime of violence aggravated felony)

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	18.2-67.3 (A)(4)(c) (force, threat, or intimidation and firearm, or dangerous weapon)	Yes	No, under 8 U.S.C. § 1101 (a)(43)(A) (rape)[73] Yes, under 8 U.S.C. § 1101 (a)(43) (F) if sentence imposed at least one year	No, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[75]	Keep imposed sentence to less than a year to foreclose a crime of violence aggravated felony. Keep reference to a firearm out of record of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to avoid firearms deportability ground.
Sexual battery	18.2-67.4(A)(i) (force, threat, intimidation, or ruse)	Yes[76]	No, under 8 U.S.C. § 1101 (a)(43)(A) (rape)[73] No, under 8 U.S.C. § 1101 (a)(43) (A)	Maybe, under 8 U.S.C. § 1227(a)(2)(E) (child abuse)[79]	Plea to assault and battery at 18.2-57(A) to avoid CIMT If possible create affirmative record in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact, that act was

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			(sexual abuse of minor)[77] No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[78]		committed by intimidation or ruse rather than force or threat. If sexual abuse was 18.2-67.10(6)(c), keep reference to victim's age out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to avoid child abuse deportability ground. But, if victim older 13 or older, mention age in these documents. To preserve an argument that the offense is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(A) or crime of child abuse under under 8 U.S.C. § 1227(a)(2)(E), affirmatively keep age out of the record
	18.2-67.4(A)(ii) (multiple acts w/out consent in 2 years)	Yes	No, under 8 U.S.C. § 1101 (a)(43)(A) (rape)[73] No, under 8 U.S.C. § 1101 (a)(43) (A) (sexual abuse of minor)[77]	Maybe, under 8 U.S.C. § 1227(a)(2)(E) (child abuse)[79]	

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			No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[78]		
Sexual abuse of a child between 13 and 15 years of age	18.2-67.4:2	Maybe[71]	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse of a minor)	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (child abuse)	Plea to assault and battery at 18.2-57(A) to avoid aggravated felony and CIMT Plea to misdemeanor non-aggravated sexual battery under 18.2-67.4, with no reference to age of victim in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to avoid child abuse deportability ground to avoid sexual abuse of a minor aggravated felony
Attempted rape, forcible	18.2-67.5	Yes	Maybe, under 8 U.S.C. §		

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
sodomy, object sexual penetration, aggravated sexual battery, and sexual battery			1101(a)(43)(U) (attempt)[80]		

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[1] Including, but not limited to: controlled substance offense, prostitution offense, commercialized vice offense, firearm offense, crimes of domestic violence, crimes of stalking, and crimes against children.

[2] An immigration attorney may argue that Va. Code § 16.1-253.2(A) is not categorically a CIMT since none of the four triggers for this provision is categorically a CIMT. A CIMT "requires two essential elements: a culpable mental state and reprehensible conduct." *Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135 (4th Cir. 2018) (citing *Sotnikau v. Lynch*, 846 F.3d 731, 735–36 (4th Cir. 2017)); *Matter of Silva-Trevino,* 26 I&N Dec. 826, 831–33 (BIA 2016). Negligence is not a sufficiently culpable mental state for a CIMT. *Sotnikau*, 846 F.3d at 736; *Matter of Tavdidishvili*, 27 I&N Dec. 142, 144 (BIA 2017). Comitting a criminal offense is not categorically a CIMT since the Va. Code makes many negligent acts criminal offenses. *See, e.g.,* Va. Code § 18.2-36 (involuntary manslaughter); Va. Code § 18.2-60 (stalking); Va Code § 18.2-88 (careless damage of a property by fire); Va. Code § 18.2-371.1 (child neglect). Family abuse, i.e. "any act involving violence, force, or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury" Va. Code § 16.1-228, is not categorically a CIMT since it "includes, but is not limited to, […] stalking," *Id.*, which is not a CIMT. *See infra* n. 66. Going/remaining upon land, buildings, or premises and contact with the victim or victim's family members both appear to be a strict liability offenses, which means that they would lack the requiste culpable mental states to be CIMTs. *See Sotnikau*, 846 F.3d at 735–36.

[3] 8 U.S.C. § 1227(a)(2)(E)(ii) requires (1) a state court determination that a noncitizen "'has engaged in conduct that violated the portion of a protective order that "involve protection against credible threats of violence, repeated harassment, or bodily injury' and (2) whether the order was 'issued for the purpose of preventing violent or threatening acts of domestic violence.'" *Matter of Obshatko*, 27 I&N Dec. 173, 177 (BIA 2017) (quoting 8 U.S.C. § 1227(a)(2)(E)(ii)). To determine whether conduct falls within this grounds, an immigration judge is not bound by the categorical approach, even if a conviction underlies the charge. *Matter of Obshatko*, 27 I&N Dec. at 176–77. Rather, the judge may consider all probative and reliable evidence regarding the protective order violation and the state court's determination of this violation. *Id.* Some protective order violations prohibited by Va. Code §§ 16.1-253.2(A), (B) and 18.2-60.4, such as family abuse, presence on protected premises (when armed with a deadly weapon), and/or nonconsensual contact with the protected party, falls within the ambit of 8 U.S.C. § 1227(a)(2)(E)(ii). *See Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011). Other conduct prohibited by Va. Code §§ 16.1-253.2(A), (B) and 18.2-60.4 such as a general violation, criminal offenses unrelated to the protected party (when armed with a deadly weapon), consensual contact with the protected party, isolated, one-off contact with the protected party, and/or contact with the protected party's family members may not. Effort should be made to minimize evidence of violations that *Matter of Strydom* identifies as falling within the scope of 8 U.S.C. § 1227(a)(2)(E)(ii).

[4] An immigration attorney may argue that neither of Va. Code §§ 16.1-253.2(B), 18.2-60.4(B) is categorically a CIMT since violating a provision of a protective order is not a CIMT and possession of a weapon onlys involve moral turpitude if accompanied by the intent to commit a crime involving moral turpitude. *See Matter of Serna*, 20 I&N Dec. 579, 584 (BIA 1992) *modified on other grounds by Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979). In Virginia, the crime of violating a provision of a protective order also appears to be a strict liability offense and so lacks the requisite culpable mental state to be a CIMT. *See Sotnikau v. Lynch*, 846 F.3d 731, 735–36 (4th Cir. 2017) (holding that a CIMT requires two essential elements: a culpable mental state and reprehensible conduct).

[5] An immigration attorney may argue that Va. Code § 16.1-253.2(B) is not categorically an explosives aggravated felony under 8 U.S.C. § 1101(a)(43)(E) via 18 U.S.C. § 844 (h)(2). While *U.S. v. Davis*, holds that ammunition is an explosive thereby bringing firearms under the ambit of an explosives aggravated felony, *see* 202 F.3d 212 (4th Cir. 2000), Va. Code § 16.1-253.2(B) also prohibits violating a protective order when armed with a non-explosive deadly weapon such as a knife. DHS may rebut this by arguing that Va. Code § 16.1-253.2(B) is divisible by weapon, i.e. that being armed with

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a firearm and being armed with a deadly weapon are alternative elements of distinct offenses, rather than alternative means of committing a single offense. If the immigration judge agrees, she may look at the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine the identity of the weapon is involved and what "offense" was committed. If she finds that a firearm was involved, an immigration attorney may respond that violating a protective order while armed with a firearm is still not categorically an explsives aggravated felony via 18 U.S.C. § 844 (h)(2) since violating a protection order when armed with an unloaded firearm falls within the ambit of Va. Code § 16.1-253.2(B) and an unloaded firearm is not an explosive. However, judge may require a showing that there is a realistic probability of the Va. Code § 16.1-253.2(B) firearm offense being applied to unloaded firearms and an immigration attorney may have difficulty finding the evidence necessary to make this showing. Effort should therefore be made to use the phrase deadly weapon instead of the term firearm in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.

[6] An immigration attorney may argue that Va. Code § 16.1-253.2(B) is not categorically a firearms offense under 8 U.S.C. § 1227(a)(2)(C) since the statute prohibits violating a protective order when armed with a non-firearm deadly weapon such as a knife. The government could attempt to rebut this argument by alleging that Va. Code § 16.1-253.2(B) is divisible by weapon, i.e. that being armed with a firearm and being armed with a deadly weapon are alternative elements of distinct offenses, rather than alternative means of committing a single offense. If the immigration judge agrees, she may look at the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine the identity of the weapon is involved and what "offense" was committed. If she finds that a firearm was involved, an immigration attorney may respond that deadly weapons whose knowing possession Va. Code § 16.1-253.2(B) criminalizes is broader than the definition of firearm in 18 U.S.C. § 921(a)(3), since at minimum it does not contain an exemption for antique firearms. However, the BIA will likely require a showing of a realistic probability that Virginia uses Va. Code § 18.2-253.2(B) to prosecute violating a protective order when armed with an antique firearm to find the statute overbroad on this basis. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 357 (BIA 2014). An immigration attorney may have difficulty finding the evidence necessary to make this showing. Effort should therefore be made to use the phrase deadly weapon instead of the term firearm in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.

[7] An immigration attorney may argue that neither of Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) is categorically CIMTs because stalking, one of the four acts trigger a protective order violation under them is not a CIMT. *See infra* n. 66. DHS may argue that Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) are divisible, i.e. that assault and battery causing injury, stalking, furtively entering the protected party's home when she is there, and entering the protected party's home in her absence and remaining there until her arrival are alternative elements of distinct offenses rather than different means of satisfying an element of a single offense. If the immigration judge agrees, she will be able to review the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine which act was committed and find the following:

- If the committed act was stalking, the judge should find that the Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) offense is a CIMT. *See infra* n. 66.
- If the committed act was assault and battery resulting in injury, the judge should find that the Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) offense is a CIMT. *See Matter of Garcia-Hernanzez*, 23 I&N Dec. 590, 592 (BIA 2003) (holding that willful infliction of bodily harm on a family member is CIMT); *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996) (same). *Cf Matter of Sergas*, 21 I&N Dec. 236, 238 (holding that assaulting and battering a family or household member under Va. Code § 18.2-57.2 is not a CIMT since a conviction "does not require the actual infliction of physical injury and may include any touching, however slight").
- If the act committed was furtively entering the home of a protected party while the party is present or entering the home of the protected party and remaining there until she arrives, the immigration judge may find that the Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) offense is a CIMT. Under

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Uribe v. Sessions and *Matter of Louissaint*, the Fourth Circuit and the BIA have found that conduct relating to breaking and entering a person's dwelling is a CIMT since it violates an person's justifiable expectation for privacy and security. 855 F.3d 622, 626–27 (4th Cir. 2017); 24 I&N Dec. 754, 758–59 (BIA 2009). An immigration practioner, however, may argue that neither furtive entry or entering and remaining in the protected parties' home under Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) necessarily involves unlawful breaking. The attorney, however, may have difficulty showing there is a realistic probability of prosecuting conduct that does not unlawful breaking under Va. Code §§ 16.1-253.2(C), 18.2-60.4(C), which the BIA requires to hold these offenses to not be CIMTs. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 831–33 (BIA 2016).

[8] An immigration attorney may argue that Va. Code § 16.1-253.2(C) is not categorically a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since none of stalking, furtively entering the protected party's home, and entering the home of the protected party and remaining there until she arrives have as an element the "use, attempted use, or threatened use of force capable of causing physical injury *against a person or property of another*." DHS may argue that Va. Code § 16.1-253.2(C) is divisible, i.e. that assault and battery causing injury, stalking, furtively entering the protected party's home when she is there, and entering the protected party's home in her absence and remaining there until her arrival are elements of different offenses rather than means of satisfying an element of a single offense. If the immigration judge agrees, he able to review the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine which act was committed. If the committed act was assault and battery resulting in injury, the judge will likely find Va. Code § 16.1-253.2(C) a crime of violence aggravated felony since it categorically has an element the use of physical force capable of causing physical pain to a person. *See Johnson v. United States*, 559 U.S. 133 (2010); *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 716 (BIA 2016).

[9] 8 U.S.C. § 1227(a)(2)(E)(i) renders removable a noncitizen who is convicted of (a) a crime of stalking; (b) a crime of child abuse, neglect, or abandonment; or (c) a crime involving as an element the use, attempted use, or threatened use of physical force capable of causing physical pain that is committed against a person by a current spouse, former spouse, cohabitual spouse, or individual with whom the person shares a child, or an individual similarly situated to a spouse. *See* 8 U.S.C. § 1227(a)(2)(E)(i); 18 U.S.C. § 16(a); *Johnson v. United States*, 559 U.S. 133 (2010); *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 716 (BIA 2016). An immigration attorney may argue that Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) do not categorically implicate 8 U.S.C. § 1227(a)(2)(E)(i) since a stalking offense in Virginia does not implicate 8 U.S.C. § 1227(a)(2)(E)(i), *see infra* n. 66, and neither furtively entering the protected party's home, nor entering the home of the protected party and remaining there until she arrives implicates one of the crimes 8 U.S.C. § 1227(a)(2)(E)(i) itemizes. DHS may argue that Va. Code Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) is divisible, i.e. that assault and battery causing injury, stalking, furtively entering the protected party's home when she is there, and entering the protected party's home in her absence and remaining there until her arrival are elements of different offenses rather than means of satisfying an element of a single offense. If the immigration judge agrees, she will be able to review the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine which act was committed. If the committed act was assault and battery resulting in injury, the judge will likely find that Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) are crimes of domestic violence since each have as an element the use of physical force capable of causing physical pain to a person by a current spouse, former spouse, cohabitual spouse, or individual with whom the person shares a child, or an individual similarly situated to a spouse. *See* 8 U.S.C. § 1227(a)(2)(E)(i); 18 U.S.C. § 16(a); *Johnson*, 559 U.S. at 140; *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 716 (BIA 2016).

[10] An offense is a domestic violence offense under 8 U.S.C. § 1227(a)(2)(E)(i) if (1) the offense constitutes a crime of violence; and (2) the victim is a protected person, i.e. the perpetrator and the victim share a child or the perpetrator is the victim's current spouse, the victim's former spouse, the victim's cohabitual spouse, or an individual similarly situated to a spouse of the victim. The Fourth Circuit and the BIA use a circumstance specific approach to determine whether the victim is a protected person, which allows them to consider evidence outside the charging document, written plea

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agreement, transcript of plea colloquy, and judicial findings of fact. *See Hernandez-Zavala v. Lynch*, 806 F.3d 259 (4th Cir. 2015); *Matter of Estrada*, 26 I&N Dec. 749, 750–54 (BIA 2016); *Matter of Milian*, 25 I&N Dec. 197, 200 (BIA 2010). Effort should be made to keep the relationship between the perpetrator and victim out of the charging document, written plea agreement, transcript of plea colloquy, judicial findings of fact, and other documentation.

[11] Second degree murder is categorically a murder aggravated felony under 8 U.S.C. § 1101(a)(43)(A) since it is equivalent to the generic federal offense that the BIA has defined for murder. *Compare Matter of M-W-*, 25 I&N Dec. 748, 752–53 (BIA 2012) (defining the generic federal murder offense as "the unlawful killing of a human being with malice aforethought" *with Pugh v. Commonwealth*, 292 S.E.2d 339, 341 (Va. 1982) (defining second degree murder as homicide committed with malice). Both these offenses include reckless conduct that manifests indifference to human life. *Compare Matter of M-W-*, 25 I&N Dec. at 752–53 (affirming a murder aggravated felony finding for acts that demonstrated reckless and wanton disregard for human life) *with Pierce v. Commonwealth*, 115 S.E. 686 (affirming a second degree murder conviction for acts that demonstrated wanton and reckess indifference to human life).

[12] Second degree murder is not categorically a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(E) via 18 U.S.C. § 16(a) since Virginia courts have affirmed second degree murder convictions for recklessly causing death and recklessness is an insufficiently cuplable mens rea for a crime of violence. *See Garcia v. Gonzales,* 455 F.3d 465, 468 (4th Cir. 2006). While the Virginia Code does not define murder, Virginia courts have hold that it is homicide committed with malice, either express or implied. *Pugh v. Commonwealth*, 292 S.E.2d 339, 341 (Va. 1982) (citing *Biddle v. Commonwealth*, 141 S.E.2d 710, 714 (Va. 1965)). Express malice exists "when 'one person kills another with a sedate, deliberate mind, and formed design.'" *Pugh*, 292 S.E.2d at 341 (quoting *McWhirt v. Commonwealth*, 44 Va. (3 Gratt.) 594, 604 (1846)). Implied malice exists "when any purposeful, cruel act is committed by one individual against another without any, or without great provocation" or when one "willfully or purposefully […]embark[s] upon a course of wrongful conduct likely to cause death or great bodily harm." *Essex v. Commonwealth*, 322 S.E.2d 216, 220 (Va. 1984); *Pugh*, 292 S.E.2d at 341. Virginia has prosecuted reckless conduct for second degree murder under the doctrine of implied malice. *See Pierce v. Commonwealth*, 115 S.E. 686 (Va. 1923) (affirming a second degree murder conviction for demonstrating wanton and reckess indifference to human life by setting a trap gun in a store despite knowing the danger it posed to innocent persons like the police officer whom it killed); *Whiteford v. Commonwealth*, 27 Va. (Rand) 71, (Va. 1828) (finding in dicta that a hypothetical "workman throwing timber from a house into the street of a populous city, without warning" commits second degree murder). While the Supreme Court has left open the question whether reckless conduct may constitute a crime of violence, *see Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004), the Fourth Circuit has held that it may not. *See Garcia*, 455 F.3d at 468.

[13] Voluntary manslaughter is not murder under 8 U.S.C. § 1101(a)(43)(A) since the generic federal murder offense requires malice afterthought and voluntary manslaughter in Virginia does not inolve malice by definition. *Compare Matter of M-W-*, 25 I&N Dec. 748, 752–53 (BIA 2012) (defining the generic federal murder offense as "the unlawful killing of a human being with malice aforethought" *with Avent v. Commonwealth*, 688 S.E.2d 244, 258–59 (Va. 2010) (citing *Jenkins v. Commonwealth*, 423 S.E.2d 360, 368 (Va. 1992)) (defining voluntary manslaughter as "the unlawful killing of another without malice").

[14] In *Sotnikau v. Lynch*, the Fourth Circuit held that Virginia involuntary manslaughter is not a CIMT because it extends to punishing conduct committed through "criminal negligence," which is a *mens rea* lower than the specific intent or recklessness requiste for a CIMT finding. 846 F.3d 731, 736 (4th Cir. 2017).

[15] Involuntary manslaughter is not a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(A) via 18 U.S.C. § 16(a) since it lacks the requisite mens rea. While Virginia Code does not define involuntary manslaughter, Virginia courts hold that its mens rea is criminal negligence. *See, e.g.*

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Commonwealth v. Gregg, 811 S.E.2d 254, 256 (Va. 2018). Negligent or accidental conduct, even if it involves the use of physical force against the person or property of another, is not a crime of violence under 18 U.S.C. § 16(a). *Leocal v. Ashcroft*, 543 U.S. 1, 9–10 (2004).

[16] Aggravated vehicular involuntary manslaughter is causing the death of another person by driving under the influence in a manner that is so gross, wanton, and culpable as to show reckless disregard for human life. Va.Code § 18.2-36.1(B). It is murder under 8 U.S.C. § 1101(a)(43)(A) since the BIA has held that generic federal murder offense is "the unlawful killing of a human being with malice aforethought" and "malice can be shown by proving a reckless and wanton disregard for human life." *See Matter of M-W-*, 25 I&N Dec. 748, 752–58 (BIA 2012).

