PRACTICE ADVISORY FOR IMMIGRATION PRACTICIONERS
Arguing Virginia Code § 18.2-51 Unlawful/Malicious Wounding is Not an Aggravated Felony Crime of Violence Under the Categorical Approach

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****NOTE: Although these arguments may benefit some noncitizens with § 18.2-51 convictions facing removal, immigration attorneys are urged to note that no binding authority on the question of whether § 18.2-51 is an aggravated felony crime of violence exists and Immigration and Customs Enforcement (ICE) continues to charge § 18.2-51 as such. In addition to the aggravated felony grounds discussed in this Practice Advisory, a conviction under § 18.2-51 may trigger numerous other immigration consequences, including potentially the "crime involving moral turpitude" grounds of removability, ICE's enforcement priorities, mandatory detention, and/or bars to benefits for undocumented noncitizens such as deferred action or Temporary Protected Status.****

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Immigration practitioners should be aware that arguments are available that Virginia's unlawful and malicious wounding statute, Virginia Code § 18.2-51 ("§ 18.2-51"), is categorically not an aggravated felony crime of violence for immigration purposes. Under the categorical approach, Virginia law supports a finding that the offense is categorically overbroad with regard to the aggravated felony crime of violence offense provision of the Immigration and Nationality Act ("INA")[1] and that it is indivisible. *See* Exh. A-C.[2]

This practice advisory answers the following questions to provide immigration practitioners with tools to argue that a conviction under § 18.2-51 is categorically not a crime of violence aggravated felony:

I. Who has the burden of proof?

II. What is the categorical approach and how does it apply to Virginia Code § 18.2-51?

***Step 1*:** How do I argue that Virginia Code § 18.2-51 is overbroad?

A. Categorical overbreadth

B. Realistic probability test

C. Unconstitutionality of 18 U.S.C. § 16(b) and the ordinary case test

Step 2: How do I argue that Virginia Code § 18.2-51 is not divisible?

***Step 3*:** What, if anything, can I argue if the immigration adjudicator finds that Virginia Code § 18.2-51 is divisible?

III. When can categorical approach arguments on Virginia Code § 18.2-51 help my client?

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.

[1] 8 U.S.C. 1101(a)(43)(F) ("a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year").

[2] Appended as Exhibits A and B are two recent Arlington Immigration Court decisions finding § 18.2-51 categorically overbroad under 18 U.S.C. § 16. The decision at Exhibit A also found that § 18.2-51 is indivisible. Exhibit C is a recent unpublished decision from the Board of Immigration Appeals finding that § 18.2-51 is categorically overbroad under 18 U.S.C. § 16(a) but remanding to apply further analysis under 18 U.S.C. § 16(b). Although these decisions only address Virginia unlawful wounding and not malicious wounding, which falls under the same statute, immigration advocates argue that the analysis applies to both offenses equally.

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I. Who has the burden of proof?

In general, ICE bears the burden of proving removability by clear and convincing evidence.[3] That means that ICE's evidence must be strong enough to convince the immigration judge to have a firm belief or conviction "without hesitancy" that the allegation of removability is true.[4] In the context of the categorical approach, this burden extends to establishing that § 18.2-51 is categorically an aggravated felony crime of violence and that the statute is divisible.[5] When ICE charges a client with removability on the basis of classifying a § 18.2-51 conviction as an aggravated felony crime of violence, immigration practitioners should be sure to contest the charge at the master calendar hearing pleading stage. Furthermore, practitioners should hold ICE to its burden throughout the removability phase of the proceedings. For example, practitioners should request that ICE brief first in motions to terminate and preserve arguments that ICE has not met its burden when it has failed to do so.

In the relief phase of removal proceedings, the burden of proof shifts to the non-citizen to demonstrate eligibility for relief.[6] However, immigration practitioners should argue that the determination of whether an offense is an aggravated felony is a pure legal question, and an offense that has been found not to constitute an aggravated felony for the purpose of removability cannot ever constitute an aggravated felony in the context of relief. *See* further discussion in Section II, Step 3 and FN 54, below.

II. What is the categorical approach and how does it apply to Virginia Code § 18.2-51?

The "categorical approach" is the legal analysis that the Supreme Court has long held immigration adjudicators must apply to determine whether a state criminal conviction matches – and therefore triggers – one of the federal grounds of removability under the INA.[7] In analyzing § 18.2-51, there are three steps:[8]

First, under the strict categorical approach, the immigration adjudicator considers whether the minimum or "least culpable" conduct[9] (i.e. the most innocent act that can be convicted under the statute) of § 18.2-51's elements matches the elements of the generic offense of removal, an aggravated felony crime of violence defined by cross-reference at 18 U.S.C. § 16 ("§ 16").[10] If the elements of § 18.2-51's minimum conduct match, or are narrower than, the elements of § 16, then § 18.2-51 does trigger that ground of removal and the inquiry ends. However, if the elements of § 18.2-51's minimum conduct do ***not*** match the elements of § 16, the categorical approach dictates that a § 18.2-51 conviction cannot be deemed an aggravated felony crime of violence because § 18.2-51 is overbroad (i.e. punishes more conduct). This stage of the analysis focuses only on the elements; the underlying "brute" facts of the offense are "irrelevant."[11]

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[3] *See* INA § 1229a(c)(3)(A); *Woodby v. INS*, 385 U.S. 276, 277 (1966); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1689, n.9 (2013). Note that the exacting clear and convincing evidence standard requires more than a mere preponderance of the evidence. *See Addington v. Texas*, 441 U.S. 418, 425 (1979); *United States v. Heyer*, 740 F.3d 284, 292 (4th Cir. 2014) (defining clear and convincing evidence as "evidence that proves the facts at issue to be *highly probable*.") (emphasis added) (citation omitted).
[4] *Jimenez v. Daimler Chrysler Corp.*, 269 F.3d 439, 450 (4th Cir. 2001) (citations omitted) (emphasis added).
[5] *See Omargharib v. Holder*, 775 F.3d 192, 199-200 (4th Cir. 2014); *Matter of Chairez-Castrejon*, 26 I&N Dec. 26 I&N Dec. 349, 355 (BIA 2014), *stayed on other grounds by Matter of Chairez-Castrejon*, 26 I&N Dec. 686 (A.G. 2015), *stay lifted by Matter of Chairez-Castrejon*, 26 I&N Dec. 796 (A.G. 2016).
[6] *See* 8 U.S.C. § 1229a(c)(2).
[7] *See, e.g.*, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Moncrieffe*, 133 S. Ct. at 1678; *Kawashima v. Holder*, 132 S. Ct. 1166 (2012); *Nijhawan v. Holder*, 557 U.S. 29 (2009).
[8] *See also* CAIR Coalition Primer Series, "Categorical Approach in a Nutshell," at https://www.caircoalition.org/primers.
[9] *See Moncrieffe*, 133 S. Ct. at 1684.
[10] *See* FN 1.
[11] *Mathis v. United States,* 136 S.Ct. 2243, 2252, 2246 (2015).

Second, subsequent to a finding of overbreadth, whether or not § 18.2-51 is "divisible" is a threshold determination that dictates whether the immigration adjudicator applies the "modified categorical approach." This procedure is *only* permissible if § 18.2-51 is divisible into alternative *elements.* Elements are defined as those "constituent parts" of a crime that a jury must find "unanimously and beyond a reasonable doubt" to convict or that a defendant must necessarily admit when pleading guilty.[12] Elements are distinct from various "means" of committing an offense, which a jury need not agree upon in order to convict.[13] If § 18.2-51 is divisible, the immigration adjudicator can look beyond the elements of the statute of conviction to your client's record of conviction[14] to determine if your client's offense matches § 16. If § 18.2-51 is ***not*** divisible, the immigration adjudicator is *not* permitted to apply the modified categorical approach to examine the record of conviction underlying the offense and must remain limited to the elements; the conviction is ***not*** an aggravated felony crime of violence.

Third, if the adjudicator finds that § 18.2-51 includes alternative elements and therefore is divisible, only a limited set of documents may be examined in the record of conviction, consisting of 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.[15] These documents may only be examined to determine "which element played a part in the defendant's conviction," they may not be consulted in order to determine facts or means irrelevant to the modified categorical analysis.[16]

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Step 1: How do I argue that Virginia Code § 18.2-51 is overbroad?

A. Categorical Overbreadth

The minimum conduct punished by § 18.2-51 is causing bodily injury to another person "*by any means*."[17] Strong arguments are available that the elements of § 18.2-51's minimum conduct are categorically overbroad as compared to the elements of § 16, which has two subsections defining a crime of violence. Both § 16(a) and § 16 (b)[18] require the element of "physical force," which the Supreme Court has defined to require a substantial level of "actively employed physical," "violent" force.[19] By contrast, causing

[12] *Id.* at 2245, 2248; *Descamps*, 133 S.Ct. at 2283; *Omargharib*, 775 F.3d 192, 198-99.
[13] *See id*.; see also *Mathis,* 136 S.Ct. at 2256 (referring to a statutory list of "illustrative examples" as only including means).
[14] *Shepard v. United States*, 544 U.S. 13, 26 (2005).
[15] *Id.*
[16] *Descamps*, 133 S.Ct. at 2283; *see also Mathis,* 136 S.Ct. at 2256-57.
[17] Va. Code. § 18.2-51.
[18] While § 16(a) and § 16(b) differ according to the actual, attempted, or threatened use versus the substantial risk of the use of physical force, both subsections explicitly center on – and certainly require – the use of actual physical force. *See Leocal*, *v. Ashcroft*, 543 U.S. 1, 9-11 (2004) (clarifying that the "substantial risk" in § 16(b) "contains the same formulation we found to be determinative in §16(a): the use of physical force against the person or property of another. Accordingly, we must give the language in § 16(b) an identical construction . . . .").
[19] The Supreme Court, Fourth Circuit Court of Appeals ("Fourth Circuit"), and Board of Immigration Appeals have consistently held that "physical force" in the immigration context means "violent force." *See, e.g., Johnson v. United States,* 559 U.S. 133, 134-40 (2010); *Leocal*, 543 U.S. at 9-11; *United States v. Gardner*, No. 14-4533, slip op. 6 (4th Cir. May 18, 2016); *United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2012); *Garcia v. Gonzales*, 455 F.3d 465, 468-69 (4th Cir. 2006); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 446-47 (4th Cir. 2005); *Matter of Guzman-Polanco* I, 26 I&N Dec. 713 (BIA 2016) (withdrawing from *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002)); *Matter of Tavarez Peralta*, 26 I&N Dec. 171, 177-78 (BIA 2013); *Matter of U. Singh*, 25 I&N Dec. 670, 676 (BIA 2012); *Matter of Velasquez*, 25 I&N Dec. 278, 282-83 (BIA 2010); *Matter of Sweetser,* 22 I&N Dec. 709, 716 (BIA 1999).

injury by any means under § 18.2-51 includes actions that involve no force whatsoever, such as poisoning.[20]

Virginia Code § 18.2-51	*18 U.S.C. § 16*
"If any person maliciously shoot, stab, cut, or wound any person or ***by any means cause him bodily injury***, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony." (emphasis added).	"(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." (emphasis added).

DHS has previously argued that a lower standard suffices for § 16's "physical force" element, for example by misconstruing the law to argue that § 18.2-51's elements regarding intent to injure and the existence of injury *alone* constitute physical force, even when the element of physical force is not present. The Board has rejected this argument.[21] DHS has also inappropriately relied on a case decided about the use of force in the context of an entirely different statute that has a broader definition of force that includes common law minimal offensive touching, *United States v. Castleman.*[22] However, the Board has found *Castleman* inapposite, as *Castleman* explicitly made clear this broader definition of force is inapplicable to § 16 and that in the immigration context, "physical force" does not encompass minimal offensive touching.[23]

Virginia courts have held that causing injury by any means is enough to sustain a conviction under § 18.2-51.[24] Accordingly, § 18.2-51 does not have an element of physical force. Therefore, the statute sweeps

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[20] *See* Exh. A-C. Board law holds circuit court law controls whether statutes that punish poisoning necessarily require an element of the use of physical force as required under § 16. *Matter of Guzman-Polanco II*, 26 I&N Dec. 806, 807-08 (BIA 2016). The Board has found that the Fourth Circuit law directly holds that poisoning does not constitute the use of physical force. *Id.* at 807 (citing to *Torres-Miguel*); Exh. C at 2 (citing to *Torres-Miguel*). Extensive case law establishes that poisoning does not involve the use of physical force. *See, e.g,. Torres-Miguel*, 701 F.3d at 168-69 (discussing poisoning as an example of how "a defendant can violate statutes [that require a result of death or great bodily injury] by threatening to poison another, which involves no use or threatened use of force."); *Matter of Guzman-Polanco* I, 26 I&N Dec. at 716-18, n. 7 (explicitly finding that poisoning is an example of an act that does *not* involve the use of violent force, citing to *Rummel v. Estelle*, 445 U.S. 263, 282 n.27 (1980), "Caesar's death at the hands of Brutus and his fellow conspirators was undoubtedly violent; the death of Hamlet's father at the hands of his brother, Claudius, by poison, was not."). DHS has previously argued poison does require force, relying on *United States v. De La Fuente*, 353 F.3d 766 (9th Cir. 2003) and *Vargas-Sarmiento v. U.S. Dep't of Justice*, 448 F.3d 159, 174 (2d Cir. 2006). However, these decisions are not binding in the Fourth Circuit, predate *Descamps,* and are highly distinguishable.

[21] *See, e.g., Matter of Guzman-Polanco* I, 26 I&N Dec. at 717-18 (finding statute that requires intentional infliction of bodily injury does not have an element of physical force and withdrawing from *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002)), aff'd *Matter of Guzman-Polanco II*, 26 I&N Dec. at 807-08; Exh. C at 2, n.1.

[22] 134 S.Ct. 1405 (2014). *See* Exh. C at 2, n. 1.

[23] *See* Exh. C at 2, n. 1. *Castleman* was distinctly decided in the 18 U.S.C. § 922(g)(9) misdemeanor crime of domestic violence sentencing enhancement provision context. *See* 134 S.Ct. at 1411-13, n.4 (explicitly declining to extend reasoning beyond 18 U.S.C. § 922(g)(9) to statutes that do not adopt the common law definition of force including § 16 and the ACCA and stating "Our view…does not extend to a provision of the Immigration and Nationality Act [that applies the § 16 definition of a crime of violence]"); *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 715 (BIA 2016) (explicitly distinguishing *Castleman* from the immigration context); *see also Johnson*, 559 U.S. at 139-40; *Gardner*, No. 14-4533, slip op. 6; *United States v. Royal*, 731 F.3d 333 (4th Cir. 2013); *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013) *cert. denied*, 134 S. Ct. 1326 (2014); *Velasquez*, 25 I&N Dec. at 278.

