OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
Violation of provisions of protective orders	16.1-253.2(A)	Maybe[2]	No	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(ii) (protective order violation)[3]	Consider alternate plea to assault and battery (18.2-57(A)) or stalking (18.2-60) to avoid the court determination of a protection order violation that is necessary for 8 U.S.C. § 1227(a)(2)(E)(ii). If applicable, obtain a state court determination that violation was triggered by consensual contact with victim, a criminal offense unrelated to victim, or contacts with family/ household members of the victim (to preserve protective order violation overbreadth argument) Keep reference to a firearm, assault and battery, bodily injury, and entering the protected party's home out of the charging document, written plea
	16.1-253.2(B) (deadly weapon/ firearm)	Maybe[4]	Maybe, under 8 U.S.C. § 1101(a)(43)(E)(firearms)[5]	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(ii) (protective order violation)[3] Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms)[6]	
	16.1-253.2(C) (assault causing injury, stalking, furtive entry,	Maybe[7]	Maybe, under 8 U.S.C. §1101(a)(43)(F) (crime of violence)[8]	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence)[9]	

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
	or waiting in victim's home)			Yes, under 8 U.S.C. § 1227(a)(2)(E)(ii) (violation of protective order)	agreement, transcript of plea colloquy, and judicial findings of fact (to preserve CIMT and aggravated felony overbreadth arguments).
Murder	18.2-32 (first degree)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(A) (murder) Yes, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed is at least one year	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	Plead to involuntary manslaughter (18.2-36) (avoids aggravated felony and CIMT) If victim was current or former spouse or similarly situated person, keep reference to relationship out of the charging document, written plea agreement, transcript of plea colloquy, judicial findings of fact, and other documents.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
	18.2-32 (second degree)	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (murder)[11] No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[12]	No	
Voluntary manslaughter	18.2-35	Yes	No, under 8 U.S.C. § 1101 (a)(43)(A) (murder)[13] Yes, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if	Yes, under 8 U.S.C. § 1227(a)(2) (E) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	Plead to involuntary manslaughter (18.2-36) (avoids CIMT and aggravated felony) Keep sentence under one year to avoid crime of violence aggravated felony and domestic violence offense. If victim was current or former spouse or similarly situated person, keep reference to relationship out of the

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.

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			sentence imposed is at least one year		charging document, written plea agreement, transcript of plea colloquy, judicial findings of fact, and other documents.
Involuntary manslaughter	18.2-36	No[14]	No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[15]	No	
Certain conduct punishable as involuntary manslaughter	18.2-36.1(A): vehicular involuntary manslaughter	No[12]	No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[13]	No	If driving under the influence of controlled substance, keep reference to controlled substance out of the charging document, written plea agreement,

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	18.2-36.1(B): aggravated vehicular involuntary manslaughter	Yes	Yes, under 8 (a)(43)(A) (murder)[16] No, under 8 (a)(43)(F) (crime of violence)[17]	No	transcript of plea colloquy, and judicial findings of fact. To avoid CIMT and aggravated felony charges, plead to (A) instead of (B) and ensure the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact reflect such.
Wounding by mob	18.2-41	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if imposed sentence at least one year	No, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)	Consider alternate plea to simple assault under 18.2-57(A) Keep references to gang membership, firearm out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
					Keep sentence under one year to avoid crime of violence aggravated felony.
Assault or battery by mob	18.2-42	No[18]	Probably Not[19]	No	Keep references to gang membership out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. Plea to simple assault 18.2-57(A) if possible. Including that penalty imposed was "12 months" specifically or less could potentially help with an argument that it is not an aggravated felony "crime of violence" as defined under federal law[20]
Act of violence by mob	18-42.1	Maybe[21]	Maybe[22]	No	Keep references to the act of violence the mob committed out of the charging document, written plea agreement, transcript of plea colloquy, and judicial