[17] Aggravated vehicular involuntary manslaughter is not a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since it lacks the requisite mens rea. The mens rea for aggravated vehicular involuntary manslaughter is recklessness. Va.Code § 18.2-36.1(B). While the Supreme Court has left open the question whether reckless conduct may constitute a crime of violence, *see Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004), the Fourth Circuit has held that it may not. *See Garcia v. Gonzales*, 455 F.3d 465, 468 (4th Cir. 2006).

[18] While there is no precedent on point, an immigration attorney should be able to establish that Va. Code § 18.2-42 lacks sufficiently reprehensible minimum culpable conduct to constitute a CIMT for two reasons. First, Virginia assault and battery is not a CIMT since it "does not require the actual infliction of physical injury and may include any touching, however slight." *Matter of Sejas*, 24 I&N Dec. 236, 238 (BIA 2007) (citing *Adams v. Commonwealth*, 534 S.E.2d. 347, 351 (Va. Ct. App. 2000)). Second, even if Virginia assault and battery were a CIMT, the perpetrator only has to be a member of a mob that commits assault and battery to fall within the ambit of Va. Code § 18.2-42; he does not have to commit assault and battery itself. *Hamilton v. Commonwealth*, 688 S.E.2d 168, 174 (Va. 2010) (quoting *Harrell v. Commonwealth*, S.E.2d 680, 683 (Va. Ct. App. 1990) ("'Every person composing the mob becomes criminally culpable even though the member may not have actively encouraged, aided, or countenanced the act' of assault or battery."). Mere mob membership extends beyond the preparatory offenses that *Matter of Gonzalez Romo* held to be CIMTs if their underlying offense was a CIMT. *See* 26 I&N Dec. 743, 746 (BIA 2016).

[19]While there is no precedent on point, an immigration attorney should be able to establish that Va. Code § 18.2-42 is not a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18. U.S.C. § 16(a). Virginia assault and battery is not a crime of violence since it does not categorically have as an element the use, attempted use, or threatened use of physical force against another. *See United States v. Carthorne*, 726 F.3d 503, 513 (4th Cir. 2013) (holding that assault and battery of a police officer under Va. Code § 18.2-57(C) is not a crime of violence); *United States v. White*, 606 F.3d 144, (4th Cir. 2010) (finding that assault and battery of a family member under Va. Code § 18.2-57.2(A) is not a crime of violence), *abrogated on other grounds by United States v. Castleman*, 134 S.Ct. 1405, 1413, (2014). Moreover, while the Supreme Court has held that "aiding and abetting" an aggravated felony is an aggravated felony, *Gonazales v. Duenas-Albarez*, 549 U.S. 183, 189–90 (2007), the minimum culpable conduct of Va. Code § 18.2-42 extends beyond preparatory offenses to mere membership in the mob. *Hamilton v. Commonwealth*, 688 S.E.2d 168, 174 (Va. 2010) (quoting *Harrell v. Commonwealth*, S.E.2d 680, 683 (Va. Ct. App. 1990) ("'Every person composing the mob becomes criminally culpable even though the member may not have actively encouraged, aided, or countenanced the act' of assault or battery.").

[20] While *Matter of Gonzalez Romo* holds that a preparatory offense may be CIMT, 26 I&N Dec. 743, 746 (BIA 2016), an immigration attorney may argue that Va. Code § 18.2-42.1 is not a CIMT since its minimal culpable conduct, membership in a mob that commits an act of violence, extends beyond a preparatory offenese. *See Hamilton v. Commonwealth*, 688 S.E.2d 168, 174 (Va. 2010) (quoting *Harrell v. Commonwealth*, S.E.2d 680, 683 (Va. Ct. App. 1990) ("'Every person composing the mob becomes criminally culpable even though the member may not have actively encouraged, aided, or countenanced the act' of assault or battery."). An immigration attorney may also argue that even if Va. Code 18.2-42.1 were akin to a preparatory offense, it is an indivisible statute whose act of violence element is categorically overbroad in that it includes acts such as unlawfully/malicious causing

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bodily injury by means of caustic substance which may not be a CIMT. *See infra* n. 37; *cf Cabrera v. Barr*, No. 18-1314 2019, WL 3242032, at *6 n. 5 (4th Cir. July 19, 2019) Cabrera v. Barr, 930 F.3d 627 (4th Cir. 2019) (holding that Va. Code § 18.2-46.2 is not divisible by predicate act because the predicate acts listed in Va. Code § 18.2-46.1 are alternative means of satisfying the predicate act element). If the immigration judge disagrees about the divisbiltiy of Va. Code § 18.2-42.1, however, the judge may consult to the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine what act of violence was committed and assess whether Va. Code § 18.2-42.1 is a CIMT on that basis.

[21] While *Gonzales v. Duenas-Alvarez* holds that a preparatory offense is an aggravated felony if the principal offense is one, 549 U.S. 183 (2007), an immigration attorney may argue that Va. Code § 18.2-42.1 is not a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since its minimal culpable conduct, membership in a mob that commits an act of violence, extends beyond a preparatory offenese. *See Hamilton v. Commonwealth*, 688 S.E.2d 168, 174 (Va. 2010) (quoting *Harrell v. Commonwealth*, S.E.2d 680, 683 (Va. Ct. App. 1990) ("'Every person composing the mob becomes criminally culpable even though the member may not have actively encouraged, aided, or countenanced the act' of assault or battery."). An immigration attorney may also argue that even if Va. Code 18.2-42.1 were akin to a preparatory offense, it is an indivisible statute whose act of violence element is categorically overbroad in that it includes acts such as kidnapping which is not a crime of violence aggravated felony. *See infra* n. 26; *cf Cabrera v. Barr*, No. 18-1314, 2019 WL 3242032, at *6 n. 5 (4th Cir. July 19, 2019) Cabrera v. Barr, 930 F.3d 627 (4th Cir. 2019)(holding that Va. Code § 18.2-46.2 is not divisible by predicate act because the predicate acts listed in Va. Code § 18.2-46.1 are alternative means of satisfying the predicate act element). If the immigration judge disagrees about the divisbiltiy of Va. Code § 18.2-42.1, however, the judge may consult to the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine what act of violence was committed and assess whether Va. Code § 18.2-42.1 is an aggravated felony on that basis.

[22] In *Cabrera v. Barr*, the Fourth Circuit held that Va. Code § 18.2-46.2 is indivisible and not a CIMT. *See* No. 18-1314, 2019 WL 3242032, at *6–9 (4th Cir. July 19, 2019).

[23] Knowingly and willfully participation in a predicate criminal act committed for the benefit of, at the direction of, or in association with any criminal street gang is not categorically an aggravated felony since the definition of predicate criminal act in Va. Code § 18.2-46.2 is overbroad. *Cf Cabrera v. Barr*, No. 18-1314, 2019 WL 3242032, at *6–9 (4th Cir. July 19, 2019) (holding Va. Code § 18.2-46.2 is not a CIMT since it reaches conduct that does not necessarily involve moral turpitude). The predicate offense definition in Va. Code § 18.2-46.1 includes offenses such as assault and battery (18.2-57) and trespass upon a church or school property (18.2-128), that are not aggravated felonies. *See infra* n. 47; *cf Cabrera*, No. 18-1314 2019, WL 3242032, at *6–9 (holding that Va. Code § 18.2-46.2 is not a CIMT since its predicate offense definition includes the offense of trespass upon a church, which is not a CIMT); *Matter of Jose Luis Castilllo-Hercules*, No. AXXX XX1 867, 2017 WL 4118893 (BIA June 29, 2017) (affirming DHS' concession that neither assault and battery by a mob under Va. Code § 18.2-42 nor participation in a criminal gang act under Va. Code § 18.2-46.2 is an aggravated felony under current case law). Va. Code § 18.2-46.2 is also indivisible, so the BIA may not apply the modified categorical approach to identify which predicated offense was committed. *See Cabrera*, No. 18-1314, 2019 WL 3242032, at *6 n. 5.

[24] In *Cabrera v. Barr*, the Fourth Circuit held that an act "committed in association with a gang by someone who actively participated in the gang" does not necessarily involve moral turpitude" since neither participation in gang nor acting in association with a gang is sufficiently reprehensible conduct. No. 18-1314, 2019 WL 3242032, at *8 (4th Cir. July 19, 2019) (internal quotiations omitted). DHS may distinguish Va. Code § 18.2-46.3 from *Cabrera* by arguing that recruiting or attempting to recruit an adult to actively participate in or become a member of a gang is turpitudinous conduct. However, dicta in *Cabrera* indicates that the Fourth Circuit is unlikely to find this argument persuasive. *See id.* (citing *Hernandez-Gonalez v. Holder*, 778 F.3d 793, 802 (9th Cir. 2015)) (emphasizing that Va. Code § 18.2-46.3 "do[es] not require an intent to injure, actual injury, [. . .] a protected class of victims[, or] the

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use of any violence) (internal quotations omitted). Even if a conviction under Va. Code § 18.2-46.3 may not be a CIMT, a criminal defense attorney should still seek to avoid it at all costs, as any conviction involving (or mere allegation of) gang activity will make a case a top enforcement priority for DHS, and will serve as a severely negative factor for all forms of discretionary immigration relief.

[25] In *Cabrera v. Barr*, the Fourth Circuit held that an act "committed in association with a gang by someone who actively participated in the gang" does not necessarily involve moral turpitude" since neither participation in gang nor acting in association with a gang is sufficiently reprehensible conduct. No. 18-1314, 2019 WL 3242032, at *8 (4th Cir. July 19, 2019) (internal quotiations omitted). However, dicta indicates that the Fourth Circuit may consider recruiting or attempting to recruit a child into a criminal street gang is turpitudinous conduct since it involves a child, a member of a protected class of victims. *cf id.* (citing *Hernandez-Gonalez v. Holder*, 778 F.3d 793, 802 (9th Cir. 2015)) (emphasizing that Va. Code § 18.2-46.2 "do[es] not require an intent to injure, actual injury, […] a protected class of victims[, or] the use of any violence) (internal quotations omitted). Regardless, conviction under Va. Code § 18.2-46.3 should still be avoid at all costs, as any conviction involving (or mere allegation of) gang activity will make a case a top enforcement priority for DHS, and will serve as a severely negative factor for all forms of discretionary immigration relief.

[26] In *Cabrera v. Barr*, the Fourth Circuit held that an act "committed in association with a gang by someone who actively participated in the gang" does not necessarily involve moral turpitude" since neither participation in gang nor acting in association with a gang is sufficiently reprehensible conduct. No. 18-1314, 2019 WL 3242032, at *8 (4th Cir. July 19, 2019) (internal quotiations omitted). However, dicta indicates that the Fourth Circuit may consider the use (or threatened use) of force against an individual or an individual's family member to encourage an individual to join a gang, remain a gang member, or commit a crime is turpitudinous conduct since it involves the use of violence. *cf id.* (citing *Hernandez-Gonalez v. Holder*, 778 F.3d 793, 802 (9th Cir. 2015)) (emphasizing that Va. Code § 18.2-46.2 "do[es] not require an intent to injure, actual injury, […] a protected class of victims[, or] the use of any violence) (internal quotations omitted).

[27] The BIA has held that Va. Code § 18.2-47 "is categorically a CIMT." *See Matter of Yerson Jack Mauricio-Vasquez*, No. AXXX XX6 043, 2017 WL 4946917 (BIA Sep. 14, 2017), *overturned on other grounds by Mauricio-Vasquez v. Whitaker*, 910 F.3d 134, 136 n.2 (4th Cir. 2018) (decling to rule on whether Va. Code § 18.2-47 is a CIMT). A federal district court has also found Va. Code § 18.2-47 a CIMT in dicta. *See U.S. v. Brown*, 127 F. Supp. 2d 392, 408 (W.D.N.Y. 2001). While the Ninth and Fifth Circuits have held that certain state kidnapping offenses not are not CIMTs, those offenses did not include a specific intent to injure. *See Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1213–14 (9th Cir. 2013); *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 626 (9th Cir. 2010); *Hamdan v. INS*, 98 F.3d 183, 187–89 (5th Cir. 1996). An immigration practicioner could argue to the Fourth Circuit that VA § 18.2-47 is not a crime involving moral turpitude since the offense does not require intent to harm or injury. DHS, however, will argue that intent to deprive the victim of personal liberty, intent to conceal the victim from any person, authority, or institution lawfully entitled to his charge, or intent to subject the victim to forced labor or services is an intent to injure. *See Fuentes-Cruz v. Gonzales*, 489 F.3d 724, 726–27 (5th Cir. 2007) (finding that a Texas kidnapping statute is a CIMT since it required "intent to conceal [the victim] from law enforcement authorities").

[28] In *Mauricio-Vasquez v. Whitaker*, the Fourth Circuit noted in dicta that it agreed with DHS' concession that 18.2-47 is no longer a crime of violence aggravated felony after Sessions v. Dimaya, 138 S.Ct. 1204, 1223 (2018).910 F.3d 134, 136 n. 1 (4th Cir. 2018).

[29] For a crime related to ransom payments under 8 U.S.C. § 1101(a)(43)(H), an offense must include a demand for or receipt of ransom, neither of which are elements of Virginia's abduction and kidnapping statute.

[30] While there does not appear to be any Fourth Circuit or BIA case law on point, an immigration attorney may argue that the knowing, wrongful, and intentional engaging in conduct in a clear and significant violation of a custody or visitation order (be it withholding of a child from a parents or legal guardian or otherwise) is not categorically a CIMT since the act is not inherently reprehensible conduct. Reprehensible conduct entails evil intent.

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Guevara-Solorzano v. Sessions, 891 F.3d 125, 135–36 (4th Cir. 2018) (citing *Matter of Gonzalez Romo*, 26 I&N Dec. 743, 746 (BIA 2016)); *Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980). *See also Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1213 (9th Cir. 2013); *Hamdan v. INS*, 98 F.3d 183, 188 (5th Cir. 1996). Va. Code § 18.2-49.1 has no element of evil intent and is arguably not a CIMT. *Cf Castrijon-Garcia*, 704 F.3d at 1213–14 (holding that the simple kidnapping offense of Cal. Penal Code § 207(a) is not a CIMT since it does not involve the actual infliction of harm upon someone, or an action that affects a protected class of victim); *Hamdan v. INS*, 98 F.3d at 188–89 (holding that the simple kidnapping offense of La. Stat. Ann. § 14:45 is not a CIMT since it does not necessarily have an element of evil intent). DHS may argue, however, that reprehensible conduct also adheres where the action affects a protected class of victim, e.g. a child. *See Betansos v. Barr*, No. 15-72347, 2019 WL 2896367, at *5 (9th Cir. July 5, 2019) (citing *Nunez v. Holder*, 594 F.3d 1124, 1132 (9th Cir. 2010)). *But see Menendez v. Whitaker*, 908 F.3d 467, 473 (9th Cir. 2018) ("Not all criminal statutes intended to protect minors establish crimes involving moral turpitude."); But, while Va. Code § 18.2-49.1 has as an element an act affecting a child, an immigration attorney may argue that withholding a child from a parent or legal guardian in clear and significant violation of a custody or visitation order does not rise to level of reprehensibility of acts that have been recognized as CIMTs under this theory. *Cf Gonzalez-Cervantes v. Holder*, 709 F.3d 1265, 1267 (9th Cir. 2013) (sexual abuse of a minor is a CIMT); *Morales v. Gonzales*, 478 F.3d 972, 978 (9th Cir. 2007) (communication with a minor for immoral purposes is a CIMT);

[31] The difference between malicious and unlawful wounding is one of mental state, wherein the mental state of the latter is the equivalent to voluntary manslaughter, i.e. an intentional act done in the heat of passion. *See Barrett v. Commonwealth*, 341 S.E.2d 190, 192 (Va. 1986). Several federal district courts have found that Va. Code § 18.2-51 is divisible into "four separate crimes: (1) malicious wounding; (2) maliciously causing bodily injury; (3) unlawful wounding; and (4) unlawfully causing bodily injury." *Al-Muwwakkil v. United States*, No. 4:16CV91, 2017 WL 745563, at *5 (E.D. Va. Feb. 24, 2017); *Land v. United States*, 201 F. Supp. 3d 776, 780 (E.D. Va. 2016); *Lee v. United States*, 89 F. Supp. 3d 805, 811 (E.D. Va. 2015); *United States v. Carter*, No. 3:11CV212-HEH, 2013 WL 5353055, at *2 (E.D. Va. Sep. 24, 2013). The Fourth Circuit, however, found an identical statute divisible into two crimes: (1) malicious wounding; and (2) unlawful wounding. *See United States v. Covington*, 880 F.3d 129, 133 (4th Cir. 2018). Relying on these decisions, the immigration judge will review the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact determine which of the aforementioned offenses was committed.

[32] United States v. Rumley, 2020 WL 1222681, at *8 (4th Cir. Mar. 13, 2020) ("[W]e hold in this case that a conviction of Virginia Code § 18.2-51 is a violent felony for the purpose of applying ACCA's sentencing enhancement, as it involves "the use of physical force . . . ."); see also Jenkins, 719 F. App'x at 244–46 ("[T]he minimum conduct necessary to sustain a conviction for unlawful wounding requires the attempted or threatened use of physical force . . . .") It is also clear that "the use of physical force" includes force applied directly or indirectly. See United States v. Castleman, 572 U.S. 157, 170–71 (2014) (construing "use of physical force" in § 921(a)(33)(A)(ii)); see also United States v. Reid, 861 F.3d 523, 529 (4th Cir. 2017) (concluding that "ACCA's phrase 'use of physical force' includes force applied directly or indirectly") dispensing of the issues as to whether the "use of poison" met the physical force definition. In *Matter of Khattak*, the BIA held that maliciously causing bodily injury under Va. Code § 18.2-51 is a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C § 16(a). *See* No. AXXX XX4 454, 2017 WL 4418305, at *3 (BIA July 31, 2017).

[33] The Fourth Circuit has held that unlawful wounding under Va. Code § 18.2-51 is a violent felony, *see United States v. Jenkins*, 719 F. App'x 241, 244–46 (4th Cir. 2018) (unpublished); *United States v. James*, 718 F. App'z 201, 203–06 (4th Cir. 2018). Fourth Circuit also held in *United States v. Covington* that unlawful wounding under W. Va. Code § 61-2-9(a), whose statutory language is virtually identifical to that of Va. Code § 18.2-5, is categorically a crime of violence. 880 F.3d at 133–34. Applying *Jenkins* and *Convington*, the BIA has held that unlawful wounding under Va. Code § 18.2-51 is a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C § 16(a). *See Matter of Rose*, No. A096-561-732 (BIA June 28, 2019)

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(unpublished) *appeal docketed*, *Rose v. Barr*, No. 19-01726 (4th Cir. July 11, 2019). *But see Commonwealth v. Gore*, No. CR12000084-00 (Va. Cir. Ct. Mar. 5, 2012) (entering a guilty plea under Va. Code § 18.2-51 for caging and neglecting a disabled child). *Commonwealth v. Gore*, No. CR12000083-00 (Va. Cir. Ct. Mar. 5, 2012) (same).