[24] *See Long v. Commonwealth*, 8 Va. App. 194, 197 (1989) ("the statute, by its explicit terms, *does not contain a limitation upon the means employed*"); *Dawkins v. Commonwealth*, 186 Va. 55, 63 (1947) (finding that the "test of the offense of maliciously or unlawfully causing bodily injury is the *intent* with which the result is accomplished *rather than the nature of the means*…"); *United States v. Lopez-Reyes*, 945 F. Supp. 2d 658 (E.D. Va. 2013)("18.2-51, by its express terms, is not limited to conduct that necessarily involves the use or threatened use of physical force…*§ 18.2–51, does not, categorically,* have 'as an element the use, attempted use, or threatened use of *physical force* against the person of another").

much more broadly than the aggravated felony crime of violence ground at § 16(a) and § 16 (b) and is categorically overbroad.

B. Realistic Probability Test

Courts sometimes apply a "realistic probability" test to determine the likelihood of prosecution for conduct that violates the state statute but falls outside of the generic crime to ensure that the application of the statute is based on reality rather than "legal imagination."[25] However, immigration practitioners should argue that the realistic probability test is unnecessary for § 18.2-51 because the facially overbroad text of the statute and Virginia case law interpreting it expressly criminalize non-forceful conduct.[26]

Nevertheless, voluminous evidence exists that there is a "realistic probability" that the Commonwealth of Virginia prosecutes and convicts defendants for non-forceful conduct under § 18.2-51:

- Sample indictments of defendants charged under § 18.2-51 for poisoning, *see, e.g.,* Exh. D,[27] and indictments and state case law prosecuting and convicting for child neglect, *see, e.g.,* Exh. E.[28]
- State case law prosecuting facial disfigurement by creams.[29]
- Case law finding poisoning is conduct that violates § 18.2-51 but does not involve force.[30]

C. Unconstitutionality of 18 U.S.C. § 16(b) and the Ordinary Case Test

The constitutionality of § 16(b) and the legal test that should be used to determine whether an offense is a categorical match to the provision are both hotly litigated across the country. Neither question is resolved by the Fourth Circuit. Accordingly, it is important for practitioners to argue that § 18.2-51 is not a match for 16(b) under the previously used standard – "the ordinary case test", and to preserve arguments that both the statute and standard are no longer valid.

First, immigration practitioners should argue that a finding under the second subsection of § 16, the § 16(b) provision that requires a substantial risk of force, cannot lawfully support removal because § 16(b) is unconstitutionally void for vagueness. In 2015, the Supreme Court held in *Johnson v. United States*[31] that the Armed Career and Criminal Act (ACCA) residual clause is unconstitutionally void for vagueness. The ACCA residual clause's unconstitutional "serious potential risk" language is nearly identical to § 16(b)'s "substantial risk" language. The statutes suffer from the same constitutional defects. Indeed, subsequent to

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[25] *Moncrieffe*, 133 S. Ct. at 1685; *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007); *Matter of Mendoza Osorio*, 26 I&N Dec. 703 (BIA 2016); *Matter of Ferreira*, 26 I&N Dec. 415, 420-21 (BIA 2014).

[26] Supreme Court and Fourth Circuit law call into question the need for the realistic probability test when the statute is clear. *See Mellouli*, 135 S. Ct. at 1986; *United States v. Aparicio-Soria*, 740 F.3d 152, 157-58 (4th Cir. 2014); *Torres-Miguel*, 701 F.3d at 170-71.

[27] Case of Cathy Turpin, Radford City Circuit Court (2013) (malicious wounding prosecution for poisoning); Case of Daniel Riase, Hampton County Circuit Court (2007) (aggravated malicious wounding conviction for poisoning pursuant to Virginia Code § 18.2-51.2, the aggravated malicious wounding statute, which includes identical language as § 18.2-51 regarding the *actus reus* element); *see also* FN 20 (case law establishing poisoning does not require force).

[28] Case of Brian and Shannon Gore, Gloucester County Circuit Court (2013) (aggravated malicious wounding prosecution for child neglect); *see also Campbell v. Com.*, 12 Va. App. 476, 482-83 (1991); *Christian v. Com.*, 221 Va. 1078, 1081 (1981). The Board of Immigration Appeals has held criminally negligent child abuse does not inherently require a substantial risk of the use of force and is not a crime of violence under § 16(b). *Sweetser,* 22 I&N Dec. at 716.

[29] *Banovitch v. Com.*, 196 Va. 210, 216 (1954) (prosecuting a doctor for disfiguring his patient's face with chemical "cancer treatments").

[30] *See, e.g., United States v. Lopez-Reyes*, 945 F. Supp. 2d 658 (E.D. Va. 2013).

[31] 135 S. Ct. 2551 (2015).

Johnson, at least four Circuit Courts of Appeals and a United States District Court within the Fourth Circuit have all found that § 16(b) is unconstitutionally void for vagueness for similar reasons.[32]

18 U.S.C. § 16(b)	*The Armed Career Criminal Act (ACCA) residual clause*
"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." (emphasis added).	"is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a **serious potential risk** of physical injury to another." (emphasis added).

Traditionally, courts have applied a different standard than that used to analyze other statutes under the categorical approach to analyze whether a state offense triggers the ACCA residual clause or § 16(b): the ordinary case test. In *Johnson*, the Supreme Court abrogated the basis for the ordinary case test.[33]

Immigration practitioners should argue that, at a minimum, *Johnson* unquestionably abrogates the ordinary case test as applied to § 16(b).[34] Therefore, the proper test to analyze § 18.2-51 under § 16(b) pursuant to the categorical approach is the minimum conduct test[35] to: (1) assess what elements causing injury to by any means necessarily involves and (2) determine whether causing injury by any means, for example poisoning, involves a substantial risk of physical force being used against another person. *See* Exh. A at 4-5; Exh. B at 5. There is a strong argument that causing injury by any means does not match § 16(b) because § 18.2-51 criminalizes whole categories of conduct that involve no risk of force whatsoever and certainly no *substantial* risk of force, as required by § 16(b).

However, in the Fourth Circuit there is no binding precedent holding that § 16(b) and/or the ordinary case test are unconstitutional; Immigration Judges continue to analyze § 18.2-51 under § 16(b).[36] Accordingly, in the alternative, advocates should argue how § 18.2-51 does not satisfy § 16(b) even under the ordinary case test: with no requirement of physical force and significant proof of Virginia ordinarily prosecuting defendants for conduct that falls under the statute but involves no force or risk of force whatsoever, the ordinary case of § 18.2-51 does not rise to the level of risk that is *substantial* as necessary to trigger § 16(b).

***Step 2*: How do I argue that Virginia Code § 18.2-51 is not divisible?**

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[32] *Bashkim Shuti v. Lynch*, No. 15-3835 (6th Cir. July 7, 2016); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015); *Fedor Golicov v. Lynch*, No. 16-9530 (10th Cir. Sept. 19, 2016); *United States v. Edmundson*, No. CR PWG-13-15, 2015 WL 9582736 (D. Md. Dec. 30, 2015); *but see United States v. Gonzales-Longoria*, --- F.3d --- (5th Cir. Aug. 5, 2016).

[33] 135 S. Ct. at 2557-63. The basis for the Board's application of the ordinary case test to § 16(b) in *Matter of Francisco-Alonzo*, 26 I&N Dec. 594 (BIA 2015), *James v. United States*, 550 U.S. 192 (2007), was expressly overruled by the subsequent Supreme Court decision in *Johnson.* Because *James* is no longer good law, there is no longer any legal grounding for *Matter of Francisco-Alonzo* and the ordinary case test.

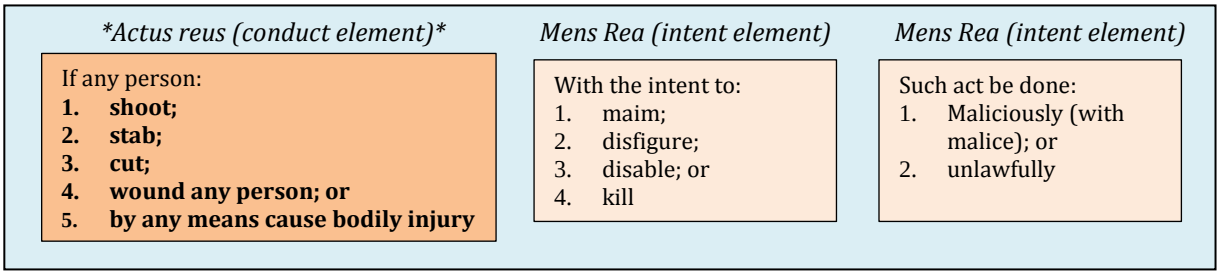
[34] 135 S. Ct. at 2557-63; *see* FN 29.

[35] *See* FN 9; *see also Johnson,* 135 S.Ct. at 2562 (reaffirming the use of the categorical approach when analyzing risk-based definitions).

[36] *See* Exh. C (remanding to the Immigration Court to apply the ordinary case test). DHS and the Immigration Courts have cited to cases including *Matter of Fitzpatrick*, 26 I&N Dec. 559, 562 (BIA 2015); *Matter of G-K-*, 26 I&N Dec. 88, 96-97 (BIA 2013); *Matter of Sanchez-Lopez*, 26 I&N Dec. 71, 74 n.3 (BIA 2012) for the proposition that Immigration Courts do not have the authority to make constitutional rulings. However, an immigration advocate may argue that the Immigration Court has the authority to apply and consider the constitutionality of a statute under Supreme Court or Circuit Court precedent or that the Court can find § 16(b) facially vague as a matter of statutory construction to avoid serious constitutional questions. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 688-702 (2001); *Clark v. Martinez,* 543 U.S. 371 (2005).

Virginia law supports a finding that § 18.2-51 is an indivisible statute, meaning that immigration adjudicators cannot apply the modified categorical approach to review the record of conviction. *See* Exh. A at 5-6.[37] Still, there is no binding authority on the question of whether § 18.2-51 is divisible into alternative elements and immigration adjudicators have previously found the statute divisible. Exh. B at 3.[38]

Particularly in light of *Mathis v. United States*,[39] there are strong arguments available that § 18.2-51 is not divisible. Because § 18.2-51 is overbroad with regard to the only element that encompasses force, the *actus reus* conduct element, the *actus reus* is the only element that is relevant to the divisibility analysis. The *actus reus* element is singular and includes five means of conduct rather than five alternative elements: (1) shoot, (2) stab, (3) cut, (4) wound any person or (5) by any means cause bodily injury.



To analyze whether the five alternative methods of § 18.2-51's *actus reus* are separate elements or simply means, the Supreme Court in *Mathis* instructed courts to look at three particular sources in consecutive order, reaching only beyond the first source if it does not "definitively answer[] the question."[40] ***First***, *Mathis* clarified that the primary and most important guide as to whether an offense is divisible is authoritative sources of state law.[41] ***Second***, the statute "on its face may resolve the issue."[42] ***Third***, only in the case in which state law "fails to provide clear answers" and "does not resolve the means-or-element question" does the Court allow adjudicators to "peek" at your client's record of conviction – as a last resort – with the sole purpose to determine if the record documents reflect whether items listed in § 18.2-51 are elements that must be chosen between to convict or instead just means.[43]

Under *Mathis*, numerous sources of Virginia law affirm that § 18.2-51's *actus reus* element is one, single indivisible element and illustrate that Virginia courts do not require juries to determine unanimously and beyond a reasonable doubt which form of the *actus reus* was committed to convict. Rather than have a requirement to parse between and decide which one of the five forms of conduct was involved, a conviction under § 18.2-51 only requires that the *actus reus* conduct element as a whole was somehow met.

1. *State law:*

[37] An Arlington Immigration Court decision found on at least one occasion that § 18.2-51 is indivisible.
[38] Relying on *Johnson v. Commonwealth*, 35 S.E.2d 594, 596-97 (Va. 1945) and *Dawkins v. Commonwealth*, 41 S.E.2d 500, 505 (Va. 1947), Immigration Judges have previously reasoned that § 18.2-51 is divisible because it can be divided up into four distinct offenses: 1) maliciously wounding; 2) maliciously causing bodily injury; 3) unlawful wounding; and 4) unlawfully causing bodily injury. However, practitioners should argue that this reasoning wrongly focuses on the statute's *mens rea* element rather than the relevant *actus reus* element.
[39] 136 S.Ct. 2243 (2016).
[40] *Mathis*, 136 S.Ct. at 2256.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 2256-57, n. 7.

A wide range of Virginia case law confirms that § 18.2-51's *actus reus* element is not divisible.[44] In addition, the Virginia cases that prior Immigration Court decisions have relied on to find that § 18.2-51 is divisible are distinguishable as they do not state whether juries must decide unanimously between alternative forms of *actus reus* conduct to convict and only demonstrate the statute's general divisibility into four distinct categories based on the *mens rea* element, irrespective of the *actus reus* element.[45] The Supreme Court and Fourth Circuit explicitly reject this approach to divisibility, requiring that generally distinct offenses must have actual alternative *elements* to establish a statute's divisibility.[46] Furthermore, at least three sets of Virginia jury instructions, *see* Exh. F-H,[47] and various Virginia sample indictments, *see* Exh. I, [48] affirm the Commonwealth's consistent and straightforward understanding of § 18.2-51's *actus reus* element as a singular element.

2. *The text of the § 18.2-51 statute* on its face:

The *Mathis* Court stated: "if statutory alternatives carry different punishments, then (. . .) they must be elements."[49] Section 18.2-51's punishment varies only depending on whether the act was malicious or unlawful, not based on the type of *actus reus* conduct, confirming that the five forms are not elements.[50]

3. *The record of conviction as a last resort:*

Immigration practitioners should argue that there is no need for the adjudicator to reach the last resort of peeking at the record of conviction because steps 1-2 under *Mathis*, Virginia legal authority, and the plain text of the statute already establish § 18.2-51 is indivisible.[51] However, if your client's record of conviction merely restates the statute of conviction and/or does not reference one alternative *actus reus* form of conduct to the exclusion of others, an argument can be made that your client's record of conviction

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[44] *See, e.g., Long*, 8 Va. App. at 197 (holding the Commonwealth is not obligated to offer specific proof of the means used to commit the offense so long as there is proof of intent: "the statute, by its explicit terms, does not contain a limitation upon the means employed"); *Campbell*, 12 Va. App. at 482-83; *Crawley v. Com.*, 25 Va. App. 768, 772 (1997) (stating the five *actus reus* forms as part of one single element: "the Commonwealth must prove that the accused: (1) intended to "maliciously shoot, stab, cut or wound any person or by any means cause bodily injury with the intent to maim, disfigure, disable or kill"; and (2) committed a direct but ineffectual act toward this purpose."); *Cuffee v. Com.*, 61 Va. App. 353, 369 (2013); *Peck v. Com.,* No. 1972-02-1, 2003 WL 22658166, at *1 (Va. Ct. App. Nov. 12, 2003); *Smith v. Com.,* No. 3001-99-1, 2001 WL 242216, at *2 (Va. Ct. App. Mar. 13, 2001); *Robertson v. Commonwealth*, 525 S.E.2d 640, 645 (Va. Ct. App. 2000).

