

CAPITAL AREA IMMIGRANTS’ RIGHTS (CAIR) COALITION  
 IMMIGRATION CONSEQUENCES OF COMMON VIRGINIA OFFENSES  
 SECTION VI – TRAFFIC OFFENSES

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

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

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

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

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intoxicated				federally prohibited controlled substance and established in record of conviction <sup>4</sup>	record of conviction
Driving motor vehicle, engine, etc., while intoxicated, etc. (simple DUI)	18.2-266	No	No	Possibly considered a controlled substance offense if person is intoxicated by a federally prohibited controlled substance and established in record of conviction	Note that any DUI greatly increases the risk that ICE will take enforcement action against an undocumented person  If driving under the influence of controlled substance(s), keep reference to particular

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

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

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

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

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

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

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

<sup>7</sup> Class 2 misdemeanor with maximum possible sentence of 6 months.

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

<sup>8</sup> Unpublished BIA decision holds that eluding under Va. Code Ann. 46.2-817(B) is not a CIMT because it only requires a mens rea of negligence. Special thanks to IRAC. (*Matter of Ramirez Moz*, 9/19/19)  
<sup>9</sup> This is a class 6 felony in VA punishable by up to 12 months. In *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999) and *Matter of Vallenzuela-Gallardo*, 25 I&N Dec. 838 (BIA 2012), the BIA found that a crime relates to obstruction of justice where it includes the critical element of an intentional attempt, motivated by a specific intent, to interfere with the process of justice. These cases are split on the question of whether such an attempt requires there to be an ongoing criminal proceeding, but it seems evident that the “willful and wanton disregard” of a law enforcement officer’s signal to stop required by 46.2-817 goes beyond the “specific intent to interfere with the process of justice.” Therefore all subsections of 46.2-817 are overbroad and not crimes relating to obstruction of justice under 8 U.S.C. §1101(a)(43)(S).

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			imposed is at least one year		avoid aggravated felony
	46.2-817(C)	Probably (see FN 6)	Possibly, but probably not under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year (see FN 9)  Possibly, under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year	No	

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Reckless driving	46.2-852	No (see FN 2)	No		
Driving vehicle that is not under control	46.2-853	No	No	No	
Duty of driver to stop, etc., in event of accident involving injury or death or damage to attended property (“hit and run”)	46.2-894 (failure to report after bodily injury and/or property damage)	No <sup>10</sup>	No	No	

<sup>10</sup> *Nunez-Vasquez v. Barr*, No. 19-1841 (4th 2020).

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Duty of certain persons accompanying driver to report accidents involving injury, death, or damage to attended property	46.2-895 (failure to report after bodily injury and/or property damage)	Possibly (see FN 8)	No	No	<p>If applicable, make explicit in record that offense involved only damage to property, not bodily injury, to decrease likelihood that offense is considered a CIMT</p> <p>If offense involved injury to person or death, keep out reference to personal injury/death in record of conviction</p>

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