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
					findings of fact unless the act was kidnapping.
Prohibited criminal street gang participation	18.2-46.2	No[23]	No, under 8 U.S.C. § 1101 (a)(43) (A, B, C, E, F, G, or K)[24]	No	Plea to the predicate offense if it is not a CIMT or aggravated felony to avoid creating a record of gang activity. Minimize any reference to the name of a gang or gang activities in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.
Recruitment of persons for criminal street gang	18.2-46.3(A) (adult)	Maybe[25]	No	No	Minimize any reference to the name of a gang or gang activities in record of conviction.
	18.2-46.3(A) (juvenile)	Maybe[26]	No	No	

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	18.2-46.3(B)	Yes[27]	Yes, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if sentence imposed is at least one year	No	Minimize any reference to the name of a gang or gang activities in record of conviction. Keep sentence under one year to avoid crime of violence aggravated felony
Abduction and kidnapping	18.2-47	Yes[28]	Maybe, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[29] No, under 8 U.S.C. § 1101 (a)(43) (H) (ransom)[30]	No	

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Violation of court order regarding custody and visitation	18.2-49.1(A)	Maybe[31]	No	No	
	18.2-49.1(B)	Maybe[31]	No	No	
Unlawful or malicious wounding[32]	18.2-51 (malicious wounding)	Yes	Yes under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if sentence imposed is one year or more[33]	Yes, under a crime of violence[34] No, under 8 U.S.C. 1227(a)(2)(C) (firearms) Yes, under 8 U.S.C. § 1227(a)(2) (E)(i) (domestic violence) if victim was a current or former spouse or	Plea to 18.2-57(A) assault and battery to avoid aggravated felony and CIMT Keep sentence under one year to avoid crime of violence aggravated felony and domestic violence offense. If underlying conduct did not involve direct or indirect use of physical force, emphasize this in the charging document, written plea agreement,

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
				similarly situated person[10]	transcript of plea colloquy, and judicial findings of fact.
	18.2-51 (unlawful wounding)	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if sentence imposed is one year or more[35]	No, under 8 U.S.C. 1227(a)(2)(C) (firearms) Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	If victim was current or former spouse or similarly situated person, keep reference to relationship out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.
Aggravated malicious wounding	18.2-51.2(A)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if	No, under 8 U.S.C. § 1227(a)(2)(C) (firearms)	Plea to 18.2-57(A) assault and battery to avoid aggravated felony and CIMT

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			sentence imposed is one year or more[36]	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	Keep sentence under one year to avoid crime of violence aggravated felony and domestic violence offense. If underlying conduct did not involve direct or indirect use of physical force, emphasize this in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. If victim was current or former spouse or similarly situated person, keep reference to relationship out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.
	18.2-51.2(B)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed is one year or more[36]	No, under 8 U.S.C. § 1227(a)(2)(C) (firearms) Maybe, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim was a current or former spouse or	

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				similarly situated person[10]	
Recklessly endangering others by throwing objects from places higher than one story	18.2-51.3	Maybe[37]	Maybe, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed is at least one year[38]	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	Keep sentence under one year to avoid crime of violence aggravated felony and domestic violence offense. If victim was current or former spouse or similarly situated person, keep reference to relationship out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.
Strangulation	18.2-51.6	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim was a current or former spouse or	Keep sentence under one year to avoid aggravated felony and domestic violence offense. If victim was current or former spouse or similarly situated person, keep reference to relationship out of the

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			imposed is at least one year	similarly situated person[10]	charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.
Unlawful or Malicious bodily injury by means of caustic substance or agent	18.2-52 (maliciously)	Maybe[39]	Maybe, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed is at least one year[40] Maybe, under 8 U.S.C. § 1101(a)(43)(E) (explosives)[41]	Maybe, under 8 U.S.C. § 1227(a)(2)(C)(firearms) if a firearm was used in commission of crime[41] Maybe, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	Plea to 18.2-57(A) assault and battery to avoid aggravated felony and CIMT. Keep sentence under one year to avoid crime of violence aggravated felony and domestic violence offense. Keep reference to firearm or any weapon/explosive out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. If underlying conduct did not involve direct or indirect use of physical force, emphasize this in the charging document, written plea agreement,