[45] *See* FN 38. *See also Johnson*, 184 Va. at 415, 418 (concurring opinion stating courts do not bifurcate the *actus reus*: "the offense of maliciously causing a person bodily injury by any means is cognate with the offense of shooting, stabbing, cutting, or wounding a person. The offenses, although caused by separate *means*, are of the same degree and the punishment is the same. The distinction between them is so indistinct that they are embraced within the same statute.") (emphasis added).

[46] *See, e.g., Mathis*, 136 S.Ct. at 2251-57; *Vinson,* 805 F.3d at 123; *Cabrera-Umanzor*, 728 F.3d at 351-53; *see also* Immigrant Defense Project and National Immigration Project of the National Lawyers Guild, "*Practice Alert: In Mathis v. United States, Supreme Court Reaffirms and Bolsters Strict Application of the Categorical Approach,"* at http://immdefense.org/wp-content/uploads/2016/07/MATHIS-PRACTICE-ALERT-FINAL.pdf

[47] Virginia Model Jury Instruction No. G37.100 (stating § 18.2-51 as having only three single elements that require jury unanimity, with the various forms of *actus reus* as only one, uniform element); Va. Prac. Jury Instructions § 83:3 (listing the *actus reus* as one element, not even specifying the five alternative means); Office of the Commonwealth's Attorney Lynchburg, Virginia Instruction No. 24.3 (listing three distinct elements, with the first element listing the actus rues as"[wounded; caused bodily injury by any means to]").

[48] *Com. v. James Arthur Miller*, 2012 WL 10739222 (Va. Cir. Ct.); *Com. v. Tenetia Turner*, 2012 WL 8304101 (Va. Cir. Ct.); *Com. v. Miguel Ronnell Cuffee*, 2012 WL 8304106 (Va. Cir. Ct.); *Com. v. Derrick Clark Goodwin*, 2009 WL 7047815 (Va. Cir. Ct.); *Com. v. Ray Daniel Freeman*, 1998 WL 35426258 (Va. Cir. Ct.).

[49] 136 S.Ct. at 2256-57.

[50] Va. Code Ann. § 18.2-51; *compare* Va. Code Ann. § 18.2-51 *with* Va. Code Ann. § 18.2-53 (providing an enhanced punishment for those who use a firearm while committing unlawful wounding).

[51] *Mathis* is unequivocal that a record of conviction that does not speak plainly to the elements of the offense cannot be relied on to establish the statute is divisible. 136 S.Ct. at 2256-57, n. 7; *see also id*. at 2253, n. 7 (emphasizing why the record of conviction cannot be relied upon to determine the specific facts of an offense).

reflects that the types of *actus reus* conduct under § 18.2-51 are means, not elements. Additionally, Virginia jury instructions and sample indictments from other cases may also be offered under this third step as examples of the actual practice of Virginia courts in convicting defendants. *See* Exh. F-I.

***Step 3*: What can I argue if the immigration adjudicator finds that Virginia Code § 18.2-51 is divisible?**

If the adjudicator does find that § 18.2-51 is divisible as to the type of conduct, consider record-based arguments arguing that the *Shepard* documents in the record of conviction[52] do not permit a finding of removability, including:

- If the record of conviction states that the conduct involved causing injury by any means (the minimum conduct, which is categorically overbroad):
  → Even under a finding that § 18.2-51 is divisible, the record of conviction only reveals overbroad conduct. Thus, the conviction cannot constitute an aggravated felony.
- If the record of conviction is "clean" (i.e. does not specify the type of conduct that was involved because it only repeats the text of § 18.2-51 in its entirety or states all five of the types of conduct, including causing injury "by any means"):
  → Even under a finding that § 18.2-51 is divisible, the record of conviction does not reveal whether force was involved and therefore cannot support removability on the basis of the aggravated felony grounds.[53]
  → In the relief eligibility context, ICE may argue that within the Fourth Circuit this type of ambiguous record is insufficient to establish that an offense is not an aggravated felony. However, advocates should argue that the determination of whether an offense is or is not an aggravated felony is a legal determination not subject to burden shifting.[54]
- If the record of conviction specifies only conduct that involves physical force (i.e. states that the conduct involved shooting, stabbing, cutting, or wounding another person but does not include the language for causing injury "by any means"), arguments must focus on what types of criminal documents may or may not be examined and for what purpose.
  - First, any documents served by ICE that are not *Shepard* documents[55] are not part of the record of conviction and must not be examined by the adjudicator. Relying on Virginia criminal procedure, practitioners should challenge the introduction into evidence of any document that is arguably not a *Shepard* document and argue that it is not part of the record of conviction.
  - Second, *Shepard* documents may only be examined for the specific purpose of determining if one of the five types of conduct involving physical force "played a part in

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[52] *See* FN 14. In Virginia, the record of conviction includes: (1) the charging document – in General District Court, the warrant or summons, and in Circuit Court, the indictment; (2) the written plea agreement; (3) the transcript of the plea colloquy; and (4) any explicit factual finding by the trial judge to which the defendant consented such as sentencing documents. Notably, in Virginia, criminal complaints, pre-sentence reports, police reports, proffers of evidence, and motions are *not* part of the record of conviction.
[53] *See Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011).
[54] The Fourth Circuit held in *Salem*, 647 F.3d at 116, that an inconclusive record is insufficient to demonstrate that an offense is not an aggravated felony for the purpose of demonstrating eligibility for relief. The validity of this holding is brought into question by *Mathis v. United States*, No. 15–6092 (U.S. June 23, 2016) and *Moncrieffe*, 133 S.Ct. at 1678. Both *Mathis* and *Moncrieffe* clarify that the determination of whether an offense constitutes an aggravated felony is a question of law, not of fact. An offense that would not be considered an aggravated felony at the removability phase of a case, therefore, should not be considered an aggravated felony in the relief context. Immigration attorneys are urged to argue that after *Moncrieffe* and *Mathis*, therefore, *Salem* is bad law. *See* American Immigration Council Legal Action Center, Immigrant Defense Project, and National Immigration Project of the National Lawyers Guild, "*Moncrieffe v. Holder: Implications for Drug Charges and Other Issues Involving the Categorical Approach,"* at p. 7-8, https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/ 2013_02May_moncrieffe-holder.pdf.; *Mathis*, slip op.*; Moncrieffe*, 133 S.Ct. at 1678.
[55] *See* FN 14, 16.

the defendant's conviction."[56] Therefore, a practitioner should argue that any facts in the record relating to other events besides the *actus reus* conduct element are irrelevant. For example, whether the record specifies if the crime was committed "maliciously" or by "maiming" would relate to the *mens rea* intent element, which is not at issue.

* * * *

For the above reasons, there are strong arguments available that irrespective of the underlying facts of the crime, § 18.2-51 cannot be an aggravated felony crime of violence offense as defined in the INA because under the categorical approach the statute is categorically overbroad and not divisible.[57]

III. When can categorical approach arguments on Virginia Code § 18.2-51 help my client?

Depending on the circumstances of your client's case, successfully arguing that § 18.2-51 is not an aggravated felony crime of violence offense may allow for termination of removal proceedings, preservation of eligibility for relief from removal, or transfer from administrative removal proceedings to Immigration Court. Accordingly, there are three procedural avenues to put forward these arguments:

- <u>If your client has lawful status and no other convictions that allow him or her to be charged by ICE as removable besides an § 18.2-51 conviction charged as an aggravated felony:</u>
  - → At master calendar hearing pleadings, deny the aggravated felony crime of violence charge of removability and orally move to terminate removal proceedings.
  - → Request a separate briefing schedule on the issue of removability, with ICE's deadline first because it bears the burden of proof to establish removability.
  - → In legal brief, argue categorical overbreadth, indivisibility, and if applicable, that the record of conviction does not support a finding of removability.

- <u>If your client is otherwise removable, eligible for relief from removal, and has no other convictions that potentially bar him or her from that relief besides an § 18.2-51 conviction charged as an aggravated felony:</u>
  - → At master calendar hearing pleadings, deny aggravated felony crime of violence charge of removability and orally move to establish relief eligibility.
  - → Request a separate briefing schedule on the issue of relief eligibility.
  - → In legal brief, argue categorical overbreadth, indivisibility, and if applicable, that the record of conviction does not support a finding that it is an aggravated felony.[58]

- <u>If your client is not a Lawful Permanent Resident, is facing administrative removal proceedings[59] due to having an § 18.2-51 conviction charged as an aggravated felony, and has no other convictions charged by ICE as aggravated felonies:</u>

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[56] *See* FN 16.

[57] Advocates should also argue that the criminal rule of lenity demands that ambiguity must be resolved in favor of a client, *see Leocal*, 543 U.S. at n. 8, and that there is a longstanding presumption of construing any ambiguities in immigration statutes against deportation. *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

[58] *See* Section I; Section II Step 3; FN 5; FN 55.

[59] INA § 238(b). If ICE believes that a non-Lawful Permanent Resident has been convicted of an aggravated felony, ICE may place him or her into an expedited deportation proceeding called administrative removal in which there is no right to go before an Immigration Judge. Instead, an ICE official determines if the offense is an aggravated felony. If the government officer thinks there is not enough proof to deport the person based on the evidence, the officer will put the person in regular deportation proceedings (called § 240 proceedings), and the person will get a Notice to Appear to see an Immigration Judge.

→ Within 10 days of when ICE submits Form I-851 (or 13 days if mailed), respond in writing with categorical approach arguments challenging the charge of § 18.2-51 as an aggravated felony including overbreadth, indivisibility, and if applicable, that the record of conviction does not support a finding of removability.[60]

* * * *

For any questions about this practice advisory, please contact Adina Appelbaum at adina@caircoalition.org.

For additional reference guides and practice advisories regarding the immigration consequences of Virginia offenses, visit our website at https://www.caircoalition.org/legal-resources.

INDEX OF EXHIBITS

[60] *See* FN 5.

TAB	EXHIBIT
A	Immigration Judge Rodger C. Harris' Decision on August 3, 2016 Holding Virginia Code § 18.2-51 is Categorically Not an Aggravated Felony Crime of Violence Under 18 U.S.C. § 16(a) or § 16(b) and that it is Indivisible
B	Immigration Judge Thomas G. Snow's Decision on December 18, 2015 Holding Virginia Code § 18.2-51 is Categorically Not an Aggravated Felony Crime of Violence Under 18 U.S.C. § 16(a) or § 16(b)
C	Unpublished Board of Immigration Appeals Decision on August 23, 2015 Holding Virginia Code § 18.2-51 is Categorically Not an Aggravated Felony Crime of Violence Under 18 U.S.C. § 16(a) and Remanding for the Immigration Judge to Apply the Ordinary Case Test Under § 16(b)
D	Case of Daniel Riase (Aggravated Malicious Wounding Conviction for Poisoning; Hampton County Circuit Court, 2007); Case of Cathy Turpin (Malicious Wounding Prosecution for Poisoning; Radford City Circuit Court, 2013)
E	Case of Brian and Shannon Gore (Aggravated Malicious Wounding Prosecution for Child Neglect; Gloucester County Circuit Court, 2013)
F	Virginia Model Jury Instructions – Criminal Instruction No. G37.100
G	Virginia Practice Jury Instruction § 84:4 Malicious wounding as an offense
H	Office of Commonwealth's Attorney Lynchburg, Virginia Instruction No. 24.3 Malicious Wounding and Lesser Included Offenses – Combined Instruction
I	Sample Indictments under § 18.2-51

EXHIBIT A

Immigration Judge Rodger C. Harris' Decision on August 3, 2016
Holding Virginia Code § 18.2-51 is Categorically Not an Aggravated Felony Crime of Violence
Under 18 U.S.C. § 16(a) or § 16(b) and that it is Indivisible

PRACTICE ADVISORY FOR IMMIGRATION PRACTICIONERS
Arguing Virginia Code § 18.2-51 Unlawful/Malicious Wounding is Not an Aggravated Felony
Crime of Violence Under the Categorical Approach

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1901 S. BELL STREET, SUITE 200
ARLINGTON, VA 22202

CAIR Coalition
Appelbaum, Adina
1612 K Street NW
Suite 204
Washington, DC 20006

IN THE MATTER OF [redacted] FILE A [redacted] DATE: Aug 3, 2016

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

+ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
1901 S. BELL STREET, SUITE 200
ARLINGTON, VA 22202

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT

FF

CC: ELIZABETH DEWAR, ESQ.
1901 S. BELL STREET
ARLINGTON, VA, 22202

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
1901 South Bell Street, Suite 200
Arlington, VA 22202

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
[redacted],	)	
	)	**File No.: A** [redacted]
Respondent.	)	

APPLICATION: Motion to terminate.

APPEARANCES

FOR THE RESPONDENT:
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FOR THE GOVERNMENT:
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DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The Respondent is a [redacted]-year-old native and citizen of [redacted]. He was admitted to the U.S. as a lawful permanent resident ("LPR") on or about [redacted]. See Ex. 1. On [redacted] he was convicted of maiming in violation of Virginia Code § 18.2-51 and sentenced to five years' imprisonment. Id. On [redacted] the Department of Homeland Security ("DHS") served the Respondent with a Notice to Appear ("NTA"), charging him with removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as an alien who, at any time after admission, was convicted of an aggravated felony as defined in INA § 101(a)(43)(F), a crime of violence for which the term of imprisonment is at least one year. Id. DHS has the burden to prove removability by clear and convincing evidence. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a).

On [redacted] the Respondent orally moved to terminate removal proceedings, alleging his conviction was not for a crime of violence. The Immigration Court then set a briefing schedule. On [redacted], the Respondent filed his motion to terminate. On [redacted], DHS filed a delayed brief in response. On [redacted], the Respondent filed a brief in reply. The Respondent argued the Immigration Court should find his motion to terminate be deemed unopposed. Despite DHS's delayed filing, the Immigration Court will consider all

arguments in the interest of judicial efficiency. For the reasons that follow, the Immigration Court grants the Respondent's motion to terminate.