[34] An immigration attorney may argue that aggravated malicious wounding under Va. Code § 18.2-51.2 is not categorically a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(E) via 18 U.S.C. § 16(a) since causing bodily injury does not necessarily require the use of physical force. *See United States v. Torres-Miguel*, F.3d 165, 168–69 (4th Cir. 2012) *abrogated by United States v. Castleman*, 572 U.S. 157 (2014). In *United States v. Torres-Miguel,* the Fourth Circuit held that "willfully threatening to commit a crime that will result in death or great bodily injury to another" was not a crime of violence since the indirect use of force was not physical force and causing injury was not equivalent to using physical force. 701 F.3d at 168–69. *Castleman* did not interpret the phrase "physical force" as used in the definition of a crime of violence and left open the question of whether causing bodily injury necessitated use of violent force in the crime of violence sense, 527 U.S. at 163, 170 (noting that Justice Scalia's concurrence "suggests that [causing a cut, abrasion, bruise, burn or disfigurement, physical pain or temporary illness, or impairment of the function of bodily member, organ, or mental faculty] necessitate violent force under *Johnson*'s definition of that phrase" but holding that "whether or not that is so [is] a question we do not decide."). However, Fourth Circuit has repeatedly read it to abrogate *Torres-Miguel*'s direct versus indirect use of force distinction for a crime of violence. *See United States v. Battle*, 927 F.3d 160, 165–66 (4th Cir. 2019) *United States v. Middleton*, 883 F.3d 485, 492 (4th Cir. 2018); *United States v. Covington*, 880 F.3d 129, 134 (4th Cir. 2018); *United States v. Reid*, 861 F.3d 523, 529 (4th Cir. 2017); *United States v. Burns-Johnson*, 864 F.3d 313, 318 (4th Cir. 2017); *In re Irby*, 858 F.3d 231, 236–38 (4th Cir. 2017). But, the Fourth Circuit has also confirmed that the *Torres-Miguel* distinction between causation and use of physical force remains good law. *See Middleton*, 883 F.3d at 491; *Covington*, 880 F.3d at 134 n. 4. An immigration practitioner may therefore argue that aggravated malicious wounding is not categorically a crime of violence because its elements encompass actions such as child neglect, which "may result in death or serious injury without involving the use of physical force." *See Covington*, 880 F.3d at 134 n. 4 (citing *Torres-Miguel*, 701 F.3d at 168). However, the practitioner may have trouble establishing the realistic probability that Virginia punishes such conduct under Va. Code § 18.2-51, which the Fourth Circuit would require to hold Va. Code § 18.2-51 overbroad. *See Covington*, 880 F.3d at 135.

[35] An immigration attorney may analogize Va. Code § 18.2-51.3 to assault with intent to cause injury under Va. Code § 18.2-57, which the BIA has held not a CIMT since it "does not require the actual infliction of physical injury" and its specific intent to cause injury "may be to the feelings or mind, as well as to the corporeal person.'" *See Matter of Sejas*, 24 I&N Dec. 236, 238 (BIA 2007) (citing *Wood v. Commonwealth*, 140 S.E. 114, 115 (Va. 1927)) (finding that assault and battery in Virginia is not a CIMT); *Matter of Sanudo*, 23 I&N Dec. 968, 970–71 (BIA 2006). However, *Wood* does not compel the finding that the specific intent to cause injury in Va. Code § 18.2-51.3 is inclusive of noncorporeal injury and there appears to be no case law on whether the term "injury" in Va. Code § 18.2-51.3 is inclusive of such injury. Nonetheless, the BIA may still find Va. Code § 18.2-51.3 not a CIMT since while it entails an intent to cause injury, it does not require any injury to occur. *Cf Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007) (holding that finding an assault to be a CIMT "involves an assessment of both the state of mind and the level of harm required to complete the offense" and that "intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous"); *Matter of Sanudo*, 23 I&N Dec. at 971 (recognizing that "assault and battery offenses that necessarily involved the intentional infliction of serious bodily injury on another have been held to involve moral turpitude"). DHS may analogize Va. Code § 18.2-51.3 assault with a deadly/dangerous weapon, which the BIA

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and Fourth Circuit have recognized as a CIMT, and argue that Va. Code § 18.2-51.3 is a CIMT since it involves an "object capable of causing injury." *See Yousefi v. INS*, 260 F.3d 318, 326–27 (4th Cir. 2001); *Matter of Medina,* 15 I&N Dec. 611, 614 (BIA 1976). An immigration attorney, however, could rebut this argument by emphasizing that an object capable of causing [injury to another]" in Va. Code § 18.2-51.3 is broader than the deadly/dangerous weapon necessary for a CIMT finding. *Cf Yousefi*, 260 F.3d at 326 (Weapon was "likely to produce death or serious bodily injury."); *Matter of Wu*, 27 I&N Dec. 8, 15 n. 11 (BIA 2017) (Weapon was "capable of producing and likely to produce, death or great bodily injury."); *Matter of Goodalle*, 12 I&N Dec. 106, 107 (BIA 1967) (Weapon was "likely to produce grievous bodily harm.") *Matter of G-R-*, 21 I&N Dec. 733, 735 (BIA 1946) (Weapon was "likely to produce great bodily injury."). The immigration attorney, however, may have difficulty finding evidence necessary to establish a realistic probability that Virginia prosecutes the throwing of objects capable of causing injury but not great bodily injury under Va. Code § 18.2-51.3.

[36] An offense is a crime of violence if it has as elements scienter and the attempted use of force capable of causing physical injury to another person. *See Johnson v. United States*, 559 U.S. 133, 140 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 447 (4th Cir. 2005). Va. Code § 18.2-51.3 satsifies the scienter requirement since its mens rea is "intent to cause injury to another." An immigration judge will likely find that Va. Code satisfies the attempted use of force capable of causing physical injury to another person since its acteus reus is throwing an object capable of causing injury. An immigration practioner may argue, however, that Va. Code § 18.2-51.3 does not necessarily entail the attempted use of force capable of causing *physical* injury since the thrown object may only be intended to or capable of causing a noncorpeal injury, e.g. a small waterballon thrown to cause someone to feel fear/embarassment. *Cf Wood v. Commonwealth*, 140 S.E. 114, 115 (Va. 1927) (holding that the injury element for a Virginia battery offense may statsified by injury "to the feelings or mind, as well as to the corporeal person"). However, the practioner may have difficult finding the necessary evidence to establish a realistic probably that Virginia prosecutes throwing such an object under Va. Code § 18.2-51.3.

[37] An immigration practitioner may argue that maliciously causing bodily injury by means of an explores, fire, or caustic substance is not categorically a CIMT since maliciously causing bodily injury in Virginia includes recklessly causing bodily injury and a recklessness assault is not a CIMT unless "involve[es] the infliction of *serious* bodily injury". *See Matter of Fualau*, 21 I&N Dec. 475, 478 (BIA 1996) (citing *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976)) (emphasis added). Virginia common law recognizes two types of malice: expressed and implied. *Knight v. Commonwealth*, 733 S.E.2d 701, 705 (Va. Ct. App. 2012) (citing *Essex v. Commonwealth*, 322 S.E.2d 216, 220 (Va. 1984) and *Canipe v. Commonwealth*, 491 S.E.2d 747, 753 (Va. Ct. App. 1997)). "Implied malice exists where when any purposeful, cruel act is committed by one individual against another without any, or without great provocation." *Pugh v. Commonwealth*, 332 S.E.2d 216, 220 (Va. 1984). It "may be inferred from 'conduct likely to cause death or great bodily harm, willfully or purposefully undertaken' [and] is equivalent to 'constructive malice;' that is, 'malice as such does not exist but the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist.'" *Knight*, 733 S.E..2d at 705 (quoting Essex, 322 S.E.2d at 220, *Pugh*, 292 S.E.2d at 341, and *Canipe*, 491 S.E.2d at 753). Virginia has used the doctrine of implied malice to prosecute reckless conduct that causes bodily injury, ableit under Va. Code § 18.2-51 rather than Va. Code § 18.2-52. *See Synan v. Commonwealth*, 795 S.E.2d 464, 471 (affirming a conviction of maliciously causing bodily injury since "directing [a] van into oncoming traffic, off the road, and into an embankment could certainly be interpreted as 'conduct which [would] necessarily result in injury'"); *Knight*, 733 S.E.2d at 705–07 (affirming a conviction of maliciously causing bodily injury because the defendant's highspeed driving in an urban area was sufficiently reckless and dangerous for a factfinder to infer malice). Relying on *Matter of Fualaau*, an immigration practitioner may therefore argue that Va. Code § 18.2-52 is not categorically a CIMT since its elements encompass reckless conduct and only require bodily injury rather than severe bodily injury. *See* 21 I&N Dec. at 478; *see also Matter of O-D-F-P*, No. AXXX XXX 070 (BIA Feb. 7, 2019) (unpublished) ("Recklessly causing mere "physical injury" is not morally turpitudinous."). However, the dearth of cases on Va. Code §

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18.2-52 may make it difficult for an immigration practitioner to establish the realistic probability of prosecuting reckless conduct under this statute, a finding that the BIA requires to hold that the statute is not a CIMT. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 831–33 (BIA 2016). Moreover even if the immigration practiotioner succeeds in establishing this possibility, DHS may distinguish Va. Code § 18.2-52 from the simple assault in *Matter of Fualaau*, arguing that the statute is a CIMT because the use of fire, an explosive, or a caustic substance like acid or lye is akin to the use of a deadly weapon, making it an aggravating factor demonstrating a "heightened proposentiy for violence and indifference to human life." *Cf Matter of Wu*, 27 I&N Dec. 8, 11–12 (BIA 2017) (citing *Matter of Medina*, 15 I&N Dec. at 612–14) (holding that assault with a deadly weapon is a CIMT).

[38]An immigration practitioner may argue that maliciously causing bodily injury under Va. Code § 18.2-52 is not categorically a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(E) via 18 U.S.C. § 16(a) since it does not necessarily have an intential mens rea, *see Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), and causing bodily injury does not necessarily require the use of physical force. *See United States v. Torres-Miguel*, F.3d 165, 168–69 (4th Cir. 2012) *abrogated on other grounds by United States v. Castleman*, 572 U.S. 157 (2014). *See also United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018); *United States v. Covington*, 880 F.3d 129, 134 n. 4 (4th Cir. 2014). With respect to mens rea, Virginia common law recognizes two types of malice: expressed and implied. *Knight v. Commonwealth*, 733 S.E.2d 701, 705 (Va. Ct. App. 2012) (citing *Essex v. Commonwealth*, 322 S.E.2d 216, 220 (Va. 1984) and *Canipe v. Commonwealth*, 491 S.E.2d 747, 753 (Va. Ct. App. 1997)). The latter "exists where when any purposeful, cruel act is committed by one individual against another without any, or without great provocation." *Pugh v. Commonwealth*, 332 S.E.2d 216, 220 (Va. 1984). It "may be inferred from 'conduct likely to cause death or great bodily harm, willfully or purposefully undertaken' [and] is equivalent to 'constructive malice;' that is, 'malice as such does not exist but the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist.'" *Knight*, 733 S.E..2d at 705 (quoting Essex, 322 S.E.2d at 220, *Pugh*, 292 S.E.2d at 341, and *Canipe*, 491 S.E.2d at 753). Virginia has used the doctrine of implied malice to prosecute reckless conduct that causes bodily injury, ableit under Va. Code § 18.2-51 rather than Va. Code § 18.2-52. *See Synan v. Commonwealth*, 795 S.E.2d 464, 471 (affirming a conviction of maliciously causing bodily injury since "directing [a] van into oncoming traffic, off the road, and into an embankment could certainly be interpreted as 'conduct which [would] necessarily result in injury'"); *Knight*, 733 S.E.2d at 705–07 (affirming a conviction of maliciously causing bodily injury because the defendant's highspeed driving in an urban area was sufficiently reckless and dangerous for a factfinder to infer malice). While the Supreme Court has left open the question whether reckless conduct may constitute a crime of violence, *see Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004), the Fourth Circuit has held that it may not. *See Garcia*, 455 F.3d at 468. With respect to physical force, the Fourth Circuit held in *United States v. Torres-Miguel* that "willfully threatening to commit a crime that will result in death or great bodily injury to another" was not a crime of violence since the indirect use of force was not physical force and causing injury was not equivalent to using physical force. 701 F.3d at 168–69. *Castleman* did not interpret the phrase "physical force" as used in the definition of a crime of violence and left open the question of whether causing bodily injury necessitated use of violent force in the crime of violence sense, 527 U.S. at 163, 170 (noting that Justice Scalia's concurrence "suggests that [causing a cut, abrasion, bruise, burn or disfigurement, physical pain or temporary illness, or impairment of the function of bodily member, organ, or mental faculty] necessitate violent force under *Johnson*'s definition of that phrase" but holding that "whether or not that is so [is] a question we do not decide."). However, Fourth Circuit has repeatedly read it to abrogate *Torres-Miguel*'s direct versus indirect use of force distinction for a crime of violence. *See United States v. Battle*, 927 F.3d 160, 165–66 (4th Cir. 2019) *United States v. Middleton*, 883 F.3d 485, 492 (4th Cir. 2018); *United States v. Covington*, 880 F.3d 129, 134 (4th Cir. 2018); *United States v. Reid*, 861 F.3d 523, 529 (4th Cir. 2017); *United States v. Burns-Johnson*, 864 F.3d 313, 318 (4th Cir. 2017); *In re Irby*, 858 F.3d 231, 236–38 (4th Cir. 2017). But, the Fourth Circuit has also confirmed that the *Torres-Miguel* distinction between causation and use of physical force remains good law. *See Middleton*, 883 F.3d at 491; *Covington*, 880 F.3d at 134 n. 4. An immigration practitioner may therefore argue that maliciously causing bodily injury by fire, explosive, or caustic substance is not categorically a

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crime of violence because could encompass actions which "may result in death or serious injury without involving the use of physical force." *See Covington*, 880 F.3d at 134 n. 4 (citing *Torres-Miguel*, 701 F.3d at 168). However, the practitioner may have trouble identifying such actions and establishing the realistic probability that Virginia punishes them Va. Code § 18.2-52, which the Fourth Circuit requires to hold Va. Code § 18.2-52 overbroad. *See Covington*, 880 F.3d at 135.

[39] While no caselaw is directly on point, an immigration judge could find that Va. Code § 18.2-52 is an explosives aggravated felony under 8 U.S.C. § 1101(a)(43)(E) or a firearms offense under 8 U.S.C. § 1227(a)(2)(C) if he held that the statute is divisible by the substance used to cause bodily injury and the record of conviction (the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact) established that a firearm was used to commit the offense. An immigration practioner, however, could argue that the statute that the statute is indivisible since a plain text reading of the statute indicates that the substance used to cause bodily is a means of commission a single offense.

[40] Unlawfully causing bodily injury by fire, an explosive, or a caustic substance such as acid or lye under Va. Code § 18.2-52 is a CIMT since it entails both a specific intent to injure and causation of bodily injury. *See Matter of Solon*, 24 I&N Dec. 239, 246 (BIA 2007). In *Matter of Solon*, the BIA held that causing physical injury to a person with the intent to cause such injury to that person is a CIMT since the offense requires a specific intent to physically injure another person and meaningfuly physical injury to that person. *Id.* at 245–46 (defining meaningful physical injury as "impairment of physical condition or substantial pain"). Like *Matter of Solon*, Va. Code § 18.2-52 has as an element specific intent to cause bodily injury because unlawfully causing bodily injury is equivalent to intentionally causing bodily injury in the heat of passion. *See Barrett v. Commonwealth*, 341 S.E.2d 190, 192 (Va. 1986). Likewise, Va. Code § 18.2-52 also has as an element the causation of physical impairment or substantial pain since Virginia courts have defined bodily injury as "any bodily injury whatsoever […] includ[ing] an act of damage or harm or hurt that relates to the body; […] impairment of a function of a bodily member, organ, or mental faculty; or […] of impairment of a physical condition." *Ricks v. Commonwealth*, 778 S.E.2d 332, 336 (Va. 2015); *See also Bryant v. Commonwealth*, 53 S.E.2d 54, 57 (Va. 1949) ("Bodily injury comprehends, it would seem, any bodily hurt whatsoever.");

[41] Unlawfully causing bodily injury by fire, an explosive, or a caustic substance such as acid or lye under Va. Code § 18.2-52 is likely a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(E) via 18 U.S.C. § 16(a). It has the requiste intentional mens rea, *see Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), since an unlawful act is one done intentionally but in the heat of passion. *See Barrett v. Commonwealth*, 341 S.E.2d 190, 192 (Va. 1986). DHS will likely argue that the offense has requiste force element since intentionally causing bodily injury by fire, explosive, or caustic substance in the heat of passion likely entails the use of force capable of causing physical pain or injury to another. *See Johnson v. United States,* 559 U.S. 133, 140 (2010). An immigration practitioner may argue otherwise, emphasizing that causing bodily injury does not necessarily require the use of physical force. *See United States v. Torres-Miguel*, F.3d 165, 168–69 (4th Cir. 2012) *abrogated on other grounds by United States v. Castleman*, 572 U.S. 157 (2014). *See also United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018); *United States v. Covington*, 880 F.3d 129, 134 n. 4 (4th Cir. 2014). However, an immigration practitioner may have trouble establishing the realistic probability that Virginia prosecutes an intentional act done in the heat of passion that causes bodily injury by fire, explosive, or caustic substance without using physical force, a prosecution that the Fourth Circuit requires to hold Va. Code § 18.2-51 overbroad. *See Covington*, 880 F.3d at 135.

[42] While no caselaw is directly on point, an immigration judge could find that Va. Code § 18.2-52 is an explosives aggravated felony under 8 U.S.C. § 1101(a)(43)(E) or a firearms offense under 8 U.S.C. § 1227(a)(2)(C) if he held that the statute is divisible by the substance used to cause bodily injury and the charging document, written plea agreement, transcript of plea colloquy, or judicial findings of fact established that a firearm was used to commit the offense. An immigration practioner, however, could argue that the statute that the statute is indivisible since a plain text reading of the statute indicates that the substance used to cause bodily is a means of commission a single offense.

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[43] In *United States v. Reid*, the Fourth Circuit held that Va. Code § 18.2-55 is categorically a violent felony under 18 U.S.C. § 924(e)(1). 861 F.3d 523, (4th Cir. 2017). As the test for a violent felony under 18 U.S.C. § 924(e)(2)(B)(i) is equivalent to a crime of violence under 18 U.S.C. 16(a), Va. Code § 18.2-55 is a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a).

