

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? ¹	COMMENTS AND PRACTICE TIPS
Maiming, etc., of another resulting from driving while	18.2-51.4	Probably not ²	No ³	Possibly considered a controlled substance offense if person is intoxicated by a	If driving under the influence of controlled substance(s), keep reference to particular controlled substance(s) out of

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

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

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

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

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

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				and established in record of conviction ⁵	of controlled substance(s), keep reference to particular 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 ⁶	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

⁵ See *supra* note 4.

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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 intoxicated by a federally prohibited controlled substance and established in record of conviction ⁷	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
Driving after forfeiture of	18.2-272	No	No	No	

⁷ See *supra* note 4.

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license					
Driving without a license	46.2-300	No	No	No	
Drinking while driving; possession of open container while operating a motor vehicle	18.2-323.1	No	No	No	Note any DUI greatly increases the risk that ICE will take enforcement action 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	No	Possibly considered a controlled substance offense if person is	

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		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 conviction establishes that ⁸		intoxicated by a federally prohibited controlled substance and established in record of conviction ⁹	If driving under the influence of controlled substance(s), keep reference to particular controlled substance(s) out of record of conviction; for (B)(2) convictions that involve violations of §§ 18.2-36.1, 18.2-51.4, 18.2-266 or § 46.2-341.24, keep out reference to those offenses in

⁸ 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.

⁹ See *supra* note 4.

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					record of conviction
Disregarding signal by law-enforcement officer to stop; eluding police	46.2-817(A)	Probably not ¹⁰	No. ¹¹	No	Consider alternative plea to reckless driving to avoid CIMT or aggravated felony Plead to subsection (A) rather than (B) or (C) to decrease chances that offense will be
	46.2-817(B)	No. ¹²	Possibly, but probably not under 8 U.S.C. § 1101(a)(43)(S) if the sentence	No	

¹⁰ 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).

¹¹ Class 2 misdemeanor with maximum possible sentence of 6 months.

¹² 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). Oral argument in Fourth Circuit 9/23/2021.

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			imposed is at least one year. ¹³ Possibly, under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year		considered CIMT or aggravated felony Keep sentence under one year including suspended time to avoid aggravated felony
	46.2-817(C)	Probably ¹⁴	Possibly, but probably not	No	

¹³ 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).

¹⁴ See *supra* note 10.

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			under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year ¹⁵ Possibly, under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year		
Reckless driving	46.2-852	No (see 2)	No		
Driving vehicle that is not	46.2-853	No	No	No	

¹⁵ See *supra* note 13.

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under control					
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 ¹⁶	No	No	
Duty of certain persons	46.2-895 (failure to	Possibly ¹⁷	No	No	If applicable, make explicit in record that offense involved

¹⁶ In *Nunez-Vasquez v. Barr*, No. 19-1841 (4th Cir. 2020), the 4th Circuit ruled that a conviction under this statute is not a CIMT and that mere failure to comply with reporting requirements is not reprehensible conduct. The Court rejected the Government’s argument that any offence that categorically involves fraud is a CIMT.

¹⁷ See *supra* note 12.

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accompanying driver to report accidents involving injury, death, or damage to attended property	report after bodily injury and/or property damage)				<p>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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