CAIR Coalition
Capital Area Immigrants' Rights

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

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PRACTICE ADVISORY[1]
FOURTH CIRCUIT HOLDS THAT VIRGINIA INVOLUNTARY MANSLAUGHTER IS NOT A CRIME INVOLVING MORAL TURPITUDE

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On January 24, 2017, the U.S. Court of Appeals for the Fourth Circuit issued a decision in *Sotnikau v. Lynch* (Case No. 15-2073), ruling that Virginia's involuntary manslaughter statute, Va. Code § 18.2-36, is categorically overbroad with regard to the crime involving moral turpitude ("CIMT") provisions of the Immigration and Nationality Act (INA).[2] **In cases within the jurisdiction of the Fourth Circuit, the *Sotnikau* ruling means that a noncitizen cannot be deported or made inadmissible *based on a charge for a crime involving moral turpitude* arising from a conviction for Virginia involuntary manslaughter.**[3]

***Although the *Sotnikau* decision will benefit noncitizens facing involuntary manslaughter charges, as well as those noncitizens facing other criminal charges that have a *mens rea* or intent element of "criminal negligence," **defense attorneys should remember that an involuntary manslaughter conviction may still have adverse immigration consequences.** Under the newly expanded priorities for immigration enforcement enacted by the Trump administration's January 25, 2017 executive order, "Enhancing Public Safety in the Interior of the United States," undocumented immigrants or immigrants who violate the terms of a non-immigrant entry visa and obtain an involuntary manslaughter conviction (or those who have merely been charged with involuntary manslaughter) are likely to be targeted and detained by Immigration and Customs Enforcement (ICE) and placed in removal proceedings. Involuntary manslaughter may also bar undocumented individuals from temporary benefits, such as Temporary Protected Status (TPS), and will be considered a strong negative factor for those seeking certain discretionary defenses against deportation.[4] ***

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[1] This practice advisory does not constitute legal advice. It is intended for the use of legal professionals and is not meant to serve as a substitute for a lawyer's obligation to conduct independent analysis and provide legal advice tailored to the facts and circumstances of a client's case.

[2] 8 USC § 1227(a)(2)(A)(i); 8 USC § 1182(a)(2)(A)(i).

[3] Thanks to a previous Fourth Circuit decision, *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005), involuntary manslaughter under Va. Code § 18.2-36 is also categorically not a crime of violence aggravated felony pursuant to 8 § 1101(a)(43)(F), because Virginia involuntary manslaughter "does not intrinsically involve a substantial risk that force will be applied as a 'means to an end,'" as required by the crime of violence definition at 18 U.S.C. § 16. *Id*. at 447.

[4] Additionally, there is another grounds of inadmissibility found at 8 USC § 1182(a)(2)(B) that an involuntary manslaughter charge under Va. Code § 18.2-36 *could* potentially trigger. This inadmissibility ground is triggered for "an alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more." For example, if a green card holder were convicted of involuntary manslaughter and, say, driving while intoxicated, and received as a result an aggregate sentence of 5 years or

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The court's reasoning: The court in *Sotnikau* applied the "categorical approach" to determine whether a conviction under Virginia's involuntary manslaughter statute constitutes a "crime involving moral turpitude" under the INA. Pursuant to the categorical approach, a state criminal conviction only qualifies as a crime involving moral turpitude under the INA if the elements of the state statute "solely encompass behavior" that fits with in the generic definition of moral turpitude. The categorical approach dictates that when a state statute is overbroad as compared to the federal generic version of that offense, a conviction under the state statute cannot be deemed a crime involving moral turpitude regardless of the underlying facts of the case.