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	18.2-52 (unlawfully)	Yes[42]	Maybe, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence), if sentence imposed is at least one year.[43] Maybe, under 8 U.S.C. § 1101(a)(43)(E) (explosives)[44]	Maybe, under 8 U.S.C. § 1227(a)(2)(C)(firearms) if a firearm was used in commission of crime[44] Maybe, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim was a current or former spouse or similarly situated person[10]	transcript of plea colloquy, and judicial findings of fact. If victim was current or former spouse or similarly situated person, keep reference to relationship out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.
Bodily injury caused by prisoners	18.2-55	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(F) (crime of	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if victim	Plead to 18.2-57(A) assault and battery to avoid aggravated felony and CIMT

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			violence) if sentence imposed is at least one year[45]	was a current or former spouse or similarly situated person[10]	Keep sentence under one year to avoid crime of violence aggravated felony and domestic violence offense.
Hazing of youth gang members	18.2-55.1	No[46]	No[47]	No	Keep references to bodily injury, intentional action, gang name/activities out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact; if possible, create affirmative record that no injuries were caused.
Assault and battery	18.2-57(A)	No[48]	No[49]	No	
Assault and battery	18.2-57(C)	No	No[50]	No	

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(police officer)					
Assault and battery (family member)	18.2-57.2(A)	No[51]	Maybe[52]	Maybe[53]	Keep the charge under regular Assault & Battery charge under 18.2-57(A).
Robbery[54]	18.2-58	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(G) (theft) if sentence imposed is at least one year[55] No, under 8 U.S.C. § 1101 (a)(43) (F)	Maybe Particularly Serious Crime	Plead to 18.2-57(A) assault and battery to avoid aggravated felony and CIMT. Keep sentence under one year to avoid the theft aggravated felony. If possible create affirmative record that robbery was committed by simple assault (rather than other methods provided by statute)[57]

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			(crime of violence)[56]		
Carjacking[58]	18.2-58.1	Maybe[59]	No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[60] Yes, under 8 U.S.C. § 1101 (a)(43)(G) (theft) if sentence imposed of at least one year.[61]	No	Keep sentence under one year to avoid theft aggravated felony.

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Extorting money by threats	18.2-59	Yes	No, under 8 U.S.C. § 1101 (a)(43)(H) (ransom) Yes, under 8 U.S.C. § 1101 (a)(43)(G) (theft) if sentence imposed is at least one year[62]	No	Keep sentence under one year to avoid theft aggravated felony.
Threats of death or bodily injury to a person or member of his family;	18.2-60(A)(1)	Yes[63]	Maybe, under 8 U.S.C. § 1101(a)(43) (F) (crime of violence) if sentence	Maybe, under 8 U.S.C. § 1227(a)(2) (E)(i) (domestic violence) if a sentence of at	Plead to misdemeanor under 18.2-416 ("punishment for using abusive language to another")

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threats to commit serious bodily harm to persons on school property			imposed is at least one year[64]	least one year is imposed[10]	Keep sentence under one year to avoid crime of violence aggravated felony
	18.2-60(A)(2)	Maybe[65]	Maybe, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed is at least one year[66]		
	18.2-60(B)	Maybe[67]	Yes, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if sentence	No	

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			imposed is at least one year.[68]		
Stalking	18.2-60.3	No[69]	No, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence)	No, under 8 U.S.C. § 1227(a)(2)(E)(i) (stalking)[70]	
Violation of protective order	18.2-60.4(A)	No	No	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(ii) (protective order violation)[3]	Consider alternate plea to assault and battery (18.2-57(A)) or stalking (18.2-60) to avoid the court determination of a protection order violation that is necessary for 8 U.S.C. § 1227(a)(2)(E)(ii). If applicable, obtain a state court determination that violation was triggered by consensual contact with victim, a criminal offense unrelated to
	18.2-60.4(B) (deadly weapon/ firearm)	Maybe[4]	Maybe, under 8 U.S.C. § 1101(a)(43)(E)(firearms)[5]	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(ii) (protective order violation)[3]	