II. LAW & ANALYSIS

A. Categorical Approach

To determine whether the Respondent's conviction under Virginia Code § 18.2-51 is a crime of violence, the Immigration Court applies the categorical approach. The state crime will be a categorical match to the federal or generic crime of violence only if the "minimum conduct that has a realistic probability of being prosecuted" under the state statute is also addressed by the generic offense. See Matter of Chairez-Castrejon, 26 I&N Dec. 349, 351 (BIA 2014) (citing Moncrieffe v. Holder, 133 S. Ct. 1678, 1684-85 (2013)). In determining whether state and generic federal crimes match, the key is "elements, not facts." Descamps v. U.S., 133 S. Ct. 2276, 2283 (2013).

The Respondent was convicted of maiming in violation of Virginia Code § 18.2-51. The statute provides, in relevant part: "If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall . . . be guilty of a Class 3 felony." DHS alleges the Respondent's conviction is for a crime of violence. A crime of violence under the INA is any offense that meets the federal definition at 18 U.S.C. § 16, which defines a crime of violence as

> (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.

To constitute a crime of violence under 18 U.S.C. § 16(a), a criminal conviction must involve the active employment of physical force with a higher degree of intent than mere negligence or accidental conduct. Leocal v. Ashcroft, 543 U.S. 1, 9 (2004). Section 16(b) looks not at the elements of the offense, but at whether the offense, by its nature, involves a substantial risk of physical force. The Supreme Court has noted that section 16(b) encompasses "offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." Id. at 10. The level of force required under 18 U.S.C. § 16 is substantial. The Supreme Court has previously held that "physical force" means "violent force...capable of causing physical pain or injury to another person." Johnson v. U.S., 559 U.S. 133, 140 (2010); see Matter of Velasquez, 25 I&N Dec. 278, 283 (BIA 2010).

1. 18 U.S.C. § 16(a)

DHS argues the Respondent's conviction is categorically an aggravated felony crime of violence under subsection (a) because the use of physical force is an element of the crime. DHS Br. at 1. The Respondent argues that physical force is not an element of the crime, and that his

conviction is therefore not categorically an aggravated felony crime of violence. Resp't Mot. at 8-9 ([redacted]).

DHS argues that the statute's elements of intent and bodily injury suffice to meet the "physical force" requirement. DHS Br. at 4-7. DHS claims that all acts under the statute are "capable of causing bodily injury because they, by their definition, result in and describe such injury." Id. at 6. To convict an individual under section 18.2-51, the Commonwealth must prove three elements: 1) the offender shot, stabbed, cut, or wounded any person, or caused bodily injury by any means; 2) the wounding or bodily injury was with the intent to maim, disfigure, disable, or kill that individual; and 3) the act was done either maliciously or unlawfully but not maliciously. Ex. 3, Tab G. Shooting, stabbing, cutting, or wounding would unquestionably involve "violent force...capable of causing physical pain or injury." Johnson, 559 U.S. at 140. This first element, however, can also be satisfied by showing that the offender caused bodily injury "by any means." DHS thus argues that all acts that could fall under the statute, including the "any means" prong, are required to have caused intentionally injury and therefore require physical force, making the statute a crime of violence. This is incorrect; merely because the acts may cause injury does not mean that they require *force* capable of causing injury. DHS conflates the test for physical force and physical injury. Under DHS's reading, *any* intentional act that causes physical pain or injury would involve physical force; this cannot be. Rather, under BIA and Supreme Court precedent, any *violent force* that causes physical pain or injury qualifies as *physical force*. There must be *force* involved that causes the injury. Existence of pain or injury is insufficient. See U.S. v. Torres-Miguel, 701 F.3d 165, 168-69 (4th Cir. 2012) (noting that an offense resulting in physical injury without the use or threatened use of force does not meet the definition of a crime of violence, and acknowledge a crime can result in serious injury without the use of physical force). The Fourth Circuit has determined[1] there is a difference between the causation of an injury and an injury's causation "by the use of physical force." Id. at 169 (citing Chrzanoski v. Ashcroft, 327 F.3d 188, 194 (2d Cir. 2003)).

DHS further argues it is impossible to intentionally cause injury without the presence of violent force. DHS Br. at 7. In Matter of Guzman-Polanco, 26 I&N Dec. 713, 717-18 (BIA 2016), the Board determined that indirect force can involve acts that do not require violent force. DHS asks the Immigration Court to ignore this binding precedent, as there is a pending motion to reconsider. Ignoring this binding case would be improper; it remains good law. Moreover, the Supreme Court *explicitly* stated in U.S. v. Castleman, 134 S. Ct. 1405, 1411-13 n.4 (2014) that it would not extend its interpretation of "force" in 18 U.S.C. § 922(g)(9) to statutes that do not use the common law definition of force, *including* 18 U.S.C. § 16 and the Armed Career Criminals Act ("ACCA"). The common-law definition of force can include the use of minimal physical force, such as offensive touching. Indeed, Johnson rejected the idea that physical force has the same meaning as at common law. 559 U.S. at 139. The Fourth Circuit has recently reinforced this finding. See U.S. v. Gardner, 823 F.3d 793, 803 (4th Cir. 2016) (noting "physical force" does not include the "slightest offensive touching").

Case law confirms physical force is not an element of section 18.2-51. See Dawkins v. Commonwealth, 41 S.E.2d 500, 504 (Va. 1947) (noting the focus of the offense is the intent

[1] Although Torres-Miguel involved sentencing guidelines, the court analyzed the same language as that contained in 18 U.S.C. § 16(a).

rather than the means); Long v. Commonwealth, 379 S.E.2d 473, 475 (Va. Ct. App. 1989) (noting the focus is on the intent of the act and that the statute "does not contain a limitation upon the means employed); see also U.S. v. Lopez-Reyes, 945 F. Supp. 2d 658, 661 (E.D. Va. 2013) (noting that "by any means" signifies the statute does not categorically have as an element the "use, attempted use, or threatened use of physical force against the person of another"). Intentional causation of injury does not satisfy the "physical force" element of 18 U.S.C. § 16(a). Guzman-Polanco, 26 I&N Dec. 716-18. A conviction under section 18.2-51 can encompass acts that do not involve violent force.[2] Because Virginia Code § 18.2-51 does not contain an element of physical force, it is not categorically a crime of violence under 18 U.S.C. § 16(a).

2. 18 U.S.C. § 16(b)

The Supreme Court in Leocal instructed that subsection (b) requires that there is a substantial risk of use of physical force against another "in the course of committing the offense." 543 U.S. at 11. The Board has decided that in determining the risk of the use of such force, the proper inquiry is whether the crime carries a substantial risk of the use of physical force in the ordinary case. Matter of Singh, 25 I&N Dec. 670, 677 (BIA 2012). Recently, the Board also found that the Supreme Court's decision in Moncrieffe has not affected the "ordinary case" test set forth in prior Supreme Court decisions. Matter of Francisco-Alonzo, 26 I&N Dec. 594, 599 (2015). The Supreme Court, however, more recently determined that the "ordinary case" analysis is unworkable. See Johnson v. U.S., 135 S. Ct. 2551 (2015). The Johnson decision rejected the dissent's suggestion of examining actual conduct, and instead confirmed that the "only plausible interpretation of the law . . . requires use of the categorical approach." Id. at 2562 (citing Taylor, 495 U.S. at 602).

DHS and the Respondent disagree as to whether Johnson found 18 U.S.C. § 16(b) void for vagueness. Resp't Mot. at 15-16; DHS Br. at 13-17. The Supreme Court found the residual clause of the ACCA, which mirrors subsection (b), void for vagueness. Since that time, four Circuit Courts and one District Court have found subsection (b) void for vagueness. Resp't Mot. at 15. Johnson, however, did not explicitly deal with 18 U.S.C. § 16; it dealt with a separate, albeit similarly worded, federal statute. The Immigration Court declines to extend the Supreme Court's holding to a different statute. Although the findings of other courts are persuasive, the Immigration Court cannot unilaterally determine the statute is unconstitutionally vague. See Matter of Fitzpatrick, 26 I&N Dec. 559, 562 (BIA 2015) (noting the BIA and Immigration Judges do not have authority to rule on "the constitutionality of the laws enacted by Congress"). Although it is possible the Supreme Court may find 18 U.S.C. § 16(b) void for vagueness, it has not yet done so. The Immigration Court declines to do so in its stead.

DHS argues that because each conviction under Virginia Code § 18.2-51 involves "physical injury caused by an intentional act," there will always be the risk that physical force will be used. DHS Br. at 11-12. Further, DHS claims that the intent element in the statute "increases the risk of the use of physical force being used in the ordinary case." Id. at 12. DHS concludes that an "unlawful intention act . . . always has a substantial risk of the use of force." Id. at 13. As the Respondent notes, the Supreme Court expressly overruled the "ordinary case"

[2] The Respondent provided several examples demonstrating physical force is not necessary for a conviction under the statute, including "poisoning, child neglect, [and] facial disfigurement." Resp't Mot. at 9.

analysis, which the BIA has adopted in analyzing subsection (b). See Johnson, 135 S. Ct. at 2563. The Immigration Court will not apply the "ordinary case" analysis, because it has found, as discussed above, that the appropriate analysis under the categorical approach is dictated by Moncrieffe. Under this approach, the factfinder must "presume that the conviction rested on nothing more than the least of the acts criminalized and then determine whether those acts" pose a substantial risk that physical force will be used. Moncrieffe, 133 S. Ct. at 1684.

The least culpable conduct punishable by the Virginia statute is causing another bodily injury, with the intent to maim, disfigure, disable, or kill. This conduct does not involve physical force. For example, an individual could intend to disable someone by cutting the brake lines in her car. Such an action would not constitute physical force. Causing injury by any means (with intent to harm) does not "by its nature" involve a substantial risk that physical force will be intentionally used. 18 U.S.C. § 16(b). The Fourth Circuit has determined that even a substantial risk that actions will cause physical injury "does not intrinsically involve a substantial risk that force will be applied." Garcia v. Gonzales, 455 F.3d 465, 468-69 (4th Cir. 2006). Therefore Virginia Code § 18.2-51 is not a crime of violence under 18 U.S.C. § 16(b).

B. Divisibility

Where the state crime is not a categorical match to the generic crime, DHS must establish the state statute of conviction is divisible. See Descamps, 133 S. Ct. at 2279; see also Omargharib v. Holder, 775 F.3d 192, 199-200 (4th Cir. 2014). Where "the crime [for] which the [Respondent] was convicted has a single, indivisible set of elements," courts may not apply the modified categorical approach. Descamps, 133 S. Ct. at 2282; see also Moncrieffe, 133 S. Ct. at 1684; Taylor v. U.S., 495 U.S. 575, 599 (1990). If the state statute is divisible, the Immigration Court may apply the modified categorical approach and review a limited set of documents to determine whether the elements of the particular offense for which the Respondent was convicted match the generic crime of violence. See Shepard v. U.S., 544 U.S. 13, 26 (2005).

Because DHS did not address divisibility and the Immigration Court has determined the Respondent's conviction is categorically overbroad, DHS has failed to meet its burden to establish by clear and convincing evidence that the Respondent is removable. DHS's burden extends to establishing the divisibility of a statute. See Omargharib, 775 F.3d at 200 (determining the government made "no meaningful argument" on divisibility and therefore failed to satisfy its burden to establish removability by clear and convincing evidence); see also Karimi v. Holder, 715 F.3d 561, 566 (4th Cir. 2013) (citing Salem v. Holder, 647 F.3d 111, 116 (4th Cir. 2011), and emphasizing that the government bears the burden of proving removability, which includes proving whether a respondent committed an aggravated felony, by clear and convincing evidence). Accordingly, the charge should be dismissed. The Immigration Court nevertheless analyzes divisibility, as the Respondent put forth significant argumentation on the issue.

The Respondent argues that the recent Supreme Court decision in Mathis v. U.S., 136 S. Ct. 2243 (2016), is instructive. Mathis reinforced that the categorical approach is an elements-based inquiry. Id. at 2252. The Court confirmed that the modified categorical approach may be used, and thus a statute is divisible, when the statute lists alternative elements, not means. Id. at 2250. The Immigration Court must determine whether the statute includes alternative elements

or simply includes alternative means of satisfying the same elements. Id. at 224; U.S. v. Royal, 731 F.3d 333, 341 (4th Cir. 2013). Elements are the "constituent parts" of a crime's definition—"the things the 'prosecution must prove to sustain a conviction.'" 136 S. Ct. at 2248 (citing Black's Law Dictionary 634 (10th ed. 2014)). At trial, elements are what "the jury must find beyond a reasonable doubt to convict the defendant," and at a plea hearing, elements "are what the defendant necessarily admits when he pleads guilty." Id.; see also Omargharib, 775 F.3d at 198. The Supreme Court instructed that in analyzing whether items in a statute constitute means or elements, courts must look at three sources—first, state case law; second, the text of the statute itself; and third, the record of conviction. Mathis, 136 S. Ct. at 2256.

Virginia case law indicates Virginia Code § 18.2-51 is not divisible into alternate elements. In Long, the Court of Appeals of Virginia determined the focus is on the intent behind the act, not the means with which it was effectuated. 379 S.E.2d at 475. Several years later, the same Court analyzed the statute and determined that the five acts within the statute are alternative means that comprise a single element. See Crawley v. Commonwealth, 492 S.E.2d 503, 505 (Va. Ct. App. 1997) (noting the Commonwealth must prove the accused (1) intended to "maliciously shoot, stab, cut, or wound any person or by any means cause bodily injury with the intent to maim, disfigure, disable, or kill"; and (2) "committed a direct but ineffectual act toward this purpose"). Several courts have since come to the same conclusion—that a conviction under Virginia Code § 18.2-51 is comprised of two elements: an overt act and an intent. See Cuffee v. Commonwealth, 735 S.E.2d 693, 701 (Va. Ct. App. 2013); Robertson v. Commonwealth, 525 S.E.2d 640, 645 (Va. Ct. App. 2000); Campbell v. Commonwealth, 405 S.E.2d 1, 4 (Va. Ct. App. 1991) (stating that to support a conviction under Virginia Code § 18.2-61, the evidence must establish the defendant "(1) maliciously shot, stabbed, cut or wounded" an individual or "'by any means' caused him bodily injury and (2) did so with the 'intent to maim, disfigure, disable, or kill'").