[44] Va. Code § 18.2-55.1 is likely not CIMT since its least culpable conduct is causing bodily injury by recklessly endangering the health or safety of a person in connection with continued membership in a gang. Generally, simple battery committed with recklessness or general intent and not causing serious bodily harm is not a CIMT. *See Matter of Wu*, 27 I&N Dec. 8, 10–11 (BIA 2017) (citing *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 466 (BIA 2011) and *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996)). "But, this general rule does not apply where a statute contains elements that deviate from those associated with simple assault and battery and involves some aggravating factor that indicates the perpetrator's moral depravity." *Matter of Jing Wu*, 27 I&N Dec. at 11 (citing *Matter of Ahortalejo-Guzman*, 25 I&N Dec. at 466); *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006). Aggravating factors include the use of a deadly weapon, the intentional inflection of serious bodily harm, and infliction of bodily harm on a member of a class of persons society views as deserving of special protection. *See Matter of Sanudo*, 23 I&N Dec. at 971. Causing bodily injury by recklessly endangering the health or safety of a person in connection with continued membership in a gang has no aggravating factor and lacks the serious harm necessary to make its reckless act a CIMT. *See Matter of Wu*, 27 I&N Dec. at 10–11. DHS, however, may argue that its attendant circumstance – commission in connection with or for the purpose of initiation, admission into or affiliation with a gang – is an aggravating factor. *Cf Matter of E.E. Hernandez*, 26 I&N Dec. 397, 402 (BIA 2014) (holding that maliciously defacing, damaging, or destroying property for the benefit of a criminal street gang in order to promote gang member criminal conduct is inherently reprehensible). *But see Cabrera v. Barr* No. 18-1314, 2019 WL 3242032, at * 8 (4th Cir. July 19, 2019) (rejecting *Matter of E.E. Hernandez* and holding that gang association is not an aggravating factor). DHS may also cite *Matter of Leal* for the proposition that recklessly endangering another person is a CIMT. *See* 26 I&N Dec. (BIA 2012). However, endangerment in *Leal* required a substantial risk of imminent death, which is absent from Va. Code § 18.2-55.1. *Compare id.* at 22 ("A person commits endangerment by recklessly endangering another person with a *substantial risk of imminent death or physical injury*.") (emphasis added) *with* Va. Code § 18.2-55.1 ("'Hazing' means to recklessly or intentionally endanger the health or safety of a person.)

[45] Causing bodily injury by hazing is not a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since it lacks the requisite mens rea. The minimum mens rea for causing bodily injury by hazing is recklessness. *See* Va. Code § 18.2-55.1. While the Supreme Court has left open the question whether reckless conduct may constitute a crime of violence, *see Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004), the Fourth Circuit has held that it may not. *See Garcia v. Gonzales*, 455 F.3d 465, 468 (2006).

[46] In *Matter of Sejas*, the BIA held that assault and battery in Virginia is not a CIMT since it "does not require the actual infliction of physical injury and may include any touching, however slight." *See* 24 I&N Dec. 236, 238 (BIA 2007). This is consistent with the BIA's general stance that an assault and battery conviction absent an aggravating factor does not constitute a CIMT because it requires only general intent and *de minimis*, if any, physical contact. *See Matter of Solon*, 24 I&N Dec. 239 (BIA 2007).

[47] In *United States v. Carthorne*, the Fourth Circuit held that assault and battery offenses in Virginia are not crime of violences under the force clause because they may be accomplished with the "slightest touching." 726 F.3d 503, 513 (4th Cir. 2013) (citing *United States v. White,* 606 F.3d 144, 148 (4th Cir. 2010), *abrogated on other grounds by United States v. Castleman*, 134 S.Ct 1405, 1413 (2014)); *Johnson v. United States*, 559 U.S. 133, 139–42 (2010)). Physical force requires more than mere touching. *Johnson*, 559 U.S. at 139. Assault and battery is not a crime of violence under the residual clause since that clause is unconstitutionally vague. *See Sessions v. Dimaya,* 138 S.Ct. 1204, 1223 (2018).

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[48] In *United States v. Carthorne*, the Fourth Circuit held that assault and battery of a police officer is not a crime of violence under the force clause because "assault and battery in Virginia may be accomplished with the "slightest touching." 726 F.3d 503, 513 (4th Cir. 2013) (citing *United States v. White,* 606 F.3d 144, 148 (4th Cir. 2010), *abrogated on other grounds by United States v. Castleman*, 134 S.Ct 1405, 1413 (2014); *Johnson v. United States*, 559 U.S. 133, 139–42 (2010)). Assault and battery of a police officer is not a crime of violence under the residual clause since that clause is unconstitutionally vague. *See Sessions v. Dimaya,* 138 S.Ct. 1204, 1223 (2018).

[49] In *Matter of Sejas*, the BIA held that "assault and battery against a family or household member in violation of section 18.2-57.2 of the Virginia Code is not categorically a crime involving moral turpitude." 24 I&N Dec. 236, 238 (BIA 2007).

[50] In *United States v. White*, the Fourth Circuit held that assault and battery of a family or household member is not a crime of violence under the force clause since "physical force, [force capable of causing physical pain or injury to another person], is not an element of assault and battery under the well-established law of Virginia." 606 F.3d 144, 153 (4th Cir. 2010), *abrogated on other grounds by United States v. Castleman*, 134 S.Ct. 1405, 1413, (2014). Assault and battery of family or household member is not a crime of violence under the residual clause since that clause is unconstitutionally vague. *See Sessions v. Dimaya,* 138 S.Ct. 1204, 1223 (2018).

[51] Va Code § 18.2-58 "prescribes the punishment for robbery but does not define the offense." *Commonwealth v. Hudgins*, 611 S.E.2d 362, 365 (Va. 2005). The common law defines robbery as "'the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation."' *Id.* (quoting *Johnson v. Commonwealth*, 163 S.E. 2d 570, 572–73 (Va. 1968)). Its elements therefore are (1) the use of violence, or the threat thereof, against the victim, and (2) the theft of property from his person or in his presence. *Briley v. Commonwealth*, 273 S.E.2d 48, 55 (Va. 1980).

[52] This includes any taking without consent, or where the "consent" was coerced through force, fear, or threats. See *Matter of Ibarra* 26 I&N Dec. 809, 812 (BIA 2016).

[53] In *United States v. Winston*, the Fourth Circuit held that Va Code § 18.2-58 was not a crime of violence since "Virginia common law robbery can be committed when a defendant uses only a 'slight' degree of force that need not harm a victim" and so "does not necessarily include the use, attempted use, or threatened use of 'violent force ... capable of causing physical pain or injury to another person.'" 850 F.3d 677, 685 (4th Cir. 2017) (quoting *United States v. Johnson*, 559 U.S. 133, 140 (2010)). DHS may cite *Stokeling v. United States* for the proposition that Va. Code § 18.2-58 is a crime of violence since it is a robbery. *See* 139 S.Ct. 544, 555 (2019) (holding that a Florida robbery conviction is a crime of violence). However, the Supreme Court only reached its decision in *Stokeling* since Florida courts had clarified that the Florida robbery offense required "'resistance by the victim that is overcome by the physical force of the offender'" and that "'mere snatching of property from another' [would] not suffice." *Id.* (quoting *Robinson v. State,* 692 So. 2d 883, 886 (Fl. 1997)). Va Code § 18.2-58 requires no resistance by the victim and may be satisfied by a mere snatching. *See Wintson*, 850 F.3d at 684–85.

[54] Virginia courts have held that the statute only has two elements: (1) act of violence or threat thereof; and (2) theft. *See* n. 55. As such, the statute is not divisible by the means through which the act of violence was committed.

[55] The elements of carjacking under Va Code § 18.2-58.1 are: "(i) the victim was in possession or control of a motor vehicle; (ii) the perpetrator intentionally seized, or seized control of, the vehicle, either temporarily or permanently; and (iii) the perpetrator so deprived the victim of possession or control of the vehicle by means of one or more of the specifically prohibited acts—which includes the use of a firearm." *Hilton v. Commonwealth*, 797 S.E.2d 781, 784 (Va. 2017).

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[56] An immigration practitioner may argue that carjacking is not a CIMT because it punishes de minimis takings. The BIA historically held that theft offenses like robbery are CIMTs if and only if they were committed with the intent to *permanently* deprive an owner of property. *See, e.g.*, *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973); *Matter of P-*, 2 I&N Dec. 887, 887 (BIA 1947); *Matter of D-*, I&N Dec. 143, 145–46 (BIA 1941). In *Matter of Diaz-Lizarraga*, the BIA reinterpreted its theft jurisprudence to hold that a theft offense is a CIMT "if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded" rather than "a de minimis taking." 26 I&N Dec. 847, 852–54 (BIA 2016). It clarified that joyriding or "borrowing" an item without permission for temporary, short-term use exemplify de minimis takings, while taking an item without permission for several years or returning a taken item in damaged condition or "after its value or usefulness to the owner has been vitiated" illustrate substantial erosions of property rights. *Id*. at 853–854. Virginia Code § 18.2-58.1 may include de minimis takings since it criminalizes the intentional seizure or seizure of control of a motor vehicle of another with intent to […] temporarily deprive another in possession or control of the vehicle. However, an immigration practitioner may difficulty establishing that there is a realistic probability of Virginia prosecuting de minimis takings under Virginia Code § 18.2-58.1, a finding that the BIA requires to hold that the statute is not a CIMT. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 831–33 (BIA 2016); *But see Martinez v. Sessions*, 892 F.3d 655, 662 (4th Cir. 2018) (finding a Maryland theft statute broader than the *Diaz-Lizarraga* standard because it permitted possible persecution of de minimis, temporary takings like joyriding without assessing whether there was a realistic probability of such prosecutions).

[57] Carjacking under Va Code § 18.2-58 is not categorically a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since it encompasses acts such as taking a vehicle via intimidation that do not have as an element the use, attempted use, or threatened use of force capable of causing physical injury to a person. *See Pressley v. Commonwealth*, 679 S.E.2d 551, 555 (Va. Ct. App. 2009) (affirming a carjacking conviction accomplished by means of intimidation). In *Pressley*, the defendant, "[wore] a mask that obscured the lower half of his face, ran toward the victim with "a great degree of speed," demanded his possssions, and pressed the victim for his keys until victim surrender them since he was afraid and believed appellant "could do anything." 679 S.E.2d at 555. The Court held that a taking "by assault or by otherwise placing a person in fear of serious bodily harm" may be accomplished via intimidation, which occurs "when the words or conduct of the accused exercise such domination and control over the victim as to overcome the victim's mind and overbear the victim's will, placing the victim in fear of bodily harm." *Id.* at 554 (citing *Anderson v. Commonwealth*, 664 S.E.2d 514, 517 (Va. Ct. App. 2008)). It also noted that "threats of violence or bodily harm are not an indispensable ingredient of intimidation [rather] [i]t is only necessary that the victim actually be put in fear of bodily harm by the willful conduct or words of the accused." *Pressley*, 679 S.E.2d at 554 (citing *Harris v. Commonwealth*, 351 S.E.2d 356, 357 (Va. Ct. App. 1986)).

[58] Carjacking under Va Code § 18.2-58 is categorically a theft aggravated felony under 8 U.S.C. § 1101(a)(43)(F) despite criminalizing temporary takings since the generic definition of theft also encompasses such takings. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007).

[59] Va Code § 18.2-59 is a theft aggravated felony under 8 U.S.C. § 1101(a)(43)(G) since the generic theft offense "encompasses extortionate takings, in which consent is coerced by the wrongful use of force, fear, or threats." *See Matter of Ibarra*, 26 I&N Dec. 809, 813 (BIA 2016).

[60] A CIMT "requires two essential elements: a culpable mental state and reprehensible conduct." *Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135 (4th Cir. 2018) (citing *Sotnikau v. Lynch*, 846 F.3d 731, 735–36 (4th Cir. 2017)); *Matter of Silva-Trevino,* 26 I&N Dec. 826, 831–33 (BIA 2016). Va. Code § 18.2-60 satisfies the culpable mental state requirements since the statute entails knowingly communicating a threat and a threat has a specific intent to injure the person of another. *See Keyes v. Commonwealth*, 572 S.E.2d 512, 516 (Va. Ct. App. 2002) (citing *Summerlin v. Commonwealth*, 557 S.E.2d 731, 736 (Va. Ct. App. 2002)). Knowingly communicating a threat to kill or do bodily injury to a person or any member of his family such that the person is placed in reasonable apprehension of death or bodily injury to himself or his family member is reprehensible conduct. *See Matter of Ajami*, 22 I&N Dec.

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949, 952 (BIA 1999) (holding that stalking under Mich. Comp. L § is a CIMT since it involves a willful course of conduct that causes another to feel great fear); *See also Latter-Singh v. Holder*, 669 F.3d 1156, 1161–1163 (9th Cir. 2012) (finding willfully threatening to commit a crime which will result in death or great bodily injury to another person is a CIMT since it entails a specific intent to injure and only encompasses threats that convey a gravity of purpose and an immediate prospect of execution of the threat to the threatened person and cause this person to reasonably fear for his or her own safety or that of his immediate family); *Chanmouny v. Aschroft*, 376 F.3d 810, 813–14 (8th Cir. 2004) (holding that threatening a crime of violence against another person with the purpose of causing extreme fear is a CIMT).

[61] An immigration practitioner may argue that knowingly threatening death or bodily injury to a person or a member of his family is not a crime of violence aggravated felony under 8 U.S.C § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since such a threat does not necessarily entail a threat to use of physical force. *See United States v. Torres-Miguel*, F.3d 165, 168–69 (4th Cir. 2012) (holding that Cal. Penal Code § 422, willfully threatening to commit a crime which will result in death or great bodily injury to another person, is a not a crime of violence), *abrogated on other grounds by United States v. Castleman*, 572 U.S. 157 (2014). *See also United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018); *United States v. Covington*, 880 F.3d 129, 134 n. 4 (4th Cir. 2014). However, the practitioner may have trouble establishing the realistic probability that Virginia prosecutes threats under Va Code § 18.2-60. *See Covington*, 880 F.3d at 135.

[62] An immigration attorney may argue that Va. Code §§ 18.2-60(A)(2) is not categorically a CIMT since communicating in writing a threat to kill or do bodily harm on a school bus/campus or at a school event such that the object of the threat has a reasonable apprehension of death or bodily harm does might not necessarily entail a sufficiently culpable mental state. *Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135 (4th Cir. 2018) (holding that a CIMT "requires two essential elements: a culpable mental state and reprehensible conduct"). Unlike Va. Code § 18.2-60(A)(1), Va. Code § 18.2-60(A)(2) does not specify the mental state with which this threat must be communicated so it is possible the statute is a strict liability offense or includes negligent conduct, neither of which entail a sufficiently culpable mental state for the statute to be a CIMT. *See Sotnikau v. Lynch*, 846 F.3d 731, 736 (4th Cir. 2017) (holding that negligence is an insufficiently culpable mental state for a CIMT finding).

[63] An immigration practitioner may argue that communicating in writing a threat to kill or do bodily harm such that the object of the threat has a reasonable apprehension of death or bodily harm is not categorically a crime of violence aggravated felony under 8 U.S.C § 1101(a)(43)(F) via 18 U.S.C. § 16(a) for two reasons. First, Va. Code §§ 18.2-60(A)(2) does not specify the mental state with which its threat must be committed so it is possible the statute is a strict liability offense or encompasses negligent and reckless conduct, none of which are sufficiently culpable for it be a crime of violence. *See Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004); *Garcia v. Gonzales,* 455 F.3d 465, 468 (4th Cir. 2006). Second, a threat to kill or do bodily harm does not necessarily entail a threat to use of physical force. *See United States v. Torres-Miguel*, F.3d 165, 168–69 (4th Cir. 2012) (holding that Cal. Penal Code § 422, willfully threatening to commit a crime which will result in death or great bodily injury to another person, is a not a crime of violence), *abrogated on other grounds by United States v. Castleman*, 572 U.S. 157 (2014). *See also United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018); *United States v. Covington*, 880 F.3d 129, 134 n. 4 (4th Cir. 2014). However, the practitioner may have trouble establishing the realistic probability that Virginia prosecutes such threats under Va Code § 18.2-60. *See Covington*, 880 F.3d at 135.

[64] An immigration attorney may argue that Va. Code §§ 18.2-60(B) is not categorically a CIMT since making an oral threat to school or hospital employee does might not necessarily have a sufficiently culpable mental state. *See Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135 (4th Cir. 2018) (holding that a CIMT "requires two essential elements: a culpable mental state and reprehensible conduct"). Unlike Va. Code § 18.2-60(A)(1), Va. Code § 18.2-60(B) does not specify the mental state with which this threat must be communicated so it is possible the statute is a strict liability offense or includes

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negligent conduct, neither of which entail a sufficiently culpable mental state for the statute to be a CIMT. *See Sotnikau v. Lynch*, 846 F.3d 731, 736 (4th Cir. 2017) (holding that negligence is an insufficiently culpable mental state for a CIMT finding).

[65] An immigration practitioner may argue that making an oral threat to school or hospital employee is not a crime of violence aggravated felony under 8 U.S.C § 1101(a)(43)(F) via 18 U.S.C. § 16(a) for two reasons. First, Va. Code §§ 18.2-60(A)(2) does not specify the mental state with which its threat must be committed so it is possible the statute is a strict liability offense or encompasses negligent and reckless conduct, none of which are sufficiently culpable for it be a crime of violence. *See Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004); *Garcia v. Gonzales,* 455 F.3d 465, 468 (4th Cir. 2006). Second, a threat to kill or do bodily harm does not necessarily entail a threat to use of physical force. *See United States v. Torres-Miguel*, F.3d 165, 168–69 (4th Cir. 2012) (holding that Cal. Penal Code § 422, willfully threatening to commit a crime which will result in death or great bodily injury to another person, is a not a crime of violence), *abrogated on other grounds by United States v. Castleman*, 572 U.S. 157 (2014). *See also United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018); *United States v. Covington*, 880 F.3d 129, 134 n. 4 (4th Cir. 2014). However, the practitioner may have trouble establishing the realistic probability that Virginia prosecutes such threats under Va Code § 18.2-60. *See Covington*, 880 F.3d at 135.

[66] Va. Code § 18.2-60.3 is not a categorical CIMT since it includes "conduct directed at another person when [the perpetrator] *knows or reasonably should know* that the conduct places that other person in reasonable fear of death, criminal sexual assault, or bodily injury" and negligence is not a sufficiently culpable mental state for a CIMT. *See Sotnikau v. Lynch*, 846 F.3d 731, 735–36 (4th Cir. 2017); *Matter of Tavdidishvili*, 27 I&N Dec. 142, 144 (BIA 2017). *See also Matter of Daria Shaban*, No. AXXX XX3 979, 2018 WL 3045823, (BIA May 1, 2018) (finding that a Minnesota stalking statute is not a CIMT since it covers offenses where the perpetrator acted with negligence);

[67] The generic definition of "stalking" for purposes of 8 U.S.C. § 1227(a)(2)(E) has three elements: (1) repeated conduct, (2) directed at a specific individual, (3) with the intent to cause that individual or a member of his or her immediate family to be placed in fear of bodily injury or death. *Matter of Sanchez-Lopez*, 26 I&N Dec. 71, 74 (BIA 2012), *vacated on other grounds by* 27 I&N Dec. 256 (BIA 2018). Va. Code § 18.2-60.3 is categorically overbroad since it extends the third element to negligently placing an individual or a member in fear of bodily injury or death.