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
				Maybe, under 8 U.S.C. § 1227(a)(2)(C) (firearms)[6]	victim, or contacts with family/household members of the victim (to preserve protective order violation overbreadth argument) Keep reference to a firearm, assault and battery, bodily injury and entering the protected party's home out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact (to preserve CIMT and aggravated felony overbreadth arguments).
	18.2-60.4 (C) (assault, causing injury, stalking, furtive entry, or waiting in victim's home)_	Maybe[7]	Maybe, under 8 U.S.C. §1101(a)(43)(F) (crime of violence) if a sentence of at least one year is imposed[8]	Maybe, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence) if a sentence of at least one year is imposed[9] Yes, under 8 U.S.C. § 1227(a)(2)(E)(ii) (protective order violation)	
Rape	18.2-61(A)(i) (force, threat, intimidation)	Yes	Yes, under 8 U.S.C. § 1101	Maybe, under 8 U.S.C. § 1227(a)(2)	Plea to simple assault and battery at 18.2-57(A) with a sentence of less than one year to avoid aggravated felony,

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
			(a)(43)(A) (rape) Maybe, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed of at least one year[71]	(E)(i) (domestic violence)[72]	domestic violence deportation ground, and CIMT. Seek plea to non-aggravated misdemeanor sexual battery, under 18.2-67.4, with sentence under one year to avoid aggravated felony.
	18.2-61(A)(ii) (mental incapacity or physical helplessness)	Yes	Yes, under 8 U.S.C. § 1101 (a)(43) (A) (rape) No, under 8 U.S.C. § 1101 a)(43)(F)	No, under 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence)[73]	Plea to aggravated sexual battery under 18.2-67 to avoid rape aggravated felony (but plea is still a CIMT).

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
			(crime of violence)[73]		
	18.2-61(A) (iii) (child younger than 13)	Maybe[74]	Yes, under 8 U.S.C. § 1101 (a)(43) (A) (sexual abuse of a minor) No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[75]	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (child abuse)	
Carnal knowledge of child	18.2-63(A)	Maybe[74]	Yes, under 8 U.S.C. § 1101 (a)(43)(A)	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (child abuse)	Plea to assault and battery at 18.2-57(A) to avoid aggravated felony and CIMT

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
between 13 and 15 years of age			(sexual abuse of a minor)		Seek plea to non-aggravated misdemeanor sexual battery, under 18.2-67.4, with sentence under one year to avoid aggravated felony and without mention of age of victim in record
	18.2-63(B)	Maybe[74]	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse of a minor)	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (child abuse)	
Carnal knowledge of certain minors	18.2-64.1	Maybe[74]	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse of minor)[76]	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (child abuse)	

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
Forcible sodomy	18.2-67.1(A)(1) (child younger than 13)	Maybe[74]	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse of a minor) No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[75]	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (child abuse)	Plea to assault and battery at 18.2-57(A) to avoid aggravated felony, child abuse, and CIMT Plea to misdemeanor non-aggravated sexual battery, under 18.2-67.4, with sentence under one year to avoid aggravated felony Keep statutory provision and age of victim out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to avoid an immigration judge identify this provision as the offense committed.
	18.2-67.1(A)(2) (force,	Yes	Yes, under 8 U.S.C. § 1101	Maybe, under 8 U.S.C. § 1227(a)(2)	Plea to assault and battery at 18.2-57(A) to avoid aggravated felony and CIMT

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
	threat, intimidation)		(a)(43)(A) (rape) Maybe, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed of at least one year[71]	(E)(i) (domestic violence)[72]	Seek plea to misdemeanor non-aggravated sexual battery, under 18.2-67.4, with sentence under one year to avoid aggravated felony
Object sexual penetration	18.2-67.2(A)(1) (child younger 13)	Maybe[74]	Yes, under 8 U.S.C. § 1101(a)(43)(A) (sexual abuse of a minor) No, under 8 U.S.C. § 1101	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (child abuse)	Plea to assault and battery at 18.2-57(A) to avoid aggravated felony and CIMT Seek plea to misdemeanor non-aggravated sexual battery, under 18.2-67.4, with sentence under one year to avoid aggravated felony