Virginia jury instructions compel the same result. The Model Jury instructions state that a conviction for malicious wounding under Virginia Code § 18.2-51 is comprised of three elements: 1) causing bodily injury by an means to an individual; 2) causing such injury with requisite intent; and 3) malice. Resp't Mot., Tab G. The Virginia Practice Jury Instructions indicate there are only two elements in the offense of malicious wounding: 1) an overt act and 2) intent. Id., Tab H. Finally, the Office of the Commonwealth's Attorney instructions include the same three elements as the Model Jury instructions. Id., Tab I. None of the instructions indicates that the various acts are separate elements. The acts in the statute are thus clearly alternate *means* of satisfying the overt act element. Accordingly, Virginia Code § 18.2-51 is indivisible.[3] Because the Respondent's statute of conviction is overbroad and indivisible, the Immigration Court finds his conviction is not for an aggravated felony crime of violence.

III. CONCLUSION

DHS has failed to establish the Respondent has been convicted of a crime of violence as defined in 18 U.S.C. § 16. Therefore, DHS has also failed to prove he has been convicted of an

[3] Even if the statute were divisible, the relevant documents in the Respondent's record of conviction do not establish he was convicted of a crime of violence. His indictment charged him with causing bodily injury, without specifying any means of commission. Resp't Mot., Tab D at 4; see also Resp't Mot. at 27-30.

aggravated felony as defined in INA § 101(a)(43)(F). Accordingly, the Immigration Court dismisses the charge. There being no additional charges of removability, the Immigration Court must terminate proceedings.

Accordingly, the Immigration Court enters the following orders.

ORDER

It is Ordered that — the charge under INA § 237(a)(2)(A)(iii) be **DISMISSED.**

It is Further Ordered that — the Respondent's motion to terminate proceedings be **GRANTED.**

August 3, 2016
Date

Rodger C. Harris
U.S. Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due at the Board of Immigration Appeals within thirty calendar days after the date of service of this decision.

EXHIBIT B

Immigration Judge Thomas G. Judge Snow's Decision on December 18, 2015
Holding Virginia Code § 18.2-51 is Categorically Not an Aggravated Felony Crime of Violence
Under 18 U.S.C. § 16(a) or § 16(b)

PRACTICE ADVISORY FOR IMMIGRATION PRACTICIONERS
Arguing Virginia Code § 18.2-51 Unlawful/Malicious Wounding is Not an Aggravated Felony
Crime of Violence Under the Categorical Approach

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1901 S. BELL STREET, SUITE 200
ARLINGTON, VA 22202

Capital Area Immigrants' Rights (CAIR) Coalition
Altman, Heidi
1612 K Street NW suite 204
Washington, DC 20006

IN THE MATTER OF [redacted] FILE [redacted] DATE: Dec 18, 2015

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
1901 S. BELL STREET, SUITE 200
ARLINGTON, VA 22202

__ OTHER: _____

_____

COURT CLERK
IMMIGRATION COURT FF

CC: IAN GALLAGHER
1901 S. BELL STREET, 9TH FL
ARLINGTON, VA, 22202

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
1901 South Bell Street, Suite 200
Arlington, VA 22202

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
[redacted]	)	**File No.: A** [redacted]
Respondent.	)	

APPLICATION: Motion to terminate.

2015 DEC 21 AM 9:03

APPEARANCES

FOR THE RESPONDENT:
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CAIR Coalition
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Washington, DC 20006

FOR THE GOVERNMENT:
Ian Gallagher, Esq.
Assistant Chief Counsel
U.S. Department of Homeland Security
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DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The respondent is a [redacted]-year-old native and citizen of [redacted]. He was admitted to the United States as a lawful permanent resident on [redacted]. *See* NTA. On [redacted] he was convicted of attempted unlawful wounding in violation of Virginia Code §§ 18.2-26 and 18.2-51 and sentenced to [redacted] imprisonment. *Id.* On [redacted], the Department of Homeland Security ("DHS") served the respondent with a Notice to Appear ("NTA"), charging him with removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as an alien who, at any time after admission, was convicted of an aggravated felony as defined in INA §§ 101(a)(43)(F) and (U), an attempted aggravated felony crime of violence for which the term of imprisonment ordered is at least one year. *See id.* On [redacted], the respondent orally moved to terminate removal proceedings, alleging his conviction was not for a crime of violence. For the reasons that follow, the Court grants the respondent's motion to terminate.

II. LAW, ANALYSIS, AND FINDINGS

The respondent was convicted of attempted unlawful wounding in violation of Virginia Code §§ 18.2-26 and 18.2-51. The unlawful wounding statute provides, in relevant part:

> If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall . . . be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.

DHS charged the respondent with removability under INA § 237(a)(2)(A)(iii) for having been convicted of an aggravated felony crime of violence under INA §§ 101(a)(43)(F) and (U). A crime of violence under the INA is any offense that meets the federal definition at 18 U.S.C. § 16, which defines a crime of violence as

> (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.

To constitute a crime of violence under 18 U.S.C. § 16(a), a criminal conviction must involve the active employment of physical force with a higher degree of intent than mere negligence or accidental conduct. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). Section 16(b) looks not at the elements of the offense, but at whether the offense, by its nature, involves a substantial risk of physical force. The Supreme Court has noted that section 16(b) encompasses "offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." *Id.* at 10. The level of force required under 18 U.S.C. § 16 is substantial. The Supreme Court has previously held that "physical force" means "violent force...capable of causing physical pain or injury to another person." *Johnson v. U.S.*, 559 U.S. 133, 140 (2010); *see Matter of Velasquez*, 25 I&N Dec. 278, 283 (BIA 2010).

To determine whether the respondent's conviction under Virginia Code § 18.2-51 is a crime of violence, the Court applies the categorical approach. The state crime of unlawful wounding will be a categorical match to the federal or generic crime of violence only if the "minimum conduct that has a realistic probability of being prosecuted" under the state statute is also addressed by the generic offense. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 351 (BIA 2014) (citing *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013)). In determining whether state and generic federal crimes match, the key is "elements, not facts." *Descamps v. U.S.*, 133 S. Ct. 2276, 2283 (2013). Where the state crime is not a categorical match to the generic crime, the Court must then determine whether the state statute of conviction is divisible. *See id.* at 2279. Where "the crime [for] which the [respondent] was convicted has a single, indivisible set of elements," courts may not apply the modified categorical approach. *Id.* at 2282; *see also Moncrieffe*, 133 S. Ct. at 1684; *Taylor v. U.S.*, 495 U.S. 575, 599 (1990). However, if the state statute is divisible, the Court may apply the modified categorical approach and review a limited set of documents to determine whether the elements of the particular offense for which the respondent was convicted match the generic crime of violence. *See Shepard v. U.S.*, 544 U.S. 13, 26 (2005).

A. Divisibility

The respondent argues Virginia Code § 18.2-51 is not divisible because it is only "generally divisible into different offenses," and the *actus reus* of the offense merely encompasses a single element with various means. *See* Respondent's Brief at 20 (Nov. 12, 2015). The Court disagrees. The statute sets forth four distinct offenses: 1) malicious wounding; 2) maliciously causing bodily injury; 3) unlawful wounding; and 4) unlawfully causing bodily injury, with different penalties. *See Johnson v. Commonwealth*, 35 S.E.2d 594, 596-97 (Va. 1945) (recognizing that broadening the statute to include "to cause bodily injury" introduced a new, distinct offense, comprised of new elements); *see also Dawkins v. Commonwealth*, 41 S.E.2d 500, 505 (Va. 1947) (noting that malicious stabbing and maliciously causing bodily injury by any means are distinct offenses). Virginia case law indicates it considers the statute to contain more than one offense, not merely different ways of committing an offense. Therefore, Virginia Code § 18.2-51 is disjunctive and requires inquiry into the specifics of the respondent's conviction to determine the particular offense under which he was convicted. The respondent's conviction documents identify the offense to which he pleaded guilty as unlawful wounding, which requires proof that the actor did "shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill." *See* DHS Submission (Sept. 30, 2015); Va. Code Ann. § 18.2-51 (West 2015).

B. 18 U.S.C. § 16(a)

The respondent argues that the government "impermissibly conflates the use of physical force with the occurrence of physical injury." Respondent's Brief at 6. The Court agrees. As stated above, "physical force" means "violent force...capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. DHS states "[w]here there is bodily injury, there is physical force." DHS Brief at 7 (Oct. 29, 2015). Merely because an act causes injury does not mean it requires *force* capable of causing injury. DHS conflates the test for physical force and physical injury. The parties agree physical force is intentional, violent force, capable of causing physical pain or injury. *See Velasquez*, 25 I&N Dec. at 283. Under DHS' reading, *any* act that causes physical pain or injury would involve physical force; this cannot be. Rather, under BIA and Supreme Court precedent, any *force* that causes physical pain or injury qualifies as *physical force*. There must be *force* involved that causes the injury. Existence of pain or injury will not suffice. In response to previous decisions from this Court, DHS states that the Supreme Court has "rejected this notion" by stating "it is impossible to cause bodily injury without applying force in the common-law sense." *Id.* at 6 (citing *U.S. v. Castleman*, 134 S. Ct. 1405, 1415 (2014)). The respondent, however, correctly notes that *Castleman* was expressly limited to 18 U.S.C. § 922(g)(9) and used the common-law definition of force (which can include the use of minimal physical force like offensive touching). *See* Respondent's Brief at 9. Indeed, *Johnson* rejected the idea that physical force has the same meaning as at common law. 559 U.S. at 139. In addition, other cases dealing with 18 U.S.C. § 16 "expressly refuse this common law definition of force due to its sweeping scope." Respondent's Brief at 10 (citing *Leocal*, 543 U.S. at 9; *U.S. v. Royal*, 731 F.3d 333 (4th Cir. 2013); *U.S. v. Vinson*, 805 F.3d 120 (4th Cir. 2015)).

Considering both parties' arguments, the Court finds the respondent's conviction under Virginia Code § 18.2-51 is not a crime of violence under 18 U.S.C. § 16(a) because violent force

is not a necessary element of the offense. To convict an individual under Virginia Code § 18.2-51, the Commonwealth must prove three elements: 1) the offender shot, stabbed, cut, or wounded any person, or caused bodily injury by any means; 2) the wounding or bodily injury was with the intent to maim, disfigure, disable, or kill that individual; and 3) the act was done either maliciously or unlawfully but not maliciously. 2-37 Va. Model Jury Instructions - Criminal Instruction No. G37.100. Shooting, stabbing, cutting, or wounding would unquestionably involve "violent force...capable of causing physical pain or injury." *Johnson*, 559 U.S. at 140. This first element, however, can also be satisfied by showing that the offender caused bodily injury "by any means." Thus, a conviction under section 18.2-51 can presumably encompass acts that do not involve violent force. Under BIA and Supreme Court precedent, any *force* that causes physical pain or injury qualifies as *physical force*. There must be *force* involved that causes the injury. Mere existence of pain or injury will not suffice.

The respondent argues that by "broadly criminalizing conduct that causes injury 'by any means,'" the statute does not require force. Respondent's Brief at 11. He also argues that case law supports that force is not statutorily required. *Id.* In 1989, the Court of Appeals of Virginia determined that Virginia Code § 18.2-51 "by its explicit terms, does not contain a limitation upon the means employed." *Long v. Commonwealth*, 379 S.E.2d 473, 475 (Va. Ct. App. 1989). In 2013, the District Court for the Eastern District of Virginia found that the statute "is not limited to conduct that necessarily involves the use or threatened use of physical force" and does not categorically have "as an element the use, attempted use, or threatened use of physical force against the person of another." *U.S. v. Lopez-Reyes*, 945 F.Supp.2d 658, 661-62 (E.D. Va. 2013).

In addition to this persuasive case law, the respondent provided the Court several examples of prosecutions establishing the statue "is actively applied to alleged crimes involving non-forceful conduct." Respondent's Brief at 11-12 (referencing prosecutions for poisoning, neglect, verbally commanding a dog to attack, and disfigurement). Because a conviction under Virginia Code § 18.2-51 does not require an element of physical force, it is not categorically a crime of violence under 18 U.S.C. § 16(a). As the respondent's criminal conviction documents do not indicate which acts he committed, the Court cannot determine that his crime constitutes a crime of violence under the modified categorical approach.

C. 18 U.S.C. § 16(b)

Although unlawful wounding is not a crime of violence under subsection (a), it may be a crime of violence under subsection (b). The respondent claims that 18 U.S.C. § 16(b) is unconstitutionally void for vagueness. *Id.* at 16. He argues the Supreme Court's holding in *Johnson v. U.S.*, 135 S. Ct. 2551 (2015), should be applied to 18 U.S.C. § 16(b). *Id.* The respondent states that the statute here and the one in *Johnson* suffer from the same constitutional problems and that any differences between the two statutes are unimportant. *Id.* at 16-17. DHS correctly states that *Johnson* did not analyze 18 U.S.C. § 16(b). DHS Brief at 9-11. The *Johnson* case dealt with a separate, albeit similarly worded, federal statute. The Court declines to extend the Supreme Court's holding to a different statute. DHS notes that the Court does not have the authority "to rule on the constitutionality of the laws enacted by Congress," including challenges of vagueness. *Id.* at 11 (citing *Matter of Fitzpatrick*, 26 I&N Dec. 559, 562 (BIA

2015); *Matter of G-K-*, 26 I&N Dec. 88, 96-97 (BIA 2013); *Matter of Sanchez-Lopez*, 26 I&N Dec. 71, 74 n.3 (BIA 2012)). Although it is possible that the Supreme Court may find 18 U.S.C. § 16(b) void for vagueness, it has not yet done so. The Court declines to do so in its stead.

To qualify as a crime of violence under 18 U.S.C. § 16(b), the conviction need only be for a felony that, by its nature, involves a substantial risk that physical (i.e. violent) force against the person or property of another may be used in the course of committing the offense. The Supreme Court in *Leocal* instructed that subsection (b) requires that there is a substantial risk of use of physical force against another "in the course of committing the offense." 543 U.S. at 11. The Board has decided that in determining the risk of the use of such force, the proper inquiry is whether the crime carries a substantial risk of the use of physical force in the ordinary case. *Matter of Singh*, 25 I&N Dec. 670, 677 (BIA 2012). Recently, the Board also found that the Supreme Court's decision in *Moncrieffe* has not affected the "ordinary case" test set forth in prior Supreme Court decisions. *Matter of Francisco-Alonzo*, 26 I&N Dec. 594, 599 (2015). The Supreme Court, however, more recently determined that the "ordinary case" analysis is unworkable. *See Johnson*, 135 S. Ct. 2551.[1] The *Johnson* decision rejected the dissent's suggestion of examining actual conduct, and instead confirmed that the "only plausible interpretation of the law . . . requires use of the categorical approach." *Id.* at 2562.