[68] An immigration attorney may argue that Va. Code §§ 18.2-61(A)(i), 18.2-67.1(A)(2), 18.2-67.3(A)(4) are not categorically crime of violence aggravated felonies under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since their minimum culpable conduct does has a not have as an element the use, attempted use, or threatened use of physical force capable of causing physical pain to a person. *See Johnson v. United States*, 559 U.S. 133 (2010); *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 716 (BIA 2016). The minimum conduct criminalized under Va. Code §§ 18.2-61, 18.2-67.1(A)(2) is sexual intercouse, cunnilingus, fellatio, anilingus, anal intercourse, or sexual abuse with a victim against her will by intimidation. The Virginia courts have emphasized that "there is a difference between threat and intimidation" and defined the latter as "putting a victim in fear of bodily harm by exercising such domination and control of her as to overcome her mind and overbear her will." *Sutton v. Commonwealth*, 324 S.E.2d 665, 669–70 (Va. 1985) (further noting that "intimidation may be caused by the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure"). *See also Sabol v. Commonwealth*, 553 S.E.2d 533, 537 (Va. Ct. App. 2001) ("Intimidation differs from threat in that it occurs without an express threat by the accused to do bodily harm."). Intimidation does not require the perpetrator to use physical force or threaten to do so. *See Sutton*, 324 S.E.2d at 671 (finding intimidation based on the perpetrator's repeated requests to have sexual intercourse with the victim, the threat that the victim would be returned to her abusive father if she did not do so, and the victim's observations of the perpetrator's violent propensities and anger); *Myers v. Commonwealth*, 400 S.E.2d 803, 804–05 (Va. Ct. App. 1991) (finding intimidation based on the age different between the victim and perpetrator and his threat to leave her in a remote, scary location if she did not have sexual intercourse with him). As such, that Va. Code §§ 18.2-61(A)(i), 18.2-67.1(A)(2), 18.2-67.3(A)(4) are not categorically crime of violence aggravated felonies.

This chart only analyzes whether convictions may fall within the primary categories of removability set forth in the Immigration and Nationality Act. Defenders should remember that it is also important to analyze whether a conviction leads to other immigration consequences, such as ineligibility for certain forms of relief from removal, Temporary Protected Status, naturalization, or Deferred Action for Childhood Arrivals. Please review the Cover Memorandum and relevant Practice Advisories on our website.

[69] A crime is a domestic violence offense under 8 U.S.C. § 1227(a)(2)(E)(i) if (1) the offense constitutes a crime of violence; and (2) the victim is a protected person, i.e. the perpetrator and the victim share a child or the perpetrator is the victim's current spouse, the victim's former spouse, the victim's cohabitual spouse, or an individual similarly situated to a spouse of the victim. Va. Code §§ 18.2-61, 18.2-67.1(A)(2), 67.3(A)(2) are not categorically crime of violence aggravated felonies. *See supra* n. 68. However, if they were, the Fourth Circuit and the BIA would use a circumstance specific approach to determine whether the victim is a protected person, which allows them to consider documents outside the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. *See Hernandez-Zavala v. Lynch*, 806 F.3d 259 (4th Cir. 2015); *Matter of Estrada*, 26 I&N Dec. 749, 750–54 (BIA 2016); *Matter of Milian*, 25 I&N Dec. 197, 200 (BIA 2010).

[70] Sexual intercouse or sexual abuse through the victim's "mental incapacity or physical helplessness" does not have as an element the use, attempted use, or threatened use of force capable of causing injury to another person, and so is not a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) or a domestic violence offense under 8 U.S.C. § 1227(a)(2)(E)(i). *See* 18 U.S.C. § 16(a); *Johnson v. United States*, 559 U.S. 133 (2010); *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 716 (BIA 2016). A mental capacity is a condition that prevents the victim "from understanding the nature or consequences of the sexual act," while physical helplessness means unconsciousness or any other condition that rendered the victim physically unable to communicate an unwillingness to act. Va. Code §§ 67.3-10(3), (4).

[71] Virginia has no common law mistake of age defense. *Lawrence v. Commonwealth*, 71 Va. 845, 855 (Va. 1878) ("The offence of having carnal knowledge of a female under twelve years of age is entirely independent of and unaffected by […] any belief, or reasonable cause of belief, on [the perpetrator's] part that she was twelve years old.") Therefore, Va. Code §§ 18.2-61(A)(iii), 18.2-63, 18.2-64.1, 18.2-67.1(A)(1), 18.2-67.2(A)(1), 18.2-67.3(A)(1), 18.2-673(A)(3), 18.2-67.5 are not categorically CIMTs. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 834 (BIA 2016) (affirming the Attorney General's previous holding in *Matter of Silva-Trevino* that intentional sexual contact between an adult and a minor only involves moral turpitude if the perpetrator know or reasonably should have known that the victim was a minor). An immigration attorney, however, may have difficulty finding the necessary evidence to establish the realistic probability of Virginia prosecuting acts with a minor whom the perepatrator reasonably believed to be an adult, which the BIA requires to hold the Virginia offenses not to be CIMTs. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 831–33 (BIA 2016).

[72] None of the acts of sexual intercouse, sexual abuse, cunnilingus, fellatio, anilingus, anal intercourse with or inanimate or animate object sexual has as an element the use, attempted use, or threatened use of force capable of causing injury to another person so Va. Code §§ 18.2-61, 18.2-67.1(A)(1), 18.2-67.2(A)(1) are not crime of violence aggravated felonies under 8 U.S.C. § 1101(a)(43)(F). *See* 18 U.S.C. § 16(a); *Johnson v. United States*, 559 U.S. 133 (2010); *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 716 (BIA 2016).

[73] Sexual abuse is categorically broader than the generic federal rape offense. *Compare* Va. Code § 18.2-67.10 (defining sexual abuse as the following acts committed with the intent to sexually molest, arouse, or gratify any person: (1) touching the victim's genitalia, anus, groin, breast, or buttocks or material directly covering these body parts; (2) forcing the victim touch another person's genitalia, anus, groin, breast, buttocks or material directly covering these body parts; (3) causing a victim younger than 13 years old to another person's genitalia, anus, groin, breast, buttocks or material directly covering these body parts; or (4) forcing another person to touch the victim's genitalia, anus, groin, breast, buttocks or material directly covering these body parts) with *Matter of Keeley*, 27 I&N Dec. 146, (BIA 2017) (defining "rape" in [8 U.S.C. § 1101(a)(43)(A)] as "(1) an act of vaginal, anal, or oral intercourse or digital or mechanical penetration, no matter how slight, that (2) is committed without consent"). Virginia has successfully prosecuted conduct as sexual abuse that falls outside the generic federal definition of rape. *See, e.g., Martin v. Commonwealth*, 630 S.E.2d 291 (Va. 2006) (affirming the conviction under Va. Code § 18.2-67.3 where eight-year-old victim masturbated the defendant after he exposed his penis to her and asked the her to do so).

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[74] As the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16, Va. Code § 18.2-67.3(a)(3) does not categorically fall within that definition and so is not an aggravated felony. *See Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562, 1568 (2017).
[75] An immigration attorney may argue that Va. Code § 18.2-67.3(A)(4)(c) is not categorically a firearms offense under 8 U.S.C. § 1227(a)(2)(C) since Virginia does not limit dangerous weapons to those firearms included in the federal definition at 18 U.S.C. § 921(a). Rather, it includes all weapons "able or likely to inflict injury." *See Cabral v. Commonwealth*, 815 S.E.2d 805, 808 (Va. Ct. App. 2018). However, the BIA will likely require a showing of a realistic probability for Virginia prosecuting sexual abuse where the defendant uses or theatens to use a dangerous weapon that is not a firearm to find it overbroad on this basis. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 357 (BIA 2014). An immigration attorney may have difficulty finding the evidence necessary to make this showing.
[76] In the unpublished case *Rivera v. Holder*, the Fourth Circuit held that a conviction under this statute is categorically a crime involving moral turpitude. *See* 496 F. App'x 264 (4th Cir. 2012) (unpublished). *See also Mohamed v. Holder*, 769 F.3d 885, 888 (4th Cir. 2014) (holding in dicta that 18.2-67.4 is a CIMT).
[77] The Virginia code defines sexual abuse as, inter alia, causing or assisting a child younger than 13 to touch another person's genitalia, anus, groin, breast, or buttocks or material directly covering these body parts with the intent to sexually molest, arouse, or gratify any person. *See* Va. Code § 18.2-67.10(6)(c). An immigration attorney may argue that these acts fall outside the ambit of the generic federal sexual abuse of a minor offense since they may be done with an intent to sexually molest rather than an intent for sexual gratification. *See Larios-Reyes v. Lynch*, 843 F.3d 146, 159 (4th Cir. 2016) (limiting the generic federal offense for sexual abuse of a minor is "physical or nonphysical misuse or maltreatment of a minor for *a purpose associated with sexual gratification*") (emphasis added).
[78] Immigration practitioners may argue that Va. Code § 18.2-67.4 is not a categorical match for the crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since its minimum culpable conduct does has a not have as an element the use, attempted use, or threatened use of physical force capable of causing physical pain to a person. *See Johnson v. United States*, 559 U.S. 133 (2010) (holding that physical force is not satisfied by mere touching); *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 716 (BIA 2016). The minimum conduct criminalized under Va. Code § 18.2-67.4 is various forms of toucing via intimidation or ruse. *See* Va. Code §§ 18.2-67. Intimidation does not require the use or threatened use of physical force. *See supra* n. 68 Neither does ruse. While the Fourth Circuit has that a conviction under Virginia Code § 18.2-67.4 is a crime of violence aggravated felony, *see Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000), it did so without explaining its rationale and before *Sessions v. Dimaya* found 18 U.S.C. § 16(b) unconstitutionally vauge. 138 S.Ct. 1204, 1223 (2018).
[79] The Virginia code defines sexual abuse as, inter alia, causing or assisting a child younger than 13 to touch another person's genitalia, anus, groin, breast, or buttocks or material directly covering these body parts with the intent to sexually molest, arouse, or gratify any person. *See* Va. Code § 18.2-67.10(6)(c). Only the conduct in Va. Code § 18.2-67.10(6)(c) falls within the ambit of the generic federal child abuse offense either as a direct act of sexual contact with a minor or more broadly as maltreatment of a person younger than 18 years old since the other conduct defined as sexual abuse is not dependent upon the victim's age. *See Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512–14 (BIA 2008). Whether a conviction under Va. Code § 18.2-67.4 may found to be a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)(i) depends upon whether the Virginia statute is divisible by type of sexual abuse, i.e. whether it creates a single sexual abuse offense for which the definitions in Va. Code § 18.2-67.10 are different means of commission or whether it creates multiple sexual abuse offenses, one for each definition in Va. Code § 18.2-67.10. The immigration judge and BIA will likely find Va. Code § 18.2-67.4 divisible by type of sexual abuse since Virginia courts have treated Va. Code § 18.2-67.4 as creating distinct offenses for each definition of sexual abuse in Va. Code § 18.2-67.4. *See Gnadt v. Commonwealth*, 497 S.E.2d 887, 889 (Va. Ct. App. 1998) (holding that assault and battery is a lesser-

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included offense of a sexual battery offense whose elements were "intentional touching administered with the intent to sexually molest, arouse, or gratify"). Such a finding allows the immigration judge to consult the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine whether a noncitizen's conviction was under Va. Code § 18.2-67.10(6)(c). If it it was, the immgration judge should find the noncitizen deportable for committing a crime of child abuse.

[80] The predicate offense of Va. Code § 18.2-67.5 is an attempt aggravated felony under 8 U.S.C. § 1101(a)(43)(U) if the underlying principal offense is an aggravated felony. Criminal defense attorneys should therefore consult the chart for the underlying principal offense.

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VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend and reenact § 16.1-241 of the Code of Virginia, relating to special immigrant juvenile status; jurisdiction.

[S 1181]

Approved

Be it enacted by the General Assembly of Virginia:

1. That § 16.1-241 of the Code of Virginia is amended and reenacted as follows:

§ 16.1-241. Jurisdiction; consent for abortion.

The judges of the juvenile and domestic relations district court elected or appointed under this law shall be conservators of the peace within the corporate limits of the cities and the boundaries of the counties for which they are respectively chosen and within one mile beyond the limits of such cities and counties. Except as hereinafter provided, each juvenile and domestic relations district court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction, and within one mile beyond the limits of said city or county, concurrent jurisdiction with the juvenile court or courts of the adjoining city or county, over all cases, matters and proceedings involving:

A. The custody, visitation, support, control or disposition of a child:

1. Who is alleged to be abused, neglected, in need of services, in need of supervision, a status offender, or delinquent except where the jurisdiction of the juvenile court has been terminated or divested;

2. Who is abandoned by his parent or other custodian or who by reason of the absence or physical or mental incapacity of his parents is without parental care and guardianship;

2a. Who is at risk of being abused or neglected by a parent or custodian who has been adjudicated as having abused or neglected another child in the care of the parent or custodian;

3. Whose custody, visitation or support is a subject of controversy or requires determination. In such cases jurisdiction shall be concurrent with and not exclusive of courts having equity jurisdiction, except as provided in § 16.1-244;

4. Who is the subject of an entrustment agreement entered into pursuant to § 63.2-903 or 63.2-1817 or whose parent or parents for good cause desire to be relieved of his care and custody;

5. Where the termination of residual parental rights and responsibilities is sought. In such cases jurisdiction shall be concurrent with and not exclusive of courts having equity jurisdiction, as provided in § 16.1-244;

6. Who is charged with a traffic infraction as defined in § 46.2-100; or

7. Who is alleged to have refused to take a blood test in violation of § 18.2-268.2.

In any case in which the juvenile is alleged to have committed a violent juvenile felony enumerated in subsection B of § 16.1-269.1, and for any charges ancillary thereto, the jurisdiction of the juvenile court shall be limited to conducting a preliminary hearing to determine if there is probable cause to believe that the juvenile committed the act alleged and that the juvenile was 16 years of age or older at the time of the commission of the alleged offense, and any matters related thereto. In any case in which the juvenile is alleged to have committed a violent juvenile felony enumerated in subsection C of § 16.1-269.1, and for all charges ancillary thereto, if the attorney for the Commonwealth has given notice as provided in subsection C of § 16.1-269.1, the jurisdiction of the juvenile court shall be limited to conducting a preliminary hearing to determine if there is probable cause to believe that the juvenile committed the act alleged and that the juvenile was 16 years of age or older at the time of the commission of the alleged offense, and any matters related thereto. A determination by the juvenile court following a preliminary hearing pursuant to subsection B or C of § 16.1-269.1 to certify a charge to the grand jury shall divest the juvenile court of jurisdiction over the charge and any ancillary charge. In any case in which a transfer hearing is held pursuant to subsection A of § 16.1-269.1, if the juvenile court determines to transfer the case, jurisdiction of the juvenile court over the case shall be divested as provided in § 16.1-269.6.

In all other cases involving delinquent acts, and in cases in which an ancillary charge remains after a violent juvenile felony charge has been dismissed or a violent juvenile felony has been reduced to a lesser offense not constituting a violent juvenile felony, the jurisdiction of the juvenile court shall not be divested unless there is a transfer pursuant to subsection A of § 16.1-269.1.

The authority of the juvenile court to adjudicate matters involving the custody, visitation, support, control or disposition of a child shall not be limited to the consideration of petitions filed by a mother, father or legal guardian but shall include petitions filed at any time by any party with a legitimate

interest therein. A party with a legitimate interest shall be broadly construed and shall include, but not be limited to, grandparents, step-grandparents, stepparents, former stepparents, blood relatives and family members. A party with a legitimate interest shall not include any person (i) whose parental rights have been terminated by court order, either voluntarily or involuntarily, (ii) whose interest in the child derives from or through a person whose parental rights have been terminated by court order, either voluntarily or involuntarily, including, but not limited to, grandparents, stepparents, former stepparents, blood relatives and family members, if the child subsequently has been legally adopted, except where a final order of adoption is entered pursuant to § 63.2-1241, or (iii) who has been convicted of a violation of subsection A of § 18.2-61, § 18.2-63, subsection B of § 18.2-366, or an equivalent offense of another state, the United States, or any foreign jurisdiction, when the child who is the subject of the petition was conceived as a result of such violation. The authority of the juvenile court to consider a petition involving the custody of a child shall not be proscribed or limited where the child has previously been awarded to the custody of a local board of social services.

A1. Making specific findings of fact required by state or federal law to enable a child to apply for or receive a state or federal benefit. *For the purposes of this subsection only, when the court has obtained jurisdiction over the case of any child, the court may continue to exercise its jurisdiction until such person reaches 21 years of age, for the purpose of entering findings of fact or amending past orders, to include findings of fact necessary for the person to petition the federal government for status as a special immigrant juvenile, as defined by 8 U.S.C. § 1101(a)(27)(J).*

B. The admission of minors for inpatient treatment in a mental health facility in accordance with the provisions of Article 16 (§ 16.1-335 et seq.) and the involuntary admission of a person with mental illness or judicial certification of eligibility for admission to a training center for persons with intellectual disability in accordance with the provisions of Chapter 8 (§ 37.2-800 et seq.) of Title 37.2. Jurisdiction of the involuntary admission and certification of adults shall be concurrent with the general district court.

C. Except as provided in subsections D and H, judicial consent to such activities as may require parental consent may be given for a child who has been separated from his parents, guardian, legal custodian or other person standing in loco parentis and is in the custody of the court when such consent is required by law.

D. Judicial consent for emergency surgical or medical treatment for a child who is neither married nor has ever been married, when the consent of his parent, guardian, legal custodian or other person standing in loco parentis is unobtainable because such parent, guardian, legal custodian or other person standing in loco parentis (i) is not a resident of the Commonwealth, (ii) has his whereabouts unknown, (iii) cannot be consulted with promptness, reasonable under the circumstances, or (iv) fails to give such consent or provide such treatment when requested by the judge to do so.

E. Any person charged with deserting, abandoning or failing to provide support for any person in violation of law.

F. Any parent, guardian, legal custodian or other person standing in loco parentis of a child:

1. Who has been abused or neglected;

2. Who is the subject of an entrustment agreement entered into pursuant to § 63.2-903 or 63.2-1817 or is otherwise before the court pursuant to subdivision A 4; or

3. Who has been adjudicated in need of services, in need of supervision, or delinquent, if the court finds that such person has by overt act or omission induced, caused, encouraged or contributed to the conduct of the child complained of in the petition.

G. Petitions filed by or on behalf of a child or such child's parent, guardian, legal custodian or other person standing in loco parentis for the purpose of obtaining treatment, rehabilitation or other services that are required by law to be provided for that child or such child's parent, guardian, legal custodian or other person standing in loco parentis. Jurisdiction in such cases shall be concurrent with and not exclusive of that of courts having equity jurisdiction as provided in § 16.1-244.

H. Judicial consent to apply for a work permit for a child when such child is separated from his parents, legal guardian or other person standing in loco parentis.

I. The prosecution and punishment of persons charged with ill-treatment, abuse, abandonment or neglect of children or with any violation of law that causes or tends to cause a child to come within the purview of this law, or with any other offense against the person of a child. In prosecution for felonies over which the court has jurisdiction, jurisdiction shall be limited to determining whether or not there is probable cause.

J. All offenses in which one family or household member is charged with an offense in which another family or household member is the victim and all offenses under § 18.2-49.1.

In prosecution for felonies over which the court has jurisdiction, jurisdiction shall be limited to determining whether or not there is probable cause. Any objection based on jurisdiction under this subsection shall be made before a jury is impaneled and sworn in a jury trial or, in a nonjury trial,

before the earlier of when the court begins to hear or receive evidence or the first witness is sworn, or it shall be conclusively waived for all purposes. Any such objection shall not affect or be grounds for challenging directly or collaterally the jurisdiction of the court in which the case is tried.

K. Petitions filed by a natural parent, whose parental rights to a child have been voluntarily relinquished pursuant to a court proceeding, to seek a reversal of the court order terminating such parental rights. No such petition shall be accepted, however, after the child has been placed in the home of adoptive parents.