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			(a)(43)(F) (crime of violence) [75]		Keep statutory provision and age of victim out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to avoid an immigration judge identify this provision as the offense committed.
	18.2-67.2(A)(2) (force, threat, intimidation)	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (rape) Maybe, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) if sentence imposed at least one year[71]	Maybe, under 8 U.S.C. § 1227(a)(2)(E) (domestic violence)[72]	

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Aggravated sexual battery	18.2-67.3(A)(1) (child younger 13)[77]	Maybe[74]	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse of a minor) No, under 8 U.S.C. § 1101 (a)(43) (F) (crime of violence) [75]	Yes, under U.S.C. § 1227(a)(2)(E)(i) (child abuse)	Plea to assault and battery at 18.2-57(A) to avoid aggravated felony and CIMT. Plea to aggravated sexual battery mental incapacity (based on age) under 18.2-67.3(A)(2) to avoid aggravated felonies and child abuse deportation ground. Plea to misdemeanor non-aggravated sexual battery, under 18.2-67.4, with sentence under one year to avoid crime of violence and sexual abuse of minor aggravated felonies. Keep age of victim out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact
	18.2-67.3(A)(2) (mental	Yes	No, under 8 U.S.C. § 1101	No, under 8 U.S.C. § 1227(a)(2)(E)(i)	

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	incapacity or physical helplessness)		(a)(43)(A) (rape)[78] No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[73]	(domestic violence)[73]	
	18.2-67.3(A)(3) (child between 13 & 18 years old and offender is a relative)	Maybe[74]	No, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse) (of a minor)[79] No, under 8 U.S.C. § 1101 (a)(43) (A) (rape)[78]	Yes, under 8 U.S.C. § 1227(a)(2)(E) (child abuse)	

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
			No, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) [75]		
	18.2-67.3 (A)(4)(a) (force, threat, intimidation, and child btwn 13-15)	Yes	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse of a minor) Maybe, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if sentence imposed at	Yes, under 8 U.S.C. § 1227(a)(2)(E) (child abuse); The Fourth Cir has held that "the phrase 'sexual abuse of a minor' means a perpetrator's physical or nonphysical misuse or maltreatment of a	Keep imposed sentence to less than a year to foreclose a crime of violence aggravated felony. If possible create affirmative record in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact, that act was committed via intimidation. Keep references to force and threat out these documents (to avoid crime of violence aggravated felony)

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			least one year[71]	minor for a purpose associated with sexual gratification." *Larios-Reyes v. Lynch*, 843 F.3d 146, 158 (4th Cir. 2016)	
	18.2-67.3(A)(4)(b) (force, threat, or intimidation and serious	Yes	No, under 8 U.S.C. § 1101 (a)(43)(A) (rape)[78]	No	Keep imposed sentence to less than a year to foreclose a crime of violence aggravated felony. If possible create affirmative record in the charging document, written plea

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	bodily or mental injury)		Maybe, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence) if sentence imposed at least one year[71]		agreement, transcript of plea colloquy, and judicial findings of fact, that act was committed via intimidation. Keep references to force and threat out these documents (to avoid crime of violence aggravated felony)
	18.2-67.3 (A)(4)(c) (force, threat, or intimidation and firearm, or dangerous weapon)	Yes	No, under 8 U.S.C. § 1101 (a)(43)(A) (rape)[78] Yes, under 8 U.S.C. § 1101 (a)(43) (F) if sentence	No, under 8 U.S.C. § 1227(a)(2)(C) (firearms offense)[80]	Keep imposed sentence to less than a year to foreclose a crime of violence aggravated felony. Keep reference to a firearm out of record of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to avoid firearms deportability ground.

