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

OFFENSE	STATUTE	CIMT?	AGGRAVATED FELONY?	OTHER GROUNDS: DEPORTABILITY/ INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
Underage possession of alcohol	4.1-305	No	No	No	To preserve any potential arguments against CIMT, consider plea to sub-part 4.1-305(A)
Failing to secure medical attention for injured child	18.2-314	Probably	No	Probably a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)[2]	Plea to simple assault and battery at 18.2-57(A) to avoid aggravated felony and CIMT; if this is not possible consider an alternative plea to 18.2-371(i) contributing to the delinquency of a minor, and specify subsection (i) in the record – note that this will likely avoid the CIMT and aggravated felony grounds but may not avoid

[1] Including, but not limited to: controlled substance offense, prostitution offense, commercialized vice offense, firearm offense, crimes of domestic violence, crimes of stalking, and crimes against children.
[2] The "crime of child abuse" ground of deportability at 8 U.S.C. § 1227(a)(2)(E)(i) has been defined broadly by the Board of Immigration Appeals, requiring the elements of a knowing mental state, coupled with an act or acts of creating a likelihood of harm to a child. *See Matter of Mendoza-Osoria*, 16 I&N Dec. 703(BIA 2016); see also *Matter of Velasquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008) (defining crime of child abuse as "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation.")

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

OFFENSE	STATUTE	CIMT?	AGGRAVATED FELONY?	OTHER GROUNDS: DEPORTABILITY/ INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
					the crime of child abuse grounds of deportability[3]
Disorderly conduct in public places	18.2-415	Probably not	No	No	Consider use as an alternative to other offenses that may trigger CIMT or other grounds of removability
Punishment for using abusive language to another	18.2-416	Probably not	No	No	Consider use as an alternative to other offenses that may trigger CIMT or other grounds of removability
Use of profane language over public airwaves	18.2-427	Probably not	No	No	Consider use as an alternative to other offenses that may trigger CIMT or other grounds of removability. However be aware of the nature of conviction and underlying facts and

[3] *See supra* note 2.

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OFFENSE	STATUTE	CIMT?	AGGRAVATED FELONY?	OTHER GROUNDS: DEPORTABILITY/ INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
					circumstances.
Causing telephone or pager to ring with intent to annoy	18.2-429	Probably not	No	No	Consider use as an alternative to other offenses that may trigger CIMT or other grounds of removability To preserve any potential arguments against CIMT, consider plea to sub-part 18.2-429(A) and emphasize in record that alleged conduct involved no more than that
Perjury	18.2-434	Probably[4]	Yes, under 8 U.S.C. § 1101(a)(43)(S) if the sentence	No	Specify in record that conduct related to written perjury was not pursuant to a judicial proceeding, as opposed to oral perjury during a

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

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OFFENSE	STATUTE	CIMT?	AGGRAVATED FELONY?	OTHER GROUNDS: DEPORTABILITY/ INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
			imposed is at least one year[5]		judicial proceeding, to preserve argument in immigration court that offense is not a CIMT Keep sentence under one year to avoid obstruction of justice aggravated felony
Contempt	18.2-456	No	No	No	
Obstruction of Justice; fleeing from law enforcement	18.2-460	No[6]	Probably, under 8 U.S.C. § 1101(a)(43)(S) if the sentence	No	Keep sentence under one year to avoid obstruction of justice aggravated felony To preserve arguments against CIMT and obstruction-of-justice aggravated felony,

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

[6] In *Ramirez*, The Fourth Circuit held that obstruction of justice does not qualify as a CIMT under Virginia immigration law because it may be committed without morally reprehensible conduct, such as the commission of fraud, deception, or any other aggravating element that shocks the public conscience. *Ramirez v. Sessions*, 877 F.3d 693, 698 (4th Cir. 2018).

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OFFENSE	STATUTE	CIMT?	AGGRAVATED FELONY?	OTHER GROUNDS: DEPORTABILITY/ INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
officer; penalties			imposed is at least one year[7]		consider plea to sub-part 18.2-460(B) and emphasize in record that alleged conduct involved no more than that.[8] Consider alternate plea to 18.2-427 (use of profane language) to avoid CIMT and aggravated felony grounds of removability
Falsely summoning or giving false	18.2-461	Probably[9]	Probably, under 8 U.S.C. §1101(a)(43)(S) if	No	Consider alternate plea to 18.2-427 (use of profane language) to avoid CIMT and

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

[8] *See supra* note 6 and note 7.

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

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

OFFENSE	STATUTE	CIMT?	AGGRAVATED FELONY?	OTHER GROUNDS: DEPORTABILITY/ INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
reports to law-enforcement officials			the sentence imposed is at least one year[10]		aggravated felony grounds of removability Keep sentence under one year to avoid obstruction of justice aggravated felony If possible, plea to sub-part 18.2-461(ii) and emphasize in record that alleged conduct involved no more than intent to interfere to preserve a potential argument that offense does not constitute a CIMT or AF[11]

[10] An immigration practitioner would have an argument that at least a portion of Va. Code 18.2-460 is overbroad with regard to the obstruction of justice aggravated felony ground. Va. Code § 18.2-461(ii) does not require "active interference with proceedings of a tribunal or investigations, or action or threat of action against those who would cooperate in the process of justice;" as required by the generic definition for obstruction of justice. *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838, 843 (BIA 2012). A conviction under Va. Code 18.2-460 can result from empty threats that need not present any real or credible threat for those engaged in the process of justice. For further analysis, *see supra* note 7.

[11] *See supra* note 7.