L. Any person who seeks spousal support after having separated from his spouse. A decision under this subdivision shall not be res judicata in any subsequent action for spousal support in a circuit court. A circuit court shall have concurrent original jurisdiction in all causes of action under this subdivision.

M. Petitions filed for the purpose of obtaining an order of protection pursuant to § 16.1-253.1, 16.1-253.4, or 16.1-279.1, and all petitions filed for the purpose of obtaining an order of protection pursuant to § 19.2-152.8, 19.2-152.9, or 19.2-152.10 if either the alleged victim or the respondent is a juvenile.

N. Any person who escapes or remains away without proper authority from a residential care facility in which he had been placed by the court or as a result of his commitment to the Virginia Department of Juvenile Justice.

O. Petitions for emancipation of a minor pursuant to Article 15 (§ 16.1-331 et seq.).

P. Petitions for enforcement of administrative support orders entered pursuant to Chapter 19 (§ 63.2-1900 et seq.) of Title 63.2, or by another state in the same manner as if the orders were entered by a juvenile and domestic relations district court upon the filing of a certified copy of such order in the juvenile and domestic relations district court.

Q. Petitions for a determination of parentage pursuant to Chapter 3.1 (§ 20-49.1 et seq.) of Title 20. A circuit court shall have concurrent original jurisdiction to the extent provided for in § 20-49.2.

R. [Repealed.]

S. Petitions filed by school boards against parents pursuant to §§ 16.1-241.2 and 22.1-279.3.

T. Petitions to enforce any request for information or subpoena that is not complied with or to review any refusal to issue a subpoena in an administrative appeal regarding child abuse and neglect pursuant to § 63.2-1526.

U. Petitions filed in connection with parental placement adoption consent hearings pursuant to § 63.2-1233. Such proceedings shall be advanced on the docket so as to be heard by the court within 10 days of filing of the petition, or as soon thereafter as practicable so as to provide the earliest possible disposition.

V. Petitions filed for the purpose of obtaining the court's assistance with the execution of consent to an adoption when the consent to an adoption is executed pursuant to the laws of another state and the laws of that state provide for the execution of consent to an adoption in the court of the Commonwealth.

W. Petitions filed by a juvenile seeking judicial authorization for a physician to perform an abortion if a minor elects not to seek consent of an authorized person.

After a hearing, a judge shall issue an order authorizing a physician to perform an abortion, without the consent of any authorized person, if he finds that (i) the minor is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independent of the wishes of any authorized person, or (ii) the minor is not mature enough or well enough informed to make such decision, but the desired abortion would be in her best interest.

If the judge authorizes an abortion based on the best interests of the minor, such order shall expressly state that such authorization is subject to the physician or his agent giving notice of intent to perform the abortion; however, no such notice shall be required if the judge finds that such notice would not be in the best interest of the minor. In determining whether notice is in the best interest of the minor, the judge shall consider the totality of the circumstances; however, he shall find that notice is not in the best interest of the minor if he finds that (a) one or more authorized persons with whom the minor regularly and customarily resides is abusive or neglectful and (b) every other authorized person, if any, is either abusive or neglectful or has refused to accept responsibility as parent, legal guardian, custodian or person standing in loco parentis.

The minor may participate in the court proceedings on her own behalf, and the court may appoint a guardian ad litem for the minor. The court shall advise the minor that she has a right to counsel and shall, upon her request, appoint counsel for her.

Notwithstanding any other provision of law, the provisions of this subsection shall govern proceedings relating to consent for a minor's abortion. Court proceedings under this subsection and records of such proceedings shall be confidential. Such proceedings shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay in order to serve the best interests of the minor. Court proceedings under this subsection shall be heard and decided as soon

as practicable but in no event later than four days after the petition is filed.

An expedited confidential appeal to the circuit court shall be available to any minor for whom the court denies an order authorizing an abortion without consent or without notice. Any such appeal shall be heard and decided no later than five days after the appeal is filed. The time periods required by this subsection shall be subject to subsection B of § 1-210. An order authorizing an abortion without consent or without notice shall not be subject to appeal.

No filing fees shall be required of the minor at trial or upon appeal.

If either the original court or the circuit court fails to act within the time periods required by this subsection, the court before which the proceeding is pending shall immediately authorize a physician to perform the abortion without consent of or notice to an authorized person.

Nothing contained in this subsection shall be construed to authorize a physician to perform an abortion on a minor in circumstances or in a manner that would be unlawful if performed on an adult woman.

A physician shall not knowingly perform an abortion upon an unemancipated minor unless consent has been obtained or the minor delivers to the physician a court order entered pursuant to this section and the physician or his agent provides such notice as such order may require. However, neither consent nor judicial authorization nor notice shall be required if the minor declares that she is abused or neglected and the attending physician has reason to suspect that the minor may be an abused or neglected child as defined in § 63.2-100 and reports the suspected abuse or neglect in accordance with § 63.2-1509; or if there is a medical emergency, in which case the attending physician shall certify the facts justifying the exception in the minor's medical record.

For purposes of this subsection:

"Authorization" means the minor has delivered to the physician a notarized, written statement signed by an authorized person that the authorized person knows of the minor's intent to have an abortion and consents to such abortion being performed on the minor.

"Authorized person" means (i) a parent or duly appointed legal guardian or custodian of the minor or (ii) a person standing in loco parentis, including, but not limited to, a grandparent or adult sibling with whom the minor regularly and customarily resides and who has care and control of the minor. Any person who knows he is not an authorized person and who knowingly and willfully signs an authorization statement consenting to an abortion for a minor is guilty of a Class 3 misdemeanor.

"Consent" means that (i) the physician has given notice of intent to perform the abortion and has received authorization from an authorized person, or (ii) at least one authorized person is present with the minor seeking the abortion and provides written authorization to the physician, which shall be witnessed by the physician or an agent thereof. In either case, the written authorization shall be incorporated into the minor's medical record and maintained as a part thereof.

"Medical emergency" means any condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of the pregnant minor as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create a serious risk of substantial and irreversible impairment of a major bodily function.

"Notice of intent to perform the abortion" means that (i) the physician or his agent has given actual notice of his intention to perform such abortion to an authorized person, either in person or by telephone, at least 24 hours previous to the performance of the abortion or (ii) the physician or his agent, after a reasonable effort to notify an authorized person, has mailed notice to an authorized person by certified mail, addressed to such person at his usual place of abode, with return receipt requested, at least 72 hours prior to the performance of the abortion.

"Perform an abortion" means to interrupt or terminate a pregnancy by any surgical or nonsurgical procedure or to induce a miscarriage as provided in § 18.2-72, 18.2-73, or 18.2-74.

"Unemancipated minor" means a minor who has not been emancipated by (i) entry into a valid marriage, even though the marriage may have been terminated by dissolution; (ii) active duty with any of the Armed Forces of the United States; (iii) willingly living separate and apart from his or her parents or guardian, with the consent or acquiescence of the parents or guardian; or (iv) entry of an order of emancipation pursuant to Article 15 (§ 16.1-331 et seq.).

X. Petitions filed pursuant to Article 17 (§ 16.1-349 et seq.) relating to standby guardians for minor children.

Y. Petitions involving minors filed pursuant to § 32.1-45.1 relating to obtaining a blood specimen or test results.

Z. Petitions filed pursuant to § 16.1-283.3 for review of voluntary agreements for continuation of services and support for persons who meet the eligibility criteria for the Fostering Futures program set forth in § 63.2-919.

The ages specified in this law refer to the age of the child at the time of the acts complained of in the petition.

Notwithstanding any other provision of law, no fees shall be charged by a sheriff for the service of any process in a proceeding pursuant to subdivision A 3, except as provided in subdivision A 6 of § 17.1-272, or subsection B, D, M, or R.

Notwithstanding the provisions of § 18.2-71, any physician who performs an abortion in violation of subsection W shall be guilty of a Class 3 misdemeanor.

Matter of Julio E. VELASQUEZ, Respondent

File A094 038 330 - Arlington, Virginia

Decided July 16, 2010

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

The misdemeanor offense of assault and battery against a family or household member in violation of section 18.2-57.2(A) of the Virginia Code Annotated is not categorically a crime of violence under 18 U.S.C. § 16(a) (2006) and therefore not categorically a crime of domestic violence within the meaning of section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i) (2006).

FOR RESPONDENT: John T. Riely, Esquire, Bethesda, Maryland

FOR THE DEPARTMENT OF HOMELAND SECURITY: Rhonda M. Dent, Appellate Counsel; Karen Donoso Stevens, Assistant Chief Counsel

BEFORE: Board Panel: GRANT and MILLER, Board Members. Concurring Opinion: MALPHRUS, Board Member, joined by MILLER, Board Member.

GRANT, Board Member:

In a decision dated May 21, 2008, an Immigration Judge found the respondent removable on his own admissions under section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i) (2006), as an alien who is present in the United States without being admitted or paroled. The Immigration Judge also pretermitted the respondent's application for cancellation of removal pursuant to section 240A(b)(1)(C) of the Act, 8 U.S.C. § 1229b(b)(1)(C) (2006), finding that he was ineligible for that relief because he had been convicted of a crime of domestic violence. The respondent has appealed from the Immigration Judge's finding regarding his eligibility for cancellation of removal. The appeal will be sustained and the record will be remanded to the Immigration Judge for further proceedings.

This case requires us to determine whether the offense of misdemeanor assault and battery of a family member in violation of section 18.2-57.2(A) of the Virginia Code Annotated categorically qualifies as a crime of domestic violence within the meaning of section 237(a)(2)(E) of the Act, 8 U.S.C. § 1227(a)(2)(E) (2006). In light of the decision of the United States Supreme Court in *Johnson v. United States*, 130 S. Ct. 1265 (2010), we hold

that because the Virginia statute reaches conduct that cannot be classified as "violent force," the respondent's offense is not categorically a "crime of violence" and thus cannot be classified as a categorical crime of domestic violence for purposes of section 237(a)(2)(E) of the Act. Accordingly, the record will be remanded to determine whether the respondent's offense qualifies as a crime of domestic violence under the modified categorical approach.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of El Salvador who entered the United States at an unknown place and time. On August 18, 2004, he was convicted of assault and battery of a family member in violation of section 18.2-57.2(A) of the Virginia Code Annotated. He was sentenced to a term of imprisonment of 10 days and was subjected to certain conditions, including a no-contact order with the victim.

On August 30, 2005, the Department of Homeland Security ("DHS") initiated removal proceedings against the respondent. At his hearing, the respondent filed an application for cancellation of removal under section 240A(b)(1) of the Act. The DHS filed a motion to pretermit the respondent's application, arguing that his conviction was for a categorical crime of domestic violence, which rendered him ineligible for relief under section 240A(b)(1)(C) of the Act. The Immigration Judge granted the motion and ordered the respondent removed to El Salvador.

The respondent appealed from the Immigration Judge's finding regarding his eligibility for cancellation of removal, arguing that he was not convicted of a crime of domestic violence. Subsequent to the decision of the Supreme Court in *Johnson v. United States*, 130 S. Ct. 1265, we invited the parties to submit supplemental briefs, and both parties did so. We review de novo the Immigration Judge's determination on this question of law. 8 C.F.R. § 1003.1(d)(3)(ii) (2010); *see also Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009).

II. ANALYSIS

An alien who has been convicted of a crime of domestic violence under section 237(a)(2)(E)(i) of the Act is ineligible for cancellation of removal under section 240A(b)(1)(C). A "crime of domestic violence" means any "crime of violence," as that term is defined in 18 U.S.C. § 16 (2006), that is committed by a specified person against one of a defined set of victims. *See* section 237(a)(2)(E)(i) of the Act. A crime of violence is defined at 18 U.S.C. § 16 as follows:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (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 respondent pled guilty to assault and battery under section 18.2-57.2(A) of the Virginia Code Annotated, which states that any "person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor." According to section 18.2-11 of the Virginia Code Annotated, a Class 1 misdemeanor under Virginia law is punishable by not more than 1 year in prison. Consequently, for purposes of Federal law, the respondent's offense would be classified as a misdemeanor, not as a felony. *See* 18 U.S.C. §§ 3559(a)(5), (6) (2006). Thus, because the respondent's offense is not a felony under Federal law, it cannot constitute a crime of violence under 18 U.S.C. § 16(b). *See Matter of Martin*, 23 I&N Dec. 491, 493 (BIA 2002). Accordingly, our inquiry is limited to whether the respondent's offense has as an element the use, attempted use, or threatened use of physical force against the person or property of another under § 16(a).

Because the Virginia Code Annotated does not define assault and battery, Virginia courts have relied on common law definitions of those crimes. *See, e.g.*, *Carter v. Commonwealth*, 606 S.E.2d 839, 841 (Va. 2005); *Zimmerman v. Commonwealth*, 585 S.E.2d 538, 539 (Va. 2003); *Clark v. Commonwealth*, 676 S.E.2d 332, 336 (Va. Ct. App. 2009). However, Virginia law is clear that "only the offense of an assault *and* a battery is encompassed within the statute." Va. Op. Att'y Gen. 99 (1997), 1997 WL 767056 (emphasis added). Thus, we must look to the definitions of both assault and battery under Virginia law to determine if, on a categorical basis, they require the use, attempted use, or threatened use of violent force.[1]

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[1] Contrary to the respondent's argument on appeal, the statute under which he was convicted is sufficiently clear with respect to the "domestic" status of the protected victim. *See* Va. Code Ann. § 16.1-228 (2004) (defining "family or household member"). In regard to whether the victim is a "protected" person within the meaning of section 237(a)(2)(E)(i) of the Act, we note that it lists a broad class of victims, including current or former spouses, parties with a child in common, individuals currently or formerly cohabiting as a spouse, individuals similarly situated to a spouse under the domestic or family violence laws of the jurisdiction where the offense occurs, or any other individual who is protected from the perpetrator's acts under the domestic or family violence laws of the jurisdiction. Virginia's definition of a "family or household member" includes both those who fit within the most restrictive definition of family members (such as spouses) and others, such as cohabitants and individuals who recently cohabited, who fit within the broad list of protected individuals

(continued...)

An assault occurs "when an assailant engages in an overt act intended to inflict bodily harm and has the present ability to inflict such harm *or* engages in an overt act intended to place the victim in fear or apprehension of bodily harm and creates such reasonable fear or apprehension in the victim." *Carter v. Commonwealth*, 606 S.E.2d at 841 (noting the merger of the criminal offense of assault and the tort of assault, which have the same definition under Virginia law); *see also Zimmerman v. Commonwealth*, 585 S.E.2d at 539 (stating that assault also includes the "unequivocal appearance" of an attempt to do physical injury to another); *Clark v. Commonwealth*, 676 S.E.2d at 336. There is no requirement that a victim of assault be physically touched. *See, e.g.*, *Zimmerman v. Commonwealth*, 585 S.E.2d at 539.

A battery under Virginia law is "'the actual infliction of corporal hurt on another . . . willfully or in anger, whether by the party's own hand, or by some means set in motion by him.'" *E.g.*, *Commonwealth v. Vaughn*, 557 S.E.2d 220, 222 (Va. 2002) (quoting *Jones v. Commonwealth*, 36 S.E.2d 571, 572 (Va. 1946)). Unlike assault, battery requires the unlawful touching of another, although it is not necessary for the touching to result in injury to the person. *See Adams v. Commonwealth*, 534 S.E.2d 347, 350-51 (Va. Ct. App. 2000) (defining touch as to be in contact or to cause to be in contact); *Perkins v. Commonwealth*, 523 S.E.2d 512, 513 (Va. Ct. App. 2000). Additionally, the "'slightest touching of another . . . if done in a rude, insolent, or angry manner, constitutes a battery.'" *Adams v. Commonwealth*, 534 S.E.2d at 350 (quoting *Crosswhite v. Barnes*, 124 S.E. 242, 244 (Va. 1924)); *see also Matter of Sejas*, 24 I&N Dec. 236, 238 (BIA 2007). However, whether a touching is a battery depends on the intent of the actor, not the force applied. *See Adams v. Commonwealth*, 534 S.E.2d at 350.

In *Johnson v. United States*, 130 S. Ct. at 1271, the Supreme Court held that in order to constitute a "violent felony" under the relevant provisions of the Armed Career Criminal Act ("ACCA"), the level of "physical force" required for a conviction must be "*violent* force—that is, force capable of causing physical pain or injury to another person." *See* 18 U.S.C. §§ 924(e)(1), (2)(B)(i) (2006). The Court concluded that simple battery under Florida law was not a violent felony because a conviction under the relevant statute may occur when an individual has committed an actual and intentional touching involving physical contact, no matter how slight. *Johnson v. United States*, 130 S. Ct. at 1269-70.

(...continued)
in section 237(a)(2)(E)(i). Moreover, we note that the domestic or family relationship need not be an element of the predicate offense to qualify as a misdemeanor crime of domestic violence under this section. *See United States v. Hayes*, 129 S. Ct. 1079 (2009).

Since the ACCA's definition of a "violent felony" is, in pertinent part, identical to that in 18 U.S.C. § 16(a), *Johnson* controls our interpretation of a "crime of violence" under § 16(a).[2] The Court in *Johnson*, 130 S. Ct. at 1271, relied on its prior decision in *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004), holding that the definitions in 18 U.S.C. § 16 suggest a category of "violent, active crimes." The Court also specifically endorsed the holding of the United States Court of Appeals for the Seventh Circuit in *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003), that in order to constitute an aggravated felony crime of violence, the elements of the offense must require the intentional use of "violent force." *Johnson v. United States*, 130 S. Ct. at 1271.

Finally, the Court specifically acknowledged that many generic domestic battery statutes do not require as an element the intentional use of violent force. The Government argued that because of this, a ruling that "violent force" is required under the ACCA would make it more difficult to obtain removal orders under section 237(a)(2)(E)(i) of the Act, which is the very issue in this case. The Court acknowledged the difficulty but stated that in such cases, recourse must be had to the modified categorical approach. In response to the Government's argument that the type of conviction records allowed under the modified categorical approach are often incomplete (and thus silent on the precise nature of the "force" used to sustain a conviction), the Court stated that the "absence of records will often frustrate application of the modified categorical approach—not just to battery but to many other crimes as well." *Johnson v. United States*, 130 S. Ct. at 1273. Moreover, the Fourth Circuit recently applied *Johnson* to reverse a conviction under 18 U.S.C. § 922(g)(9) for possession of a firearm after having "been convicted in any court of a misdemeanor crime of domestic violence," holding that section 18.2-57.2(A) of the Virginia Code Annotated includes nonviolent force, such as an offensive touching, and that "violent force," as required in *Johnson*, is not an element of assault and battery under Virginia common law. *United States v. White*, 606 F.3d 144 (4th Cir. 2010).

The DHS argues in its supplemental brief that *Johnson* does not control the outcome of this case because the Court's decision was limited to the question of what constitutes a "violent felony," and because the Court specifically endorsed the use of the modified categorical approach to determine whether, in the immigration context, an offense is a crime of domestic violence. However, the DHS argument overlooks both the Court's specific endorsement

[2] The ACCA does not, as does 18 U.S.C. § 16(a), reach crimes against the property of another. Because it is not necessary to address whether "violent" force would be required for property crimes as well as for crimes against the person, we do not resolve that issue in this case.

of the Seventh Circuit's decision in *Flores* and its clear statement that resort could be made to the modified categorical approach. Had the Supreme Court determined that its ruling in *Johnson* did not apply outside the context of the ACCA, it could have responded to the Government's specific arguments regarding immigration cases, and to those of the dissent,[3] by so limiting its ruling. Instead, it fully engaged those arguments and left no room for the Government to contend that 18 U.S.C. § 16(a) can be satisfied with proof of anything less than "violent" force. Only Congress can address whether the categorical approach should be required to establish deportability in these circumstances.