While the definition of "crime involving moral turpitude" has been notoriously difficult for courts to pin down, the Fourth Circuit in *Sotnikau* noted that the Board of Immigration Appeals has found that, "[t]o involve moral turpitude, a crime requires essentially two elements: a culpable mental state and reprehensible conduct."[5] The Fourth Circuit noted that, while a sufficient "culpable mental state" could include an element of intentional or knowing conduct or even criminally reckless conduct, an element of criminally *negligent* conduct would cause an offense to fall outside of the generic definition of moral turpitude, as criminally negligent conduct neither requires proof of specific intent nor proof that a perpetrator acted "with conscious disregard of a substantial and unjustifiable risk."[6]

For this reason, the Fourth Circuit found that the elements of involuntary manslaughter under Virginia law are not a categorical match with the generic definition of a crime involving moral turpitude. Specifically, the court found that the Virginia involuntary manslaughter statute penalizes criminal negligence, because a conviction under the statute can be sustained even where the the perpetrator "**knew or should have known** the probable results of his act,"[7] and merely "**failed to be aware of substantial risks**."[8] **This sweeps broader than criminal recklessness**, which requires a **conscious disregard of the known risks** attendant to the offender's conduct. Therefore, the Fourth Circuit concluded, involuntary manslaughter under Va. Code § 18.2-36 is categorically overbroad, and, as a result, it is never a crime involving moral turpitude, irrespective of the underlying facts of the crime.

In the *Sotnikau* decision, the Fourth Circuit drew a very clear line delineating between statutes that require a showing of criminal recklessness, which may by CIMTs, and those that can be sustained merely by a showing of criminal negligence, which are categorically not CIMTs. The clear distinction in *Sotnikau* reaches beyond just involuntary manslaughter; it can be applied to argue that *any* Virginia criminal offense statute under which a conviction can be sustained through a showing of criminal negligence is also categorically NOT a CIMT. Virginia statutes potentially impacted by the *Sotnikau* decision include, but are not limited to, the following:

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more, that green card holder would be subject to inadmissibility under 8 USC § 1182(a)(2)(B), and would be vulnerable to being placed in removal proceedings if they were to ever leave the country and seek to reenter the U.S. from abroad.

[5] *Matter of Ortega-Lopez*, 26 I. & N. Dec. 99, 100 (BIA 2013).

[6] *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992).

[7] *Conrad v. Commonwealth*, 521 S.E.2d. 321, 326 (Va. Ct. App. 1999).

[8] *Matter of Perez Contreras* at 618.

- Va. Code § 18.2-371, subsection (i) (Causing or encouraging acts rendering children delinquent, abused, etc. – Note that a conviction under subsection (ii) of this statute, which involves sexual acts with a minor, IS likely to be charged as a CIMT).[9]
- Va. Code § 18.2-371.1 (Abuse and neglect of children)[10]
- Va. Code § 40.1-103 (Cruelty and injuries to children)[11]
- Va. Code § 18.2-51.4 (Maiming, etc. of another resulting from driving while intoxicated)
- Va. Code §§ 46.2-852 through 46.2-869 (Reckless driving statutes)

PRACTICE TIP TAKEAWAYS FOR VIRGINIA DEFENSE ATTORNEYS:

- *A plea to involuntary manslaughter can no longer trigger either the crime involving moral turpitude grounds of inadmissibility/deportability or the crime of violence aggravated felony ground of deportability. This will make involuntary manslaughter a "safe plea" for some noncitizens (i.e., lawful permanent residents) but not for others. It also means that an involuntary manslaughter conviction will trigger fewer bars to relief from removal for noncitizens who are already deportable.*

- *A conviction for involuntary manslaughter will STILL make an undocumented immigrant or an immigrant who overstayed or otherwise violated a non-immigrant visa (in other words, an immigrant who is otherwise removable) a priority for ICE enforcement, detention, and removal.*

- *If you have an immigrant client convicted of involuntary manslaughter or one of the other Virginia statutes identified in this Practice Advisory as potentially impacted by the Sotnikau decision, please contact CAIR Coalition for advice on how to mitigate against immigration consequences.*

The court's decision in *Sotnikau* can be accessed on CAIR Coalition's website **here**. For any questions about the decision or this practice advisory, please contact Rachel Jordan at rachel.jordan@caircoalition.org.

[9] ICE may still charge a person convicted under this statute of being deportable under the crimes against children deportability grounds found at 8 USC § 1227(a)(2)(E).
[10] ICE may still charge a person convicted under this statute of being deportable under the crimes against children deportability grounds found at 8 USC § 1227(a)(2)(E).
[11] ICE may still charge a person convicted under this statute of being deportable under the crimes against children deportability grounds found at 8 USC § 1227(a)(2)(E).