The least culpable conduct punishable by the Virginia statute is causing another bodily injury, with the intent to maim, disfigure, disable, or kill. This conduct does not involve physical force. For example, an individual could intend to disable someone by cutting the brake lines in her car; neglecting a child; or putting itching powder in someone's food. Such actions would not include physical force. Causing injury by any means (with intent to harm) does not "by its nature" involve a substantial risk that physical force will be intentionally used. 18 U.S.C. § 16(b). Therefore Virginia Code § 18.2-51 is not categorically a crime of violence under 18 U.S.C. § 16(b).

DHS also argues that the acts contained in the statute include "an inherent risk that the perpetrator will resort to actual direct force." DHS Brief at 12. There is no indication, as established above, that there is any risk that physical force will be intentionally used. As the respondent notes, DHS' reasoning has been rejected by this Court and the Supreme Court. *See* Respondent's Brief at 19-20. Finally, DHS submitted additional information arguing the analysis is affected by *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002). DHS Submission (Nov. 13, 2015). As the respondent correctly notes, however, *Martin* has been overruled by the Second Circuit, and its reasoning has been rejected by both the Fourth Circuit and the Supreme Court. Respondent's Submission at 1-2 (Nov. 16, 2015). Thus, the Court will not accord this additional case law any weight.

Accordingly, the Court finds the respondent's conviction is not a crime of violence under 18 U.S.C. § 16(a) or (b). The Court emphasizes, however, that it only finds that his crime is not *categorically* a crime of violence under either subsection. Where the facts in the record clearly identify which statutory elements an individual was convicted of, a violation of Virginia Code § 18.2-51 could constitute a crime of violence. Such facts are absent here. The respondent's

[1] DHS argues *Francisco-Alonzo* is still valid, but the Court finds that *Johnson* was clear on the applicability of the categorical approach.

conviction documents do not indicate anything other than his statute of conviction. *See* DHS Submission ([redacted]).

III. CONCLUSION

DHS failed to establish the respondent has been convicted of a crime of violence as defined in 18 U.S.C. § 16. Therefore, DHS has also failed to prove he has been convicted of an aggravated felony as defined in INA §§ 101(a)(43)(F) and (U). Because DHS did not charge him with any other ground of removability, the Court grants his motion to terminate.

Accordingly, the Court enters the following orders:

ORDERS

It is Ordered that: The respondent's motion to terminate be **GRANTED.**

It is Further Ordered that: The charge under INA § 237(a)(2)(A)(iii) be **DISMISSED.**

Dec 18, 2015
Date

Thomas G. Snow
U.S. Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due at the Board of Immigration Appeals within thirty (30) calendar days after the date of service of this decision.

EXHIBIT C

Unpublished Board of Immigration Appeals Decision on August 23, 2015 Holding Virginia Code § 18.2-51 is Categorically Not an Aggravated Felony Crime of Violence Under 18 U.S.C. § 16(a) and Remanding for the Immigration Judge to Apply the Ordinary Case Test Under § 16(b)

PRACTICE ADVISORY FOR IMMIGRATION PRACTICIONERS
Arguing Virginia Code § 18.2-51 Unlawful/Malicious Wounding is Not an Aggravated Felony Crime of Violence Under the Categorical Approach

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Appelbaum, Adina
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1612 K Street NW, Suite 204
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DHS/ICE Office of Chief Counsel - WAS
1901 S. Bell Street, Suite 900
Arlington, VA 22202

Name: [redacted] **A** [redacted]

Date of this notice: 8/23/2016

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger
Cole, Patricia A.
Wendtland, Linda S.

YungD
Userteam: Docket

File: A[redacted] – Arlington, VA

Date: AUG 23 2016

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Adina B. Appelbaum, Esquire

ON BEHALF OF DHS: Ian N. Gallagher
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from an Immigration Judge's December 18, 2015, decision terminating removal proceedings against the respondent. The respondent opposes the appeal. The record will be remanded.

In [redacted], the respondent—a native and citizen of [redacted] and a lawful permanent resident of the United States—was convicted of attempted unlawful wounding in violation of sections 18.2-26 and 18.2-51 of the Virginia Code, a felony for which he was sentenced to a 2-year term of imprisonment. The only issue on appeal is whether that conviction renders the respondent removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an "aggravated felony"—to wit, an "attempt" to commit a "crime of violence" under 18 U.S.C. § 16. *See* sections 101(a)(43)(F) and 101(a)(43)(U) of the Act, 8 U.S.C. §§ 1101(a)(43)(F), (U).

The Immigration Judge found that the aforementioned conviction does not support the aggravated felony charge because the DHS failed to prove that Va. Code § 18.2-51 defines a crime of violence under 18 U.S.C. § 16, which states:

> The term 'crime of violence' means—
>
> (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.

Specifically, the Immigration Judge found that Va. Code § 18.2-51 does not satisfy the requirements of 18 U.S.C. §§ 16(a) and 16(b) because it is possible for a defendant to be convicted based on poisoning, neglect, or other conduct which neither has the use of violent physical force as an element nor presents a substantial risk that such force will be used (I.J. at 3-5). The DHS appeals.

Upon de novo review, we conclude that unlawful wounding under Va. Code § 18.2-51 is not a crime of violence under 18 U.S.C. § 16(a) because it does not have as an element the use, attempted use, or threatened use of violent physical force against the person or property of another. As the Immigration Judge determined (I.J. at 4), and as the respondent explains on appeal (R. Brief at 18-19), defendants have been convicted of unlawful wounding in Virginia based on acts of poisoning and child neglect, neither of which entails violent physical force as contemplated by 18 U.S.C. § 16(a). *See Matter of Guzman-Polanco*, 26 I&N Dec. 713, 717-18 & n.7 (BIA 2016) (holding that battery under Puerto Rico law—which requires proof that the accused inflicted bodily injury on the victim—does not have the use of violent physical force as an element where the requisite injury can be inflicted by means of poison).[1] Though the DHS maintains on appeal that poisoning and similar conduct entail the violent use of force by indirect means, the United States Court of Appeals for the Fourth Circuit—in whose jurisdiction this case arises—has determined in analogous circumstances that poisoning does not involve the use of violent physical force. *See United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2012) (holding that the California offense of willfully threatening to commit a crime that would result in death or great bodily injury does not have the threatened use of violent physical force as an element where the offense can be committed by means of a threat to poison another). Accordingly, we will dismiss the DHS's appeal as it relates to the applicability of 18 U.S.C. § 16(a).

Although we conclude that unlawful wounding under Va. Code § 18.2-51 is not a crime of violence under 18 U.S.C. § 16(a), the record will be remanded because we conclude that the

[1] The DHS maintains on appeal that *Matter of Guzman-Polanco* was wrongly decided, and argues—by reference to the Supreme Court's decision in *United States v. Castleman*, 134 S. Ct. 1405 (2014)—that all acts which cause bodily injury must perforce have the use of violent physical force as an element under 18 U.S.C. § 16(a). Yet as we explained in *Guzman-Polanco*, *Castleman* is distinguishable because it involved 18 U.S.C. § 921(a)(33)(A)(ii), which employs the phrase "use of physical force" in a non-violent, common-law sense that is very different from that which governs 18 U.S.C. § 16(a). *See* 26 I&N Dec. at 717. Indeed, the *Castleman* Court expressly refrained from adopting Justice Scalia's view—now echoed by the DHS—that the infliction of physical injury necessarily contemplates the use of physical force. *See United States v. Castleman, supra*, at 1414 ("Justice SCALIA's concurrence suggests that [bodily injury] necessitate[s] *violent* force, under [the] ... definition [adopted in *Johnson v. United States*, 559 U.S. 133, 137 (2010)]. But whether or not that is so—*a question we do not decide*—these forms of injury do necessitate force in the common-law sense." (emphasis added) (citation omitted)).

Immigration Judge did not properly examine whether the offense qualifies as a crime of violence under 18 U.S.C. § 16(b). Because 18 U.S.C. § 16(b) is phrased in "probabilistic" terms, we have held that the proper inquiry for determining whether a conviction is for a crime of violence under that subsection is whether the offense's elements define conduct that, in an "ordinary case," would present a substantial risk of the use of violent physical force against another. *Matter of Francisco-Alonzo*, 26 I&N Dec. 594, 597-600 (BIA 2015). The Immigration Judge did not apply this "ordinary case" analysis on remand, however, because he found that it had been repudiated by *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court invalidated as unconstitutionally vague the residual clause of the Armed Career Criminal Act's ("ACCA") "violent felony" definition, 18 U.S.C. § 924(e)(2)(B)(ii) (hereafter "the ACCA residual clause") (I.J. at 5 & n.1). Instead, the Immigration Judge asked whether the "least culpable conduct" punishable under Va. Code § 18.2-51 presented the "substantial risk" of violent physical force contemplated by 18 U.S.C. § 16(b). Concluding that it did not, he terminated the proceedings.

We do not agree with the Immigration Judge's broad reading of *Johnson* as having invalidated application of the "ordinary case" test for cases arising under 18 U.S.C. § 16(b). The United States Court of Appeals for the Fourth Circuit—in whose jurisdiction this case arises—has held in a precedential decision that the proper inquiry under § 16(b) is whether the conduct encompassed by the elements of the offense raises a substantial risk the defendant may use physical force in the "ordinary case." *United States v. Avila*, 770 F.3d 1100, 1107 (4th Cir. 2014). Although *Avila* was decided before *Johnson*, it is not for the Immigration Judge or this Board to declare that Fourth Circuit precedent has been implicitly overruled by the Supreme Court. If *Avila* needs to be revisited in light of *Johnson*, then the Fourth Circuit (or the Supreme Court) would be the proper authority to do so. Unless that happens, *Avila* and *Francisco-Alonzo* will remain controlling within the Fourth Circuit.

Although *Avila* is binding here, we realize that the *Johnson* Court expressed serious reservations about the "ordinary case" methodology. *See* 135 S. Ct. at 2557, 2561. However, the Court also took pains to clarify that the invalidity of the ACCA residual clause resulted from the combined effect of numerous ambiguities and uncertainties, many of which are not present in § 16(b) cases and any one of which "may be tolerable in isolation." *Id.* at 2560. Under the circumstances, we conclude that the best approach to interpreting and applying 18 U.S.C. § 16(b) is to adhere to the "ordinary case" methodology endorsed in *Matter of Francisco-Alonzo, supra*, absent controlling circuit or Supreme Court authority to the contrary.

In conclusion, *Matter of Francisco-Alonzo* and *United States v. Avila* remain controlling in this case as to the application of 18 U.S.C. § 16(b). Under those precedents, an alien's offense of conviction is a crime of violence under 18 U.S.C. § 16(b) if the offense is a felony and if the conduct encompassed by the elements of the offense presents a substantial risk that physical force may be used in the course of committing the offense in the "ordinary case." The record will be remanded for the Immigration Judge to reconsider the respondent's removability in accordance with this standard.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated, the removal proceedings are reinstated, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

File: A[redacted] – Arlington, VA

Date: AUG 23 2016

In re: [redacted]

DISSENTING OPINION: Patricia A. Cole, Board Member

I respectfully dissent.

Like the Immigration Judge, I conclude that the Supreme Court's rejection of the "ordinary case" test for determining whether an offense qualifies as a "violent felony" under the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) (hereafter "the ACCA residual clause")—*see Johnson v. United States*, 135 S. Ct. 2551 (2015)—applies with equal force in the "crime of violence" context under 18 U.S.C. § 16(b). Thus, I disagree with the majority's conclusion that *United States v. Avila*, 770 F.3d 1100 (4th Cir. 2014), and *Matter of Francisco-Alonzo*, 26 I&N Dec. 594 (BIA 2015)—pre-*Johnson* decisions applying the "ordinary case" test in the § 16(b) context—are controlling here.

In *Avila* and *Francisco-Alonzo*, the Fourth Circuit and the Board applied the "ordinary case" test in reliance on *James v. United States*, 550 U.S. 192 (2007). *See United States v. Avila*, *supra*, at 1107 (applying *James*); *Matter of Francisco-Alonzo*, *supra*, at 597-600 (same). The *Johnson* Court's overruling of *James* thus undercuts the holdings in *Avila* and *Francisco-Alonzo*.

The *Johnson* Court explained that when the "ordinary case" test is applied to the language of a "probabilistic" or risk-focused statute such as § 16(b), the result is "grave uncertainty about how to estimate the risk posed by a crime." *See* 135 S. Ct. at 2557 ("How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"). This "grave uncertainty" is no less intolerable in the § 16(b) context than it was in the context of the ACCA residual clause. *See United States v. Vivas-Ceja*, 808 F.3d 719, 722-23 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110, 1118-19 (9th Cir. 2015). Indeed, the vagaries of the "ordinary case" test may be particularly problematic in the § 16(b) context because in such cases those idiosyncrasies overlay what is already a highly speculative and subjective inquiry into the degree of risk the offense of conviction poses "by its nature."

I further agree with the Immigration Judge that after *Johnson* the relevant test for determining whether an offense satisfies § 16(b)—i.e., whether the offense "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"—is whether the "least culpable conduct" consistent with the offense's elements would present such a risk. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) ("Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense."). Applying that test, I agree with the Immigration Judge that the respondent's offense of conviction—unlawful wounding under VA. CODE § 18.2-51—does not qualify as a crime of violence under § 16(b) because the offense, taken at its minimum,

encompasses a risk of unintentional harm (e.g., extreme child neglect) as well as the application of non-violent force to victims (e.g., poisoning).

In light of the foregoing, I respectfully dissent from the majority's decision to remand the record for further proceedings. Instead, I would affirm the Immigration Judge's decision and dismiss the appeal.

Patricia A. Cole
Board Member

EXHIBIT D

Case of Daniel Riase
(Aggravated Malicious Wounding Conviction for Poisoning; Hampton County Circuit Court, 2007); Case of Cathy Turpin (Malicious Wounding Prosecution for Poisoning; Radford City Circuit Court, 2013)

PRACTICE ADVISORY FOR IMMIGRATION PRACTICIONERS
Arguing Virginia Code § 18.2-51 Unlawful/Malicious Wounding is Not an Aggravated Felony Crime of Violence Under the Categorical Approach

NewsRoom

10/16/07 AP Alert - VA 21:44:22

AP Alert - Virginia

October 16, 2007

Man gets 5 years for spiking pregnant girlfriend's milk

HAMPTON, Va. (A man who induced his girlfriend's miscarriage by secretly drugging a glass of milk has been sentenced to five years in prison.

Twenty-one-year-old Daniel Riase pleaded guilty in Hampton to one count of aggravated malicious wounding leading to the involuntary termination of a woman's pregnancy and one count of adulterating a drink.

Riase was sentenced to 35 years in prison, with all but five years suspended. He must maintain good behavior 20 years, submit DNA sample to the state and be on supervised probation indefinitely.