Accordingly, in regard to crimes against the person, we conclude that the "physical force" necessary to establish that an offense is a "crime of violence" for purposes of the Act must be "violent" force, that is, force capable of causing physical pain or injury to another person. The key inquiry is not the alien's intent for purposes of assault, but rather whether battery, in all cases, requires the intentional use of "violent force." An offense cannot therefore be classified as a "categorical" crime of violence unless it includes as an element the actual, attempted, or threatened use of violent force that is capable of causing pain or injury. The crime of assault and battery in Virginia does not contain such a requirement.

For the reasons discussed above, an assault and battery conviction under section 18.2-57.2(A) of the Virginia Code Annotated does not, in all cases, require the use, attempted use, or threatened use of violent physical force under 18 U.S.C. § 16(a). Consequently, the respondent's offense is not categorically a crime of violence and therefore not categorically a crime of domestic violence under section 237(a)(2)(E) of the Act. Thus, the modified categorical approach must now be applied. *See Johnson v. United States*, 130 S. Ct. at 1273; *United States v. White*, 606 F.3d at 155; *see also, e.g.*, *Matter of Milian*, 25 I&N Dec. 197, 199-200 (BIA 2010) (discussing documents that may be considered in applying the modified categorical approach). The record will therefore be remanded for consideration of evidence regarding whether the offense constitutes a crime of domestic violence under the modified categorical approach.[4] Accordingly,

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[3] The dissent in *Johnson* clearly foretold the result here. It explained that the analysis regarding "violent force" in *Johnson* would be applicable in the context of domestic violence and noted that the outcome of this approach would be that "many convicted spousal and child abusers will escape removal, a result that Congress is unlikely to have intended." *Johnson v. United States*,130 U.S. at 1278 (Alito, J., dissenting).

[4] Analysis under the modified categorical approach must include an assessment of whether the respondent was convicted of intentional, as opposed to reckless, use of violent force. *Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006).

the respondent's appeal will be sustained, and the record will be remanded for further proceedings.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

CONCURRING OPINION: Garry D. Malphrus, Board Member, in which Neil P. Miller, Board Member, joined

I fully concur with the reasoning and the result in this case, which is controlled by *Johnson v. United States*, 130 S. Ct. 1265 (2010). However, because of this approach to section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i) (2006), "many convicted spousal and child abusers will escape removal." *Johnson v. United States*, 130 S. Ct. at 1278 (Alito, J., dissenting). This is true because in State courts, "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies." *United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009). Instead, these domestic abusers are routinely prosecuted under generally applicable misdemeanor assault or battery laws. *See id.* The legislative history behind the relevant provisions indicates that Congress intended for these perpetrators to face immigration consequences. *See generally Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1138, 1142 (9th Cir. 2006) (Wardlaw, J., dissenting) (discussing congressional intent to protect victims and punish perpetrators of misdemeanor crimes of domestic violence in enacting section 237(a)(2)(E)(i) of the Act); *Matter of Martin*, 23 I&N Dec. 491, 494 (BIA 2002) (discussing legislative history showing that Congress intended to include a "threatened or attempted simple assault or battery" in the definition of a crime of violence under 18 U.S.C. § 16(a)).

Moreover, even when the modified categorical approach is applied, which *Johnson* permits, the limited conviction records that may be consulted to "conclusively show that the offender's conduct involved the use of violent force" often are not available in these cases. *Johnson v. United States*, 130 S. Ct. at 1278 (Alito, J., dissenting). Both the majority and dissent in *Johnson* recognized the limitations of applying the modified categorical approach to this crime. *Id.* at 1273, 1278. Going forward, only Congress can determine whether the categorical approach and its inherent restrictions on considering the actual conduct of the offender should apply to convictions involving domestic violence in immigration proceedings.

COURT OF APPEALS OF VIRGINIA

UNPUBLISHED

Present: Chief Judge Decker, Judges Humphreys and Russell
Argued at Leesburg, Virginia

CRAIG BROWN AND
BONNIE BROWN

v. Record No. 0330-19-4

DANIEL CERNIGLIA AND
MILLICENT CERNIGLIA

MEMORANDUM OPINION* BY
CHIEF JUDGE MARLA GRAFF DECKER
DECEMBER 27, 2019

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY
Tracy C. Hudson, Judge

Craig A. Brown (The Law Office of Craig A. Brown, PLLC, on briefs), for appellants.

Norman A. Thomas (Norman A. Thomas, PLLC, on brief), for appellee.

Craig and Bonnie Brown (the appellants) appeal a circuit court order dismissing their appeal of a juvenile and domestic relations district court (J&DR court) order. The J&DR court awarded custody of C.B., the biological daughter of the appellants, to Daniel and Millicent Cerniglia (the appellees). The appellees argue that the decision of the circuit court should be affirmed and ask for an award of appellate attorney's fees and costs. For the reasons that follow, we affirm the circuit court's decision and deny the appellees' request for fees and costs.

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

I. BACKGROUND[1]

In 2018, the appellees petitioned for sole custody of C.B. On September 20, 2018, the J&DR court entered an order awarding the appellees sole legal and physical custody.

The appellants noted their appeal of that order to the circuit court on September 28, 2018. In January 2019, the appellees filed a motion seeking dismissal because C.B. had turned eighteen years old in November 2018. The appellants responded that the case was not moot due to the possibility of adverse effects that could extend past C.B.'s eighteenth birthday. They also suggested that the circuit court retained jurisdiction despite the fact that C.B. was no longer a minor.

The circuit court held that no relief could be granted and that it lacked jurisdiction because C.B. had turned eighteen. Based on this holding, the court dismissed the case.

II. ANALYSIS

The appellants argue that the circuit court erred by dismissing the case because there was relief that could be granted and it retained jurisdiction to consider the issues before it. The appellees disagree, argue that the decision should be affirmed, and ask for an award of attorney's fees and costs on appeal.

A. Mootness

The appellants contend that the case was not rendered moot when C.B. turned eighteen because they face continuing collateral consequences from the decision and relief is available. They suggest that a ruling that the challenged J&DR custody order remains valid may

[1] The relevant facts are uncontested. Although the record is sealed, this appeal necessitates unsealing relevant portions of the record for purposes of resolving the issues raised. Consequently, "[t]o the extent that this opinion mentions facts found in the sealed record, we unseal only those specific facts, finding them relevant to the decision in this case. The remainder of the previously sealed record remains sealed." Levick v. MacDougall, 294 Va. 283, 288 n.1 (2017).

"jeopardize" their "standing in the law with regard to their remaining minor children." In addition, the appellants contend that another collateral consequence is the potential to deprive them of tax benefits.

The burden of establishing mootness is on the party alleging it, unless a court raises the issue *sua sponte*. Reston Hosp. Ctr., LLC v. Remley, 63 Va. App. 755, 767 (2014) (noting that a court can consider whether a case is moot even if the parties did not raise the issue).

As a general principle, a case is moot when the "controversy that existed between litigants has ceased to exist." Chaffins v. Atl. Coast Pipeline, LLC, 293 Va. 564, 571 (2017) (quoting E.C. v. Dep't of Juv. Justice, 283 Va. 522, 530 (2012)). "It is not the office of courts to give opinions on abstract propositions of law, or to decide questions upon which no rights depend, and where no relief can be afforded."[2] Id. (quoting E.C., 283 Va. at 530); see Va. Dep't of State Police v. Elliott, 48 Va. App. 551, 554 (2006) (quoting Hankins v. Town of Va. Beach, 182 Va. 642, 643-44 (1944)). Nevertheless, the controversy between the parties still exists if there is a continuing adverse effect and relief that can still be afforded. Tazewell Cty. Sch. Bd. v. Brown, 267 Va. 150, 157-58 (2004); see also E.C., 283 Va. at 531 (describing an ongoing adverse effect of a conviction as a "collateral consequence").

It is clear that once a child reaches the age of majority, the question of custody itself is no longer an issue. See Code § 20-124.2 (governing child custody decisions); Miederhoff v. Miederhoff, 38 Va. App. 366, 373 (2002) (holding that once the child reached the age of majority, he "was no longer subject to" parental custody); Turner v. Turner, 3 Va. App. 31, 33 (1986) (noting that a petition for change in custody is rendered moot by the child's eighteenth

[2] An exception to this general principle exists "[i]f the underlying dispute is capable of repetition, yet evading review." Va. Broad. Corp. v. Commonwealth, 286 Va. 239, 248 (2013) (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563 (1980)). The appellants do not contend that this exception applies here.

birthday). However, the appellants do not seek custody of C.B. Instead, they claim that the J&DR custody order continues to negatively impact them despite resolution of the primary issue. The appellants point to the possibilities of adverse effects on their legal relationship with their remaining minor children and of negative income tax consequences.

1. Legal Relationship with Other Children

The appellants claim that the J&DR custody order, if allowed to remain valid, could adversely affect their legal relationship with their other children and, consequently, the circuit court erred when it dismissed the case without reaching the merits.

"[A] case may remain alive based on '[c]ollateral consequences[, which] may be found in the prospect that a judgment will affect future litigation or administrative action.'" Hyosung TNS Inc. v. Int'l Trade Comm'n, 926 F.3d 1353, 1358 (Fed. Cir. 2019) (second and third alterations in original) (quoting 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3533.3.1 (3d ed. 2008)). Despite this principle, if the threat is too "remote and speculative" a possibility, it is not sufficient to keep the case or controversy alive. See Allen v. Likins, 517 F.2d 532, 534-35 (8th Cir. 1975); see also Cilwa v. Commonwealth, No. 161278, at *4 (Va. Dec. 14, 2017) (unpublished order) (acknowledging that "some of the collateral consequences resulting from the judgment of the trial court may be too remote and speculative to defeat a claim of mootness"); Commonwealth v. Harley, 256 Va. 216, 219 (1998) (holding that the Commonwealth's assertion that a Court of Appeals opinion caused harm was speculative and therefore its claim on appeal was moot).

In the instant case, the possibility that the existing J&DR custody order could affect the appellants' legal relationship with their two remaining minor children is pure speculation based on the facts before us. See generally Code § 20-124.2(A) (requiring a court to consider "all the facts" in determining child custody). No evidence in the record suggests that the Department of

Social Services has or will take any action regarding the other two children. Further, a circuit court is required to consider a plethora of factors in assessing child custody. See Code § 20-124.3. That court must then weigh all of the facts in order to reach the ultimate conclusion regarding legal custody. See id. Nothing in the existing record supports the appellants' purely hypothetical claim.

The appellants do not cite any case for the proposition that a parent's relationship with another child is relevant to a custody determination. See generally McEntire v. Redfearn, 217 Va. 313, 316 (1976) (holding that a "prior merits custody determination . . . adverse to the parent" involving the *same* children may be a relevant factor in a subsequent custody determination). Under these circumstances, the mere possibility that the ruling relating to C.B. could have future ramifications on the appellants' custody of their other two children is not an assertion of harm sufficient to prevent this case from becoming moot. See Allen, 517 F.2d at 534-35 (holding that an adverse custodial decision was moot despite the possibility of affecting a future custodial decision).

The appellants rely on Tazewell County School Board v. Brown, 267 Va. 150, for the proposition that if they prevail on appeal, the circuit court could afford them relief other than custody of C.B. In Tazewell, which involved the suspension of a school employee, the Supreme Court held that the employee suffered ongoing adverse effects despite his reinstatement to his position. Id. at 157-58. Those effects were that the "fact[s] . . . and reasons" for the employee's suspension remained in his personnel file. Id. at 157. The Code of Virginia provides a grievance procedure under which school board employees can challenge unfounded information contained in their personnel files. Id. (citing Code § 22.1-295.1). The Supreme Court reasoned that the employee had presented a cognizable claim because the potential relief if he won on appeal was that he could pursue the available grievance procedure. Id. at 157-58. Tazewell differs

significantly from the case at hand. An employee's ability to institute a grievance procedure is substantially more concrete than the alleged relief asserted here of removing the chance of the custody order being weighed against the appellants in any future hypothetical proceedings involving their younger children.

In addition, the appellants argue that this case is analogous to E.C. v. Department of Juvenile Justice, 283 Va. 522, and Paugh v. Henrico Area Mental Health & Developmental Services, 286 Va. 85 (2013). In E.C., the Supreme Court of Virginia held that the petitioner faced collateral consequences from his convictions due in part to the requirement that he register as a sex offender. 283 Va. at 531, 536. In Paugh, the Court similarly concluded that Paugh could appeal his commitment order despite his release from commitment. 286 Va. at 88 n.2. The "particular collateral consequence aggrieving [him was] the effect of a commitment order on his ability to possess firearms." Paugh, 286 Va. at 93 n.2 (Mims, J., concurring). Both of these cases are distinguishable because the collateral consequences were not speculative.

Therefore, the possibility of the custody order negatively affecting the appellants' custody of their other two children is not a collateral consequence that prevents this case from becoming moot. See Allen, 517 F.2d at 534-35.

2. Tax Consequences

The appellants argue that the custody order could have negative income tax consequences by divesting them of their ability to claim C.B. as a dependent and to make use of the earned income credit.[3]

[3] The appellees counter that a separate J&DR order awarded the appellees the ability to claim C.B. as a dependent for tax purposes. However, this order is not in the record. See generally CPM Va., LLC v. MJM Golf, LLC, 291 Va. 73, 85 (2015) (noting that it is generally "improper for a litigant to present to an appellate court evidentiary documents outside the trial court record"). Therefore, we do not consider it in deciding whether the custody case is moot.

In addition, to the extent that the appellants suggest that the custody order had other adverse tax effects on them, they neither make argument nor cite any authority for this

A taxpayer may claim an exemption for a dependent for income tax purposes. 26 U.S.C § 151(c). A child can be a dependent if he or she is a "qualifying child." 26 U.S.C. § 152(a)(1). Similarly, the earned income credit calculation is affected by "qualifying" children. See 26 U.S.C. § 32(b). A qualifying child must live with the taxpayer for more than half of the taxable year. 26 U.S.C. § 152(c)(1). That child must also be younger than nineteen at the end of the calendar year or be a student younger than twenty-four. 26 U.S.C. § 152(c) (providing exceptions to this general rule that are not applicable to this case).

C.B. turned eighteen years old in 2018. She was eligible to be a qualifying child for dependency and earned income purposes that year. However, going forward, any hypothetical change to the custody order could not change with whom she lived in 2018. Since C.B. had to actually reside with the appellants in order for them to claim her as a qualifying child, the appellants' claim of adverse tax consequences stemming from her custody status is also moot. Cf. Fish v. Fish, 939 A.2d 1040, 1044 n.8 (Conn. 2008) (holding that the appeal was not moot because the father "may be entitled to favorable tax and other financial consequences should he prevail").

C.B. could possibly be a qualifying child until the age of twenty-four if she is a student, but after she reached majority at the age of eighteen years, no person has custody of her, and her living arrangements are no longer controlled by the J&DR order. Therefore, we fail to see how the J&DR custody order could possibly impact her status as a qualifying child past age eighteen.

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proposition. See Rule 5A:20(e) (requiring that an appellant's opening brief contain "the argument" and supporting "principles of law and authorities"). Consequently, we do not address the appellants' suggestion of possible further negative tax consequences of the custody order.

For these reasons, we hold that this case is moot. See, e.g., Elliott, 48 Va. App. at 555 (holding that the case was moot because there was no continuing controversy). Consequently, we affirm the circuit court's decision to dismiss the matter.[4]

B. Attorney's Fees

The appellees request an award of appellate attorney's fees and costs.

Pursuant to Rule 5A:30, in specified cases in which attorney's fees are recoverable under Title 20 of the Code of Virginia, the Court of Appeals may award some or all of the fees requested or "remand the issue to the circuit court . . . for a determination thereof." Rule 5A:30(b)(1), (2). Whether to award fees is discretionary. See Rule 5A:30(a), (b). In determining whether to make such an award, we may consider factors including whether the requesting party has prevailed, whether the appeal was "fairly debatable" or frivolous, and whether other reasons exist to support an award of attorney's fees and costs. See Rule 5A:30(a), (b)(3), (b)(4); Brandau v. Brandau, 52 Va. App. 632, 642 (2008); O'Loughlin v. O'Loughlin, 23 Va. App. 690, 695 (1996). In addition, Rule 5A:30(b)(3) specifically directs this Court to "consider all the equities of the case."

Considering all the factors set out in Rule 5A:30 and the applicable case law, we do not require the appellants to pay the appellees' attorney's fees and costs. The question of mootness is not frivolous. Accordingly, we exercise our discretion to decline to make an award of

[4] In light of this holding, which constitutes the best and narrowest ground, we do not reach the appellants' argument that the trial court erred in dismissing the case because it retained jurisdiction past C.B.'s eighteenth birthday. See generally Davis v. Cty. of Fairfax, 282 Va. 23, 30 (2011) (holding that when a *de novo* appeal is taken to a circuit court, that court "obtain[s] appellate jurisdiction over [the] suit derivatively" from the lower court); Cumbo v. Dickenson Cty. Dep't of Soc. Servs., 62 Va. App. 124, 127 n.2 (2013) (noting that appellate courts decide cases on the "best and narrowest" ground (quoting Luginbyhl v. Commonwealth, 48 Va. App. 58, 64 (2006) (*en banc*))).

attorney's fees and costs to the appellees. See, e.g., Wright v. Wright, 61 Va. App. 432, 470 (2013).

III. CONCLUSION

For the foregoing reasons, we hold that the circuit court correctly dismissed the case as moot. Nonetheless, we deny the appellees' request for an award of appellate attorney's fees and costs. We affirm the decision of the circuit court.

Affirmed.

CAIR Coalition
Capital Area Immigrants' Rights

Working to ensure all immigrants are treated with fairness, dignity and respect for their human and civil rights.

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PRACTICE ADVISORY[1]
DEFENDING IMMIGRANTS FACING CONTROLLED SUBSTANCE CHARGES

Prepared by Morgan Macdonald
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July 21, 2015

This practice advisory provides a summary of defense strategies that Virginia criminal defense attorneys can use when representing immigrant defendants facing controlled substance-related charges. As a general matter, defense attorneys should bear in mind that avoiding any controlled substance convictions should remain a very high priority. With one very limited exception involving marijuana, controlled substances convictions constitute mandatory grounds of removal[2] and many such offenses are also considered "aggravated felonies"[3] if they involve sale or distribution. Accordingly, even low-level controlled substance offenses can have severe immigration consequences. The following defense strategies can be used to defend against some of those consequences.

(1) **Seek a deferred disposition under Virginia Code § 18.2-251 with not guilty plea**: For first time offenders, certain deferred dispositions under § 18.2-251 will not be considered "convictions" for immigration purposes[4] and therefore will not give rise to the controlled substance grounds of removability. In order to obtain a disposition under § 18.2-251 that is not a conviction for immigration purposes, the defendant must plead **not guilty and leave it to the judge to find facts justifying a finding of guilt without making any admissions.** Under those circumstances, the U.S. Court of Appeals for the Fourth Circuit has ruled that an immigrant will not have a conviction. *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011). Thus, a § 18.2-251 disposition consistent with *Crespo* will provide a strong immigration defense no matter the controlled substance involved in the offense.