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Resisting arrest; fleeing from a law enforcement officer	18.2-479.1	Possibly[12]	No		
Racketeering offenses	18.2-514	Probably	Yes, under 8 U.S.C. § 1101(a)(43)(J) if sentence imposed is at least one year Possibly, under 8 U.S.C. § 1101(a)(43)(M)	Possibly, depending on underlying offense, for example controlled substance ground where record of conviction	If possible, make clear in record of conviction that actual and intended loss to the victim did not exceed $10,000 to avoid fraud aggravated felony charge under 8 U.S.C. § 1101(a)(43)(M), (U) Keep sentence under one year to avoid theft aggravated felony charge under 8 U.S.C. §

[12] *Repealed 2018.* The government has previously charged Va. Code § 18.2-479.1 as a CIMT. However, an immigration attorney would have a strong argument that it is not. Interfering with law enforcement is analogous to assault, which is not considered to be a CIMT. Indeed, resisting arrest is a CIMT only when it results in bodily harm to the victim, or involves the threat of the use of deadly force. *See Matter of Logan, 17 I&N Dec. 367, 368-69 (BIA 1980); Matter of Danesh,* 19 I&N Dec. 669 (BIA 1988); *Matter of Garcia-Lopez,* A38 096 900, 2007 WL 4699842, at *2 (BIA Nov. 2, 2007) (unpublished). Although obstruction of justice offenses that require intent to deceive or fraudulent intent may be considered CIMTs, the only intent required by Va. Code § 18.2-479.1 is the intent to "prevent[] or attempt[] to prevent a law-enforcement officer from lawfully arresting."

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OFFENSE	STATUTE	CIMT?	AGGRAVATED FELONY?	OTHER GROUNDS: DEPORTABILITY/ INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
			and (U) if there are allegations of loss and the actual/intended loss to the victim exceeds $10,000	establishes that underlying conduct involved a controlled substance	1101(a)(43)(G)
Giving false identity to law-enforcement officer	19.2-82.1	Yes[13]	Possibly, under 8 U.S.C. §1101(a)(43)(S) if the sentence imposed is at least	No	If at all possible consider plea to 18.2-415 (disorderly conduct) or 18.2-427 (use of profane language) to avoid CIMT Keep sentence under one year to avoid

[13] The Board has held other state statutes involving false identity to a police officer with intent to evade or deceive the court or a police officer are CIMTs. *See Matter of Migran Oganyan*, A72 301 718, 2004 WL 1739156 (BIA June 29, 2004) (unpublished); *Matter of Ivon Reyes Morales*, A200 897 761, 2010 WL 4971017 (BIA Nov. 23, 2010) (unpublished). However, an immigration practitioner could make an argument that Va. Code § 19.2-82.1 is not a CIMT because the *mens rea* element is somewhat ambiguous: while it is clear that an intent to deceive law enforcement regarding one's identity is required, the statute does not require a showing that the goal of the deception is to procure something of value to the detriment of another, and the element of knowing misrepresentation itself does not by itself make fraud a necessary element of a crime. *See Blanco v. Mukasaey*, 518 F.3d 714, 718 (9th Cir. 2008); *Flores-Molina v. Sessions*, _ F.3d _, No. 16-9516 (10th Cir. March 7, 2017). Furthermore, courts have held convictions for false or fraudulent statements are not CIMTs where fraud is not an essential element and the statement is not material. *See, e.g., Matter of Di Filippo*, 10 I&N Dec. 76 (BIA 1962).

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			one year.		obstruction of justice aggravated felony
Failure to Appear	19.2-128	Possibly[14]	Yes, under 8 U.S.C. § 1101(a)(43)(Q), if conviction relates to failure to appear for service of sentence and underlying offense is punishable by a term of five years or more Yes, under 8 U.S.C. § 1101(a)(43)(T) if conviction relates to failure to appear		

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

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OFFENSE	STATUTE	CIMT?	AGGRAVATED FELONY?	OTHER GROUNDS: DEPORTABILITY/ INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
			to answer to a felony charge punishable by two years or more		
Cruelty and injuries to children; abandoned	40.1-103	Probably[15]	Possibly, under 8 U.S.C. § 1101(a)(43)(F), if sentence of one year or more is imposed[16]	Probably a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)[17]	Plea to simple assault and battery at 18.2-57(A) to avoid aggravated felony and CIMT; if this is not possible consider an alternative plea to 18.2-371(i) contributing to the delinquency of a minor, and specify subsection (i) in the record – note that this will likely avoid the

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

[16] In order to be a crime of violence under 8 U.S.C. § 1101(a)(43)(F), a conviction must necessarily meet the definition of a crime of violence at 18 U.S.C. § 16(a), including an element of the use, attempted use, or threatened use of physical force against the person or property of another. Under this statute, a person can be convicted for negligently permitting the life of a child to be endangered or health injured or to be overworked, not necessarily force. Furthermore, this statute does not require as an element the knowing or willful infliction of harm to a victim. Thus, an argument could be made that at least some convictions under this statute do not constitute crimes of violence. Note the Supreme Court held 18 U.S.C. § 16(b) is unconstitutionally void for vagueness. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

[17] *See supra* note 2.

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infant					CIMT and aggravated felony grounds but may not avoid the crime of child abuse grounds of deportability[18]
Trademark Infringement	59.1-92.12	Possibly[19]	Possibly, under 8 U.S.C. § 1101(a)(43)(M) and (U) if there are allegations of loss and the actual/intended loss to the victim exceeds $10,000 Possibly a theft offense under 8 U.S.C. § 1101(a)(43)(G) if	No	If possible, make clear in record of conviction that actual and intended loss to the victim did not exceed $10,000 to avoid fraud aggravated felony charge under 8 U.S.C. § 1101(a)(43)(M), (U) Keep sentence under one year to avoid theft aggravated felony charge under 8 U.S.C. § 1101(a)(43)(G)

[18] *See supra* note 2.

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

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			the sentence imposed is at least one year[20]		

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

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