After his girlfriend decided not to have an abortion, Riase bought a drug online that typically is used to bring on labor or to ure ulcers.

he woman originally thought the miscarriage was natural, but then she found an e-mail with a receipt for the drug purchase Riase's computer.

- Index References -

mpany: EDITIONS DES DERNIERES NOUVELLES D'ALSACE SA

guage: EN

er Indexing: (DNA; RIASE) (Daniel Riase; Riase; Twenty)

words: (n)

d Count: 165

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: October 16, 2007
JUDGE: William C. Andrews, III

COMMONWEALTH OF VIRGINIA

vs. **CASE NO.: 07-598-00 & -01**

DANIEL HENRY RIASE, DEFENDANT

DATE OF BIRTH: 9-26-85 **SEX: Male**
SSN/OL NO.: 421-37-4781 **RACE: Black**

OFFENSE DESCRIPTION: Adulterate food/drink (F);Aggravated maiming (F)
OFFENSE DATE: 2-21-07
VA CODE SECTION: 18.2-54.2; 18.2-51.2
VCC: ASL-1317-F3; ASL-1340-F2

SENTENCING ORDER

Attorney for the Commonwealth: Sheree Konstantinou
Attorney for the Defendant: Ronald Smith
Court Reporter: Cindy T. Zember

The defendant, who was led to the bar in the custody of the jailor of this Court, was present and represented by the retained attorney named above.

On August 16, 2007, the defendant was found GUILTY of the above offense.

The presentence report was received by the Court in the manner prescribed by law, and ordered filed.

Pursuant to the provisions of §19.2-298.01, the Court has considered the applicable discretionary guidelines worksheets, which are ordered filed as a part of the record in this case.

Before pronouncing sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCED** the defendant to:

Incarceration with the Virginia Department of Corrections for a term of ten (10) years on the charge of Adulterate food/drink and twenty-five (25) years on the charge of Aggravated maiming.

This sentence shall run consecutively with any other sentences imposed.

The Court **SUSPENDED** the ten (10) year sentence on the charge of Adulterate food/drink and twenty (20) years of the twenty-five (25) year sentence on the charge of Aggravated maiming for a period of twenty (20) years, upon the following conditions:

Good behavior. The defendant shall be of good behavior and not violate any laws for twenty (20) years from today.

Supervised probation. The defendant is placed on probation under the supervision of a Probation Officer of this Court from the date above or his release from confinement, whichever occurs last, and the defendant shall comply with the probation rules of this Court provided by the Probation Officer and with all additional requirements set by the Probation Officer. Probation shall include substance abuse counseling and/or testing as prescribed by the Probation Officer.

Costs. The defendant shall pay Court costs of this proceeding within one (1) year of release as described in the payment plan presented by the defendant.

DNA Testing. The defendant shall provide a blood sample before being released from custody in accordance with Section 19.2-310.2 of the Code of Virginia of 1950, as amended.

The Court certifies that at all times during the trial of this case the defendant and his attorney were personally present. Unless otherwise receiving credit, the defendant shall be given credit for the time spent in custody awaiting trial, pursuant to Section 53.1-187 of the Code of Virginia of 1950, as amended.

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: 35 years
TOTAL SENTENCE SUSPENDED: 30 years

S/WILLIAM C. ANDREWS, III
JUDGE

CLERK:mlw

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Hampton Circuit - Criminal Division

Case Details

Case Number: CR07000598-01	Filed: 04/27/2007	Commenced by: Indictment	Locality: COMMONWEALTH OF VA
Defendant: RIASE, DANIEL	Sex: Male	Race: Black (Non-Hispanic)	DOB: 09/26/****
Address: HAMPTON VA 23663			
Charge: AGG MALICIOUS WOUNDING	Code Section: 18.2-51.2	Charge Type: Felony	Class: 2
Offense Date: 02/21/2007	Arrest Date: 02/25/2007		

Hearings

Date	Time	Type	Room	Plea	Duration	Jury	Result
04/2007	9:00AM	Advise About Attorney Arrangements	1				Continued Motion Of Defense
07/2007	2:00PM	Grand Jury	2				True Bill
11/2007	9:00AM	Advise About Attorney Arrangements	2				Continued Motion Of Defense
25/2007	9:00AM	Advise About Attorney Arrangements	2				Set For Trial
10/2007	9:00AM	Motion - Other Pre-Trial	3				Granted
16/2007	9:00AM	Plea	2	Guilty			Tried
6/2007	9:00AM	Pre-Sentence Report	3				Sent

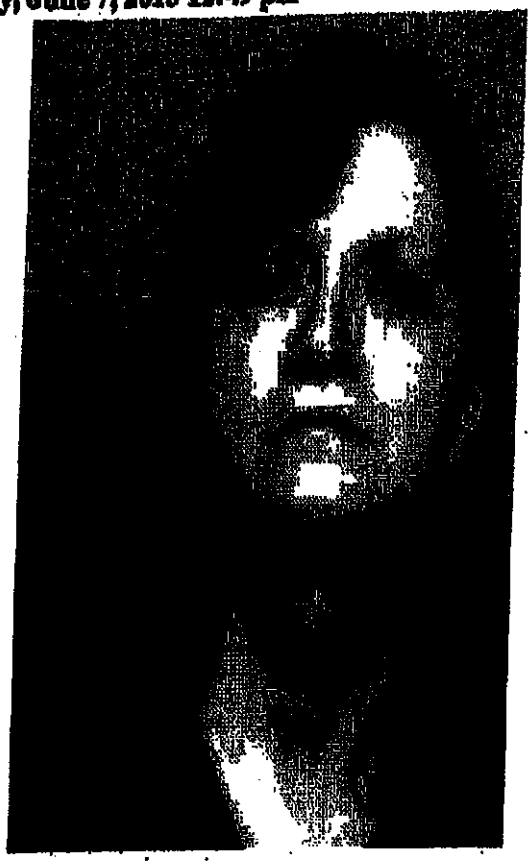
Final Disposition

Disposition Code: Guilty	Disposition Date: 10/16/2007	Concluded By: Guilty Plea
Amended Charge:	Amended Code Section:	Amended Charge Type:

Jail/Penitentiary: Penitentiary	Concurrent/Consecutive:	Life/Death:
Sentence Time: 25 Year(s)	Sentence Suspended: 20 Year(s)	Operator License Suspension Time:
Fine Amount:	Costs:	Fines/Cost Paid:
Program Type:	Probation Type: Supervised	Probation Time: 20 Year(s)
Probation Starts:	Court/DMV Surrender:	Driver Improvement Clinic:

oman guilty of poisoning husband

/elissa Powell | The Roanoke Times | Posted: Friday, June 7, 2013 12:49 pm



Womanguilty ofpoisoninghusband

Cathy Turpin

FORD — He made a ham sandwich out of dients from his fridge, and about an hour after eating vin Turpin said he became extremely ill.

n's former wife, whom he was married to for 32 , pleaded guilty Friday in Radford Circuit Court to g "itching powder" in Alvin Turpin's mayonnaise am in September 2008, sending him to the hospital.

Turpin, 56, of Dublin was convicted of adulteration d and sentenced to 10 years in prison, suspended he serves one year. She'll also be responsible for her ex-husband's medical bill.

d Commonwealth's Attorney Chris Rehak said Turpin later told police that the two had been g and she was "very, very mad." Alvin Turpin said e hearing that he and Cathy Turpin have been d since March 2010 and were separated and living the time of the incident.

urpin said he came back to his Radford house one eptember 2008 and discovered that it had been into. Though nothing major had been stolen, he olice.

noticed that the wires to his refrigerator had been cut, but because his food was still cold, he said ot concerned about making a sandwich with the ham and mayonnaise inside.

he became so ill after eating the sandwich that he went to the Carilion New River Valley Medical where he was kept overnight in the intensive care unit, with IVs in both of his arms.

hought of someone deliberately poisoning him didn't cross his mind, Turpin said.

think anything about it," he said. "But then I came back from the hospital and found the emails."

id that his sister, posing online as a man, had started communicating with Cathy Turpin on a e. It started as a joke, Alvin Turpin said, but Cathy Turpin began opening up to the online user,

ing her sister-in-law — whom s.. believed was a potential romantic . erest — that she had poisoned husband.

ak said Friday that Cathy Turpin wrote in an email that she at first found it funny that Alvin Turpin to go to the hospital but that if she had seriously hurt him, she would be "devastated."

ak said that Cathy Turpin told police that she "wanted to make him sick and vomit out of spite." No ifics about why she used the powder were disclosed during Friday's hearing.

y Turpin was originally charged with administering poison, but the charge was amended as part of a agreement. She also faced one count of malicious wounding and charges of burglary, forgery and card larceny, but those charges were dismissed Friday.

Turpin said he and Cathy Turpin had lived together in Dublin, but after separating, he moved back childhood home in Radford. It was there that he had to change his locks three times because of ins, he said.

Turpin said he called police each time, and he informed his lawyer. Cathy Turpin was using a One card in his name without his knowledge and spent more than $3,000, he said. But his lawyer ime "did nothing," Alvin Turpin said.

have said the investigation into the September 2008 break-in didn't go anywhere because ies were unclear about the marital status of the couple, which might have complicated a burglary The police did not hear about the attempted poisoning accusation until this year, Radford police y Wilburn has said. The new piece of information led to the reopening of the case.

rpin said that after the last break in, a police officer advised him to meet with Rehak, which led Turpin's indictments in March.

rpin's lawyer, Mark Hicks, said his client will pay $1,860 in restitution to Alvin Turpin if he can locumentation of his hospital bills. Cathy Turpin will also be placed on two years of active d probation upon her release.

imum punishment for an adulteration of food charge is 20 years, and when asked by Judge Joey r why there was a downward departure in Cathy Turpin's sentence, Rehak said Turpin is older, lical condition and has never been convicted of a felony.

pin said he first met Cathy Turpin at a furniture company where they both worked. They 1977 and had two children together, who are now grown and have children of their own.

e nothing to do with her," Alvin Turpin said of his children. He added that his newest will most likely never see Cathy Turpin in person.

d have gotten the 20 years," Alvin Turpin said. "But there was a little justice."

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Radford Circuit - Criminal Division

Case Details

ase Number: R13012085-00	**Filed:** 03/08/2013	**Commenced by:** Direct Indictment	**Locality:** COMMONWEALTH OF VA
fendant: RPIN, CATHY WHITED	**Sex:** Female	**Race:** White Caucasian (Non-Hispanic)	**DOB:** 01/31/****
dress: BLIN,VA 24084			
arge: LICIOUS WOUNDING	**Code Section:** 18.2-51	**Charge Type:** Felony	**Class:** 3
ense Date: 1/2008	**Arrest Date:** 03/10/2013		

Hearings

Date	Time	Type	Room	Plea	Duration	Jury	Result
03/08/2013	9:00AM	Grand Jury					True Bill - Def. Arrested On Capias
03/22/2013	11:00AM	Bond					Tried
04/12/2013	9:00AM	To Be Set					Continued
04/19/2013	9:00AM	To Be Set					Continued
05/24/2013	9:00AM	To Be Set					Continued
06/07/2013	1:00PM	Plea					Dismissed

Final Disposition

Disposition Code: Dismissed	**Disposition Date:** 06/07/2013	**Concluded By:** Dismissal
Amended Charge:	**Amended Code Section:**	**Amended Charge Type:**

Jail/Penitentiary:	**Concurrent/Consecutive:**	**Life/Death:**
Sentence Time:	**Sentence Suspended:**	**Operator License Suspension Time:**

Instrument # 201300801

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY RADFORD THIS 7th DAY OF JUNE, 2013

COMMONWEALTH OF VIRGINIA

V. CR13-12085, CR13-12086, CR13-12088 thru CR13-12092

CATHY WHITED TURPIN, DEFENDANT

Comes now, the Commonwealth, by counsel, Christian Rehak, Mark Hicks, attorney for defendant and Cathy Turpin in person and respectfully requests this Honorable Court enter an Order of Dismissal of Indictment Numbers CR13012085-00, CR13012086-00, CR13012088-00, CR13012089-00, CR13012090-00, CR13012091-00 and CR13012092-00 which charges the defendant with Malicious Wounding, Burglary, two counts, Forgery and /or Uttering two counts, Forgery and/or Uttering of a Public Record, and Credit Card Theft.

Upon consideration of the Commonwealth's request to enter an Order of Dismissal, it is hereby, ADJUDGED, ORDERED and DECREED that the above referenced indictments be and hereby are dismissed.

ENTER: [signature] JUDGE

DATE: 6-20-13

EXHIBIT E

Case of Brian and Shannon Gore (Aggravated Malicious Wounding Prosecution for Child Neglect; Gloucester County Circuit Court, 2013)

PRACTICE ADVISORY FOR IMMIGRATION PRACTICIONERS
Arguing Virginia Code § 18.2-51 Unlawful/Malicious Wounding is Not an Aggravated Felony Crime of Violence Under the Categorical Approach

Va. couple sentenced to 30 years in girl's abuse

Authorities say the girl's abuse went on for years and that no one except her parents knew she _ or the child buried in the yard _ ever existed. Both children were born at home, and neither had a birth certificate or was seen by a doctor.

A third child appeared to be well cared for when sheriff's deputies found the girl during a search for the Gores' home.

The girl, who is not being identified by the AP, was filthy, unable to stand and weighed less than 16 pounds.

The Gores told deputies the girl was born in 2004 and had Down syndrome and cerebral palsy. They had locked her up, they said, because she was disruptive. She stayed in the cage when the couple went to work _ Shannon at a fast-food restaurant and Brian as a heating and air-conditioning technician. They told authorities they started out feeding her while she was in the cage, but had tapered off in recent years.

Brian Gore told deputies after their arrest that the child buried in their yard was born in 2007 and had died after having trouble breathing.

The couple has spent two years in isolation cells in Norfolk. They originally pleaded not guilty but changed their pleas during jury selection in March. Each pleaded guilty to felony child abuse and entered Alford pleas to charges of malicious wounding. That means they didn't admit guilt but agreed that evidence was strong enough to convict them.

The Gores were stripped of their parental rights. Both the girl and her younger brother have been adopted by different families.

Ian Decker, an attorney appointed as the girl's guardian ad litem, told the newspaper she had gained weight and was "fortunate to have found the family that she's with."

"She is doing as well as you can expect a child to do considering what her parents put her through," Decker said in an email. "She is with a very loving family that puts her interests first."

rmation from: WAVY-TV, http://www.wavy.com/

ndex References ...