(2) **For immigrants with no prior controlled substance convictions facing a marijuana offense, establish in the record that the offense involved 30 grams or less of marijuana**: The controlled substance ground of deportability (which applies to lawful permanent residents and other lawfully admitted immigrants) has a narrow exception for a **single**

[1] This practice advisory does not constitute legal advice. It is intended for the use of legal professionals and is not meant to serve as a substitute for a lawyer's obligation to conduct independent analysis and provide legal advice tailored to the facts and circumstances of a client's case.
[2] Both the grounds of deportability (applicable to those who have been lawfully admitted) and the grounds of inadmissibility (applicable to those who have not been lawfully admitted) contain very broad controlled substances grounds of removal. *See* 8 U.S.C. § 1227(a)(2)(B) (deportability); 8 U.S.C. § 1182(a)(2)(C) (inadmissibility).
[3] 8 U.S.C. § 1101(a)(43)(B).
[4] 8 U.S.C. § 1101(a)(48)(A).

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offense involving possession of 30 grams or less of marijuana.[5] Thus, when applicable, defense attorneys should make sure that the record clearly states that the offense in question involves 30 grams or less of marijuana. Importantly, an immigration judge can look to *any* facts or documents in the record to establish that an offense did, or did not, meet the 30 grams exception.[6] Although this defense strategy is particularly important for lawful permanent residents, it should be implemented for any immigrant with no prior controlled substance convictions.[7]

(3) **When taking a plea under Virginia Code § 18.2-248.1, plea explicitly to subpart "(a)"**: If a defendant has no option other than to take a plea under § 18.2-248.1 (possession, distribution, sale, etc. of marijuana), make clear in the record, if applicable, that the offense involved only possession and seek a plea to subpart (a), which states that the marijuana involved was less than one-half ounce. Such a plea preserves two immigration defense arguments. First, for immigrants who do not have a prior drug offense, it preserves the argument that the offense falls within the 30 grams exception to the controlled substance ground of deportability (see #2, above). Second, for all immigrants, it preserves the argument that they should not be charged as "drug trafficker" aggravated felons because the offense necessarily involves a small amount of marijuana.[8]

(4) **For other controlled substance offenses, keep the name of the drug out of the record of conviction to preserve a defense under *Mellouli*:** In June 2015, the U.S. Supreme Court decided *Mellouli v. Lynch*[9] and confirmed that when a state's drug schedules criminalize more controlled substances than the federal schedules, state convictions may be overbroad and therefore cannot support the federal controlled substance grounds of removability. As described in Appendix A, Virginia criminalizes certain substances that are not included in the federal drug schedules. Thus, immigration lawyers have strong grounds to argue that, under the "categorical approach," at least some Virginia controlled substance offenses should not make an immigrant removable due to the overbreadth of the drug schedules. However, the degree to which overbreadth provides a defense largely depends on whether Virginia's controlled substance statutes – such as Virginia Code § 18.2-250 – are "divisible." The question of divisibility is very complex and has not been resolved with respect to Virginia's controlled substance statutes. Nevertheless, defense attorneys can adopt three strategies to help preserve *Mellouli*-related defenses for their clients in immigration court:

- First, keep the name of the controlled substance out of the record of conviction because doing so preserves a potential overbreadth argument consistent with *Mellouli*. For this purpose, the "record of conviction" constitutes the statutory definition of the offense, the charging document, the written plea agreement, the transcript of the plea colloquy and any explicit factual finding by the trial judge to which the defendant consented.[10] Thus, for example, if the name of the controlled

[5] 8 U.S.C. § 1227(a)(2)(B)(i).
[6] *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012).
[7] Immigrants who are subject to the grounds of inadmissibility (because they have not been lawfully admitted) also benefit from this strategy because, although there is no 30 gram exception to the grounds of inadmissibility, a first marijuana offense involving 30 grams or less may be "waived" by means of a 212(h) waiver. *See* 8 U.S.C. § 1182(h). A 212(h) waiver may be an important defense for certain inadmissible immigrants facing removal proceedings or seeking to obtain lawful status.
[8] *See Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).
[9] 135 S. Ct. 1980 (2015).
[10] *Shepard v. United States*, 544 U.S. 13 (2005).

substance has already been specified in the indictment, consider asking the prosecutor to strike the name of the controlled substance. Similarly, ensure that the defendant does not specify any particular controlled substance during the plea colloquy or otherwise stipulate to a particular substance.

- Second, as shown by Appendix A, Virginia's Drug Control Act Schedule I, Virginia Code § 54.1-3446, contains substances that are not on the federal drug schedules. Thus, in circumstances where it is necessary to designate a drug schedule, it may best serve the client's interest to designate schedule I (as opposed to schedules II-VI) because doing so preserves an immigration defense argument that the conviction is overbroad with regard to the controlled substance grounds of removability. Of course, the potential immigration benefit from such a plea must be balanced against the higher criminal penalty that results from a plea to a schedule I.

- Third, under the rationale of the Court in *Mellouli*, there may be circumstances when it is advisable for a defendant to plead to possession of paraphernalia under Virginia Code § 54.1-3466. This will be the case when it is impossible to plea to a controlled substance offense without specifying the particular controlled substance in the record. In that circumstance, if it is possible to enter an alternate plea to a paraphernalia offense that does not require specifying the name of the controlled substance, the paraphernalia offense is more likely to preserve a defense under the holding of *Mellouli*.

For any questions about this advisory, please contact Morgan Macdonald at morgan@caircoalition.org. For further information about CAIR Coalition's work on the immigration consequences of crimes, please visit this page.

Appendix A
Schedule I Virginia Controlled Substances Not In Federal Schedules
(as of June 2015)[11]

Salvinorin A

4-methoxymethcathinone (other names: methedrone; bk-PMMA)

3,4-methylenedioxyethcathinone (other name: ethylone)

4-methoxy-alpha-pyrrolidinopropiophenone (other name: MOPPP)

3,4-methylenedioxy-alpha-pyrrolidinopropiophenone (other name: MDPPP)

6,7-dihydro-5H-indeno-(5,6-d)-1,3-dioxol-6-amine (other name: MDAI)

Methoxetamine (other names: MXE, 3-MeO-2-Oxo-PCE)

4-Fluoromethamphetamine (other name: 4-FMA)

4-Fluoroamphetamine (other name: F-4A)

(2-aminopropyl)benzofuran (other name: APB)

(2-aminopropyl)-2,3-dihydrobenzofuran (other name: APDB)

Acetoxydimethyltryptamine (other names: AcO-Psilocin, AcO-DMT, Pscilacetin)

Benocyclidine (other names: BCP, BTCP)

N-1-benzyl-4-piperidyl]N-phenylpropanamide (other name: benzylfentanyl), its optical isomers, salts and salts of isomers

N-1-(2-thienyl)methyl-4-piperidyl]-N-phenylpropanamide (other name: thenylfentanyl), its optical isomers, salts and salts of isomers

[11] This list is meant to be illustrative of Virginia controlled substances currently not included in the federal schedules. However, practitioners should confirm that specific Virginia substances relevant to a defendant's case were not included in the federal schedules during the time periods pertinent to analyzing the immigration implications of a particular criminal charge/conviction. Practitioners should note that state and federal drug schedules change regularly.

Representing Noncitizen Defendants:
A Defense Attorney's Ethical and Constitutional Obligations

by Morgan Macdonald

Defense attorneys representing noncitizens have an obligation to provide accurate advice concerning the immigration consequences of criminal convictions. In order to fulfill this obligation, defense attorneys must be knowledgeable about developments in immigration law, including the new "deferred action" programs announced by President Obama in November 2014.[1] These new programs do not modify the categories of criminal offenses that trigger removal (*i.e.* deportation) under federal immigration law, but maintaining eligibility for deferred action may now rank as one of the highest priorities for noncitizens facing criminal charges. Accordingly, in developing a litigation strategy, a defense attorney should account for the possibility that his client's conviction could lead to severe — and often disproportionate — adverse immigration penalties, such as deportation, and could also make the client ineligible for important immigration benefits, including deferred action.

Litigation Strategies Must Account for Differences between Immigration and Criminal Law

Representing a noncitizen in a criminal case frequently requires a litigation strategy that differs significantly from the strategy used when defending a citizen. In many criminal cases, the most important factor is whether (and for how long) a defendant will be required to serve time in prison. Decreasing jail time is also a high priority for noncitizen defendants but is often overshadowed by a noncitizen's desire to ensure that he does not become deportable or inadmissible[2] as a result of his criminal case. Accordingly, a "good" result in a criminal case for a citizen defendant (*e.g.* a suspended imposition of sentence) could lead to dire consequences for a noncitizen, particularly one who is lawfully present and has US citizen family members.

One notable reason that a criminal case may lead to a disparate outcome for a noncitizen defendant is that the definition of "conviction" under the Immigration and Nationality Act (INA) bears little resemblance to the way that term is defined under state law. For example, under the INA, a noncitizen can have a "conviction" for immigration purposes even after he has successfully completed a pre-plea diversion program or when his record has been otherwise expunged.[3] Moreover, the INA makes no distinction between whether a prison sentence is imposed or suspended — the immigration consequences are usually the same.[4] It is therefore critical for a defense attorney to know when his client will have a "conviction" under the INA and to understand the impact of any related "sentence."

Case Examples — The Importance of Accurate Advice

To illustrate the importance of an attorney providing accurate advice concerning immigration consequences, consider the following examples. First, take the case of Roberto,[5] a 22-year-old lawful permanent resident (LPR)[6] from Honduras who came to the United States as a child with his parents and siblings, all of whom are now LPRs or US citizens. Roberto works two jobs to support himself but struggles with mental illness and alcohol addiction. One evening, Roberto drank too much and could not find his way home so he entered a garage connected to another person's house and fell asleep. Upon finding Roberto in the morning, the homeowner called the police and Roberto was charged with felony burglary under Virginia Code 18.2-91, an offense regularly deemed an "aggravated felony" under the INA if it is accompanied by a prison sentence of one year or more, regardless of whether the sentence is suspended.[7]

DANIEL AND JAMES: SAME OFFENSE, DIFFERENT CONSEQUENCES

Daniel was born in Mexico, came to the U.S. in 2011 and became a lawful permanent resident (green card holder).

James was born in the U.S. He is a U.S. Citizen.

Daniel and James are both college students, each working to support a U.S. citizen child.

Daniel and James don't have enough money for clothes for their children. Out of desperation, they each steal from a store.

Daniel and James are arrested and charged with misdemeanor petit larceny (Va. Code 18.2-96).

Daniel and James go to court:

- They both have a prior DWI conviction on their records.

- Advised by their attorneys, Daniel and James agree to take a plea to a 3 month suspended sentence.

Daniel's attorney is not familiar with immigration law. He fails to tell him that his conviction will be considered a "crime involving moral turpitude" (CIMT) under immigration law, making him deportable.

After Court...

James returns home.

Soon James returns to work and school.

James eventually graduates, gets a full-time job, and can support his child.

Daniel returns home but he is then arrested by immigration officers.

The government initiates deportation proceedings against Daniel because of his CIMT conviction.

He is not entitled to appointed counsel in immigration court.

Daniel is deported, leaving his child fatherless.

If Daniel's lawyer had been familiar with immigration law and advised him appropriately, he would have warned Daniel about immigration consequences and attempted to negotiate a non-CIMT plea for him, such as trespass, so that he could remain in the U.S. and support his U.S. citizen child.

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Although Roberto had no criminal record, his attorney failed to advise him about immigration consequences and recommended that Roberto take a plea to a fourteen-month suspended sentence so he could avoid jail time. Roberto took the plea but was thereafter apprehended by the Department of Homeland Security (DHS) and detained in an immigration facility while DHS initiated removal proceedings against him. Roberto avoided deportation because an immigration judge found that he would be tortured if returned to Honduras, but he spent six months in detention while fighting his case and lost his LPR status, making it much more difficult to maintain employment or receive public benefits.

Had Roberto's attorney given appropriate advice, he would have informed Roberto that any plea to a sentence under 365 days, even one that involved some up-front jail time, would be preferable. Indeed, had Roberto's attorney negotiated a plea of less than 365 days with some jail time imposed, Roberto would not have been considered an aggravated felon under the INA and therefore would not have been placed into removal proceedings.[8]

Or consider the story of Salma, a 45-year-old long-time LPR from Egypt who received a conviction for misdemeanor petit larceny under Virginia Code 18.2-96 in 2007 and, in 2014, faced a second charge of petit larceny. The prosecutor offered Salma a plea deal in which he would seek no jail time in exchange for her guilty plea. Because the prosecutor did not ask for jail, Salma was not entitled to court-appointed counsel.[9] Salma accepted the plea but was unaware that petit larceny is considered a "crime involving moral turpitude" (CIMT) under immigration law and that two convictions for CIMTs render an LPR deportable.[10] If Salma had a knowledgeable defense attorney, he could have helped Salma avoid deportation by negotiating with the prosecutor to craft a non-CIMT plea, such as trespass.

A Defense Attorney's Ethical and Constitutional Obligations When Representing Noncitizen Defendants

As these examples show, accurate advice about immigration consequences is critical for noncitizen defendants. The Supreme Court affirmed this point in 2010, when it held in *Padilla v. Kentucky* that the Sixth Amendment requires defense attorneys to accurately advise their clients about the immigration consequences of a guilty plea.[11] The Court further held that the failure to provide such advice could give rise to an effective assistance of counsel claim.[12] The Court premised its reasoning on the "dramatic" change in immigration laws over the past century that has "expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation" so that now "[t]he drastic measure of deportation or removal" is "virtually inevitable for a vast number of noncitizens convicted of crimes."[13] Accordingly, the Court found that "the importance of accurate legal advice for noncitizens accused of crimes has never been more important."[14]

Although *Padilla* does not give defenders explicit instructions on what to say to their clients, state courts have begun to address the circumstances in which an attorney's advice fails to meet the standard set by the Supreme Court. For example, in September 2014, the Supreme Court of Georgia held that where "the law is clear that deportation is mandatory and statutory discretionary relief is unavailable, an attorney has a duty to accurately advise his client of that fact."[15] Accordingly, the court found that an attorney was deficient for only advising his client that deportation "may" result when the law was clear that his client's burglary conviction constituted an "aggravated felony" under the INA, almost certainly leading to removal proceedings.[16] To date, the Supreme Court of Virginia has not addressed the scope of *Padilla* other than in a decision holding that an ineffective assistance of counsel claim under *Padilla* does not constitute an error of fact sufficient to support a *coram vobis* petition.[17]

Under *Padilla*, a defense attorney must understand his client's immigration and criminal histories and, based on that information, analyze the likely immigration impact of the potential case disposition. The executive action programs announced by President Obama add a further dimension to this analysis. Specifically, the new deferred action programs offer temporary protection from deportation and the ability to obtain employment authorization for millions of immigrants who are currently present in the US without lawful status. Defense attorneys representing noncitizens who may be eligible for deferred action should understand the criminal bars to the new programs so they can advise their clients accordingly.[18]

Given the complexity of immigration law, some states have adopted an institutional structure to ensure that public defenders and appointed counsel are informed about key developments in the law and can consult with

attorneys who have immigration expertise. In Maryland, for example, the Office of the Public Defender has an immigration unit to assist defenders with the representation of noncitizens. In Virginia, there is no similar program. However, at the Capital Area Immigrants' Rights (CAIR) Coalition, we are working to develop a program dedicated to providing resources, training, and consultations to defense attorneys in Virginia concerning the intersection of criminal law and federal immigration law.[19] Such resources are necessary because defense attorneys have an ethical and constitutional obligation to provide accurate advice under *Padilla* and, in doing so, must analyze the impact of a potential conviction on a client's immigration status and eligibility for future immigration benefits.

Endnotes:

1 The executive action programs include an expansion of the Deferred Action for Childhood Arrivals (DACA) program and a new program called Deferred Action for Parental Accountability (DAPA).

2 Grounds of inadmissibility prevent a noncitizen from being admitted to the US, whether traveling abroad or present in the US without having been lawfully admitted. They can also bar certain individuals from obtaining lawful permanent resident status. The grounds of deportability lead to the deportation of a noncitizen who was previously lawfully admitted (such as a lawful permanent resident or asylee).

3 *See* 8 U.S.C. § 1101(a)(48)(A).

4 *Id.* § 1101(a)(48)(B). For example, many "aggravated felonies" under the INA require an offense for which the term of imprisonment is at least one year. *See, e.g.*, *id.* § 1101(a)(43)(G) (theft aggravated felony). For the term of incarceration, it does not make a difference whether the sentence is suspended or imposed.

5 These examples are based on actual cases but names and facts have been changed for brevity and to protect confidentiality.

6 Lawful permanent residents are often referred to as "green card" holders.

7 8 U.S.C. § 1101(a)(43)(G); 8 U.S.C. § 1227(a)(2)(A)(iii).

8 Although Roberto would not have been considered an aggravated felon and rendered deportable, he may have been considered inadmissible if the government took the position that his conviction constituted a "crime involving moral turpitude," thereby preventing him from returning to the US if he left the country. *See* 8 U.S.C. § 1182(a)(2)(A); 8 U.S.C. § 1101(a)(13)(C)(v).

9 The ethics of a prosecutor offering this type of plea arrangement are currently being analyzed by the Virginia State Bar Standing Committee on Legal Ethics. On December 4, 2014, the Committee issued a proposed legal ethics opinion addressing "ethical obligations of a prosecutor who plea bargains with an unrepresented defendant whom the prosecutor knows is a noncitizen subject to deportation under immigration law upon conviction of the offense which is the subject of the plea offer." CAIR Coalition submitted a comment arguing for amendments to the proposed opinion. The comment can be accessed here: http://www.caircoalition.org/2015/01/05/cair-coalition-comments-on-prosecutors-ethical-obligations-in-misdemeanor-cases-that-can-lead-to-deportation/

10 8 U.S.C. § 1227(a)(2)(A)(ii).

11 559 U.S. 356 (2010).

12 *Id.*

13 *Id.* at 360 (internal citations omitted).

14 *Id.* at 364.

15 *Encarnacion v. State*, 763 S.E.2d 463, 466 (Ga. 2014).

16 *Id.* at 464. The Supreme Court of Georgia's ruling is consistent with the language of *Padilla*, where the Court recognized the importance of "preserving [a noncitizen's] right to remain in the United States and preserving the possibility of discretionary relief from removal." 559 U.S. at 357 (internal ellipses and quotations removed) (quoting INS v. St. Cyr, 533 U.S. 289, 323 (2001)).

17 *Commonwealth v. Morris*, 281 Va. 70, 80-81 (2011).

18 For a further discussion of how the immigration executive action affects a noncitizen's case, see *Practice Advisory for Virginia Criminal Defenders: Immigration Executive Action* (December 10, 2014), available at: http://www.caircoalition.org/wp-content/uploads/2014/12/CAIR-Coalition-Practice-Advisory-Immigration-Executive-Action-20141210.pdf.

19 More information about the program can be found at http://www.caircoalition.org/what-we-do/vjp/.

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