Subject: (Legal (1LE33); Sex Crimes (1SE01); Social Issues (1SO05); Criminal Law (1CR79); Health & Family (1HE30); y Social Issues (1FA81); Parents & Parenting (1PA25); Crime (1CR87); Prisons (1PR87))

n: (USA (1US73); Americas (1AM92); North America (1NO39); Virginia (1VI57); U.S. Southeast Region (1SO88))

age: EN

ndexing: (Brian Gore; Brian Decker; Shannon Gore; Bruce Long; Holly Smith) (United States; USA; North America) distribution)

ds: (n); (Legal); (Crime)

ount: 690

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Gloucester County Circuit - Criminal Division

Case Details

se Number: 12000084-00	Filed: 03/05/2012	Commenced by: Direct Indictment	Locality: COMMONWEALTH OF VA
endant: RE, BRIAN SCOTT	Sex: Male	Race: White Caucasian (Non-Hispanic)	DOB: 09/19/****
ress:			
rge: AULT: MALIC; VICTIM INJURED	Code Section: 18.2-51.2	Charge Type: Felony	Class: 2
se Date: /2011	Arrest Date: 03/07/2012		

Hearings

Date	Time	Type	Room	Plea	Duration	Jury	Result
/05/2012	9:00AM	Grand Jury					True Bill - Def. Arrested On Capias
/05/2012	9:00AM	Grand Jury					True Bill - Def. Arrested On Capias
/13/2012	2:30PM	Review					Continued
/07/2012	9:30AM	To Be Set					Continued
02/2012	9:30AM	To Be Set					Joint Motion
25/2012	9:30AM	Trial			2 Day(s)		Joint Motion
26/2012	9:30AM	Trial			2 Day(s)		Joint Motion
08/2013	9:30AM	Motion - Other Pre-Trial					Granted
1/2013	3:30PM	Motion - Other Pre-Trial					Resolved Order Pending
5/2013	9:30AM	Plea		Alford			Presentence Ordered
0/2013	1:30PM	Pre-Sentence Report					Sent

Final Disposition

Disposition Code: Guilty	Disposition Date: 06/10/2013	Concluded By: Guilty Plea
Amended Charge:	Amended Code Section:	Amended Charge Type:

Jail/Penitentiary: Penitentiary	Concurrent/Consecutive:	Life/Death:
Sentence Time:	Sentence Suspended:	Operator License Suspension Time:

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Gloucester County Circuit - Criminal Division

Case Details

e Number: 12000083-00	**Filed:** 03/05/2012	**Commenced by:** Direct Indictment	**Locality:** COMMONWEALTH OF VA
endant: RE, SHANNON NICOLE	**Sex:** Female	**Race:** White Caucasian (Non-Hispanic)	**DOB:** 06/27/****
A: RE, SHANNON N			
ress:			
ge: AULT: MALIC; VICTIM INJURED	**Code Section:** 18.2-51.2	**Charge Type:** Felony	**Class:** 2
se Date: /2011	**Arrest Date:** 03/07/2012		

Hearings

Date	Time	Type	Room	Plea	Duration	Jury	Result
/05/2012	9:00AM	Grand Jury					True Bill - Def. Arrested On Capias
/05/2012	9:30AM	Jury Trial			4 Day(s)		
/13/2012	2:30PM	Review					Continued
/07/2012	9:30AM	To Be Set					Continued
/02/2012	9:30AM	To Be Set					Joint Motion
/25/2012	9:30AM	Trial			2 Day(s)		Joint Motion
/26/2012	9:30AM	Trial			2 Day(s)		Joint Motion
/11/2013	3:30PM	Motion - Other Pre-Trial					Resolved Order Pending
05/2013	9:30AM	Plea		Alford			Presentence Ordered
10/2013	1:30PM	Pre-Sentence Report					Sent

Final Disposition

Disposition Code: Guilty	**Disposition Date:** 06/10/2013	**Concluded By:** Guilty Plea
Amended Charge:	**Amended Code Section:**	**Amended Charge Type:**

Jail/Penitentiary: Penitentiary	**Concurrent/Consecutive:**	**Life/Death:**

EXHIBIT F

Virginia Model Jury Instructions – Criminal Instruction No. G37.100

PRACTICE ADVISORY FOR IMMIGRATION PRACTICIONERS
Arguing Virginia Code § 18.2-51 Unlawful/Malicious Wounding is Not an Aggravated Felony Crime of Violence Under the Categorical Approach

2-37 Virginia Model Jury Instructions - Criminal Instruction No. G37.100

Copy Citation

Virginia Model Jury Instructions - Criminal CHAPTER 37 MALICIOUS WOUNDING, ASSAULT, BATTERY AND RELATED OFFENSES

nstruction No. G37.100 Malicious Wounding and Lesser ncluded Offenses—Combined Instruction

uilt Phase:

ıe defendant is charged with the crime of malicious wounding. The Commonwealth must ove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [shot, stabbed, cut or wounded; caused bodily injury by any means to] (name of person)**; and**

(2) That such [shooting, stabbing, cutting or wounding; bodily injury] **was with intent to kill r permanently maim, disfigure or disable** (name of person)**; and**

) That the act was done with malice.

ou find from the evidence that the Commonwealth has proved beyond a reasonable ıbt each of the above elements of the crime as charged, then you shall find the ndant guilty of malicious wounding but you shall not fix the punishment until your dict has been returned and further evidence has been heard by you.

ou find from the evidence that the Commonwealth has proved beyond a reasonable bt each of the first two elements of the crime as charged, but that the act was done wfully, and not maliciously, then you shall find the defendant guilty of unlawful

wounding, but you shall not ( ) the punishment until your verdi( ) been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either malicious wounding or unlawful wounding but you do find beyond a reasonable doubt:

(1) That the defendant willfully touched (name of person) without legal excuse or justification; and

(2) That the touching was done in an angry, rude, insulting, or vengeful manner

then you shall find the defendant guilty of assault and battery, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above crimes, then you shall find the defendant not guilty.

Document Notes (1)

My Notes | All Notes

Add Note

Katherine, Beck Jun 01, 2015 09:45:08 a.m. EDT

Jury instructions for malicious wounding statute and lesser offenses

Edit | XDelete

EXHIBIT G

Virginia Practice Jury Instruction § 84:4 Malicious wounding as an offense

PRACTICE ADVISORY FOR IMMIGRATION PRACTICIONERS
Arguing Virginia Code § 18.2-51 Unlawful/Malicious Wounding is Not an Aggravated Felony Crime of Violence Under the Categorical Approach

Va. Prac. Jury Instruction § 84:4

Virginia Practice Series TM
Database updated September 2015
Ronald J. Bacigal[a0], Margaret Ivey Bacigal[a1]
Part VI. Crimes—Forms of Instructions
Chapter 84. Mayhem (Felonious Woundings)

§ 84:4. Malicious wounding as an offense

A man is presumed to intend to do that which he voluntarily does. If you believe from the evidence beyond a reasonable doubt that the defendant, with malice, *[description of overt acts of defendant that, if true, would constitute malicious act]* with intent to maim, disfigure, disable or kill *[name of prosecuting witness]*, then you shall find the defendant guilty of maliciously *[shooting/wounding/[other type of malicious act]] [name of prosecuting witness]*.

Notes
Commentary
See Shifflett v. Com., 221 Va. 191, 192, 269 S.E.2d 353, 354 (1980); Christian v. Com., 221 Va. 1078, 1081, 277 S.E.2d 205, 207 (1981); Campbell v. Com., 12 Va. App. 476, 482–483, 405 S.E.2d 1, 4 (1991).
West's Key Number Digest
West's Key Number Digest, Assault and Battery ⚿58
Legal Encyclopedias
C.J.S., Assault and Battery § 75

Footnotes
a0 Professor of Law, University of Richmond, T.C. Williams School of Law.
a1 Professor and Director, Clinical Placement Program, University of Richmond

EXHIBIT H

Office of Commonwealth's Attorney Lynchburg, Virginia Instruction No. 24.3 Malicious Wounding and Lesser Included Offenses – Combined Instruction

PRACTICE ADVISORY FOR IMMIGRATION PRACTICIONERS
Arguing Virginia Code § 18.2-51 Unlawful/Malicious Wounding is Not an Aggravated Felony Crime of Violence Under the Categorical Approach

Office of the Commonwealth's Attorney
Lynchburg, Virginia
Index of Jury Instructions

24.3 Malicious Wounding and Lesser Included Offenses – Combined Instruction

Instruction No. [Insert Number]

The defendant is charged with the crime of [malicious wounding; maliciously causing bodily injury] . The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [wounded; caused bodily injury by any means to] [name of person] ; and

(2) That such [wounding; bodily injury] was with intent to kill or permanently maim, disfigure, disable or kill [name of person] ; and

(3) That the act was done with malice.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty of [malicious wounding; maliciously causing bodily injury] , but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the offense as charged, but that the act was done unlawfully, and not maliciously, then you shall find the defendant guilty of [unlawfully wounding; unlawfully causing bodily injury] but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either [malicious wounding; maliciously causing bodily injury] or [unlawful wounding; unlawful causing of bodily injury] but you do find beyond a reasonable doubt that:

(1) That the defendant willfully touched [name of person] without legal excuse or justification; and

(2) That the touching was done in an angry, rude, insulting or vengeful manner; then you shall find the defendant guilty of assault and battery, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above offenses, then you shall find the defendant not guilty.

EXHIBIT I

Sample Indictments under § 18.2-51

PRACTICE ADVISORY FOR IMMIGRATION PRACTICIONERS
Arguing Virginia Code § 18.2-51 Unlawful/Malicious Wounding is Not an Aggravated Felony Crime of Violence Under the Categorical Approach

Virginia:

In The Circuit Court of the City of Chesapeake

August 7, 2012

THE COMMONWEALTH OF VIRGINIA	**Malicious Wounding**
v.	**Docket Number: 12-1956-00**
JAMES ARTHUR MILLER **DOB: 11/28/91** **Social Security #: 227-63-7119**	*VCC Number: ASL-1334-F3 (For administrative use only)*

Grand Jury Indictment

The Grand Jurors of the Commonwealth of Virginia and of the City of Chesapeake, attending the Court aforesaid, upon their oaths, present that, in the City of Chesapeake,

JAMES ARTHUR MILLER

On or about May 18, 2012, did maliciously shoot, stab, cut or wound or by any means cause bodily injury to Michael Batty, with the intent to maim, disfigure, disable, or kill, in violation of § 18.2-51 of the Code of Virginia (1950) as amended.

Grand Jury Date: August 7, 2012

Grand Jury Witness: Detective Becky M. Roberson
Chesapeake Police Dept.

A True Bill

Foreman of the Grand Jury

Not A True Bill

Foreman of the Grand Jury

60

2012 WL 8304101 (Va.Cir.Ct.) (Trial Pleading)
Circuit Court of Virginia.
Chesapeake City

THE COMMONWEALTH OF VIRGINIA,

v.

Tenetia TURNER.

No. CR121761.
July 3, 2012.

Dob: XX/XX/84
Social Security #: XXX-XX-XXXX
Malicious Wounding
Docket Number: 12-1761-01

Grand Jury Indictment

The Grand Jurors of the Commonwealth of Virginia and of the City of Chesapeake, attending the Court aforesaid, upon their oaths, present that, in the City of Chesapeake,

TENISHA TURNER

On or about May 11, 2012, did maliciously shoot, stab, cut or wound or by any means cause bodily injury to Qiisha Jones, with the intent to maim, disfigure, disable, or kill, in violation of § 18.2-51 of the Code of Virginia (1950) as amended.

Grand Jury Date: July 3, 2012

Grand Jury Witness: Detective Becky M. Roberson Chesapeake Police Dept

True Bill Foreman of the Grand Jury

A True Bill Foreman of the Grand Jury

61

2012 WL 8304106 (Va.Cir.Ct.) (Trial Pleading)
Circuit Court of Virginia.
Chesapeake City

THE COMMONWEALTH OF VIRGINIA,

v.

Miguel Ronnell CUFFEE DOB: XX/XX/77 Social Security #: XXX-XX-XXXX.

No. CR12163500.
July 3, 2012.

VCC Number: ASL-1334-F3 (For administrative use only)
Malicious Wounding

Grand Jury Indictment

The Grand Jurors of the Commonwealth of Virginia and of the City of Chesapeake, attending the Court aforesaid, upon their oaths, present that, in the City of Chesapeake,

MIGUEL RONNELL CUFFEE

on or about May 14, 2012, did maliciously shoot, stab, cut or wound or by any means cause bodily injury to Garnett Lewis, with the intent to maim, disfigure, disable, or kill; in violation of § 18.2-51 of the Code of Virginia (1950) as amended.

Grand Jury Date: July 3, 2012

Grand Jury Witness:

Detective Becky M. Roberson

Chesapeake Police Dept.

True Bill

Foreman of the Grand Jury

A True Bill

Foreman of the Grand Jury

62

2009 WL 7047815 (Va.Cir.Ct.) (Trial Pleading)
Circuit Court of Virginia.
Chesapeake City

THE COMMONWEALTH OF VIRGINIA,

v.

Derrick Clark GOODWIN Dob: XX/XX/XXXX Social Security #: XXX-XX-XXXX.

No. 09-3081.
September 1, 2009.

VCC Number: ASL-1334-F3 (For administrative use only)

Grand Jury Indictment

Malicious Wounding

he Grand Jurors of the Commonwealth of Virginia and of the City of Chesapeake, attending the Court aforesaid, upon their ths, present that, in the City of Chesapeake,

DERRICK CLARK GOODWIN

or about June 21, 2009, did maliciously shoot, stab, cut or wound or by any means cause bodily injury to Todd Williamon, h the intent to maim, disfigure, disable, or kill, in violation of § 18.2-51 of the Code of Virginia (1950) as amended.

nd Jury Date: September 1, 2009

nd Jury Witness: Detective Becky M. Roberson

apeake Police Dept.

ue Bill

nature>>

an of the Grand Jury

True Bill

n of the Grand Jury

63

983 b

VIRGINIA: In the Circuit Court of the City of Norfolk

THE COMMONWEALTH OF VIRGINIA	Indictment for:
v.	Malicious Wounding
RAY DANIEL FREEMAN DOB: 03/02/92 SSN: 223-63-8617	(Felony)

March 16, 2011

The Grand Jury charges that:

On or about December 21, 2010, in the City of Norfolk, RAY DANIEL FREEMAN did feloniously shoot, stab, cut, wound or cause bodily injury to James Knight, with the intent to maim, disfigure, disable, or kill.

Va. Code § 18.2-51.

Grand Jury Witness: D.A. Brasfield
Victor H. Powell
Detective Division
Norfolk Police Department

A True Bill [✓]
Not A True Bill [ ]

Foreperson of the Grand Jury

(For administrative use only)
Paula M Bruns

VC Code: ASL-1334-F3