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			imposed at least one year		
Sexual battery	18.2-67.4(A)(i) (force, threat, intimidation, or ruse)	Yes[81]	No, under 8 U.S.C. § 1101(a)(43)(A) (rape)[78] No, under 8 U.S.C. § 1101(a)(43) (A) (sexual abuse of minor)[82] Maybe, under 8 U.S.C. § 1101(a)(43)(F) (crime of violence)[83]	Maybe, under 8 U.S.C. § 1227(a)(2)(E) (child abuse)[84]	Plea to assault and battery at 18.2-57(A) to avoid CIMT If possible create affirmative record in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact, that act was committed by intimidation or ruse rather than force or threat. If sexual abuse was 18.2-67.10(6)(c), keep reference to victim's age out of the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to avoid child abuse deportability ground. But, if

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	18.2-67.4(A)(ii) (multiple acts w/out consent in 2 years)	Yes	No, under 8 U.S.C. § 1101 (a)(43)(A) (rape)[78] No, under 8 U.S.C. § 1101 (a)(43) (A) (sexual abuse of minor)[82] Maybe, under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence)[83]	Maybe, under 8 U.S.C. § 1227(a)(2)(E) (child abuse)[84]	victim older 13 or older, mention age in these documents. To preserve an argument that the offense is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(A) or crime of child abuse under 8 U.S.C. § 1227(a)(2)(E), affirmatively keep age out of the record

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Sexual abuse of a child between 13 and 15 years of age	18.2-67.4:2	Maybe[74]	Yes, under 8 U.S.C. § 1101 (a)(43)(A) (sexual abuse of a minor)	Yes, under 8 U.S.C. § 1227(a)(2)(E)(i) (child abuse)[85]	Plea to assault and battery at 18.2-57(A) to avoid aggravated felony and CIMT Plea to misdemeanor non-aggravated sexual battery under 18.2-67.4, with no reference to age of victim in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to avoid child abuse deportability ground to avoid sexual abuse of a minor aggravated felony
Attempted rape, forcible sodomy, object sexual penetration, aggravated sexual	18.2-67.5	Yes	Maybe, under 8 U.S.C. § 1101(a)(43)(U) (attempt)[86]		

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
battery, and sexual battery					

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[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] An immigration attorney may argue that Va. Code § 16.1-253.2(A) is not categorically a CIMT since none of the four triggers for this provision is categorically a CIMT. A CIMT "requires two essential elements: a culpable mental state and reprehensible conduct." *Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135 (4th Cir. 2018) (citing *Sotnikau v. Lynch*, 846 F.3d 731, 735–36 (4th Cir. 2017)); *Matter of Silva-Trevino*, 26 I&N Dec. 826, 831–33 (BIA 2016). Negligence is not a sufficiently culpable mental state for a CIMT. *Sotnikau*, 846 F.3d at 736; *Matter of Tavdidishvili*, 27 I&N Dec. 142, 144 (BIA 2017). Committing a criminal offense is not categorically a CIMT since the Va. Code makes many negligent acts criminal offenses. *See, e.g.*, Va. Code § 18.2-36 (involuntary manslaughter); Va. Code § 18.2-60 (stalking); Va. Code § 18.2-88 (careless damage of a property by fire); Va. Code § 18.2-371.1 (child neglect). Family abuse, i.e., "any act involving violence, force, or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury" Va. Code § 16.1-228, is not categorically a CIMT since it "includes, but is not limited to, […] stalking," *Id.*, which is not a CIMT. *See infra* n. 69. Going/remaining upon land, buildings, or premises and contact with the victim or victim's family members both appear to be strict liability offenses, which means that they would lack the requisite culpable mental states to be CIMTs. *See Sotnikau*, 846 F.3d at 735–36.

[3] 8 U.S.C. § 1227(a)(2)(E)(ii) requires (1) a state court determination that a noncitizen "'has engaged in conduct that violated the portion of a protective order that "involve protection against credible threats of violence, repeated harassment, or bodily injury' and (2) whether the order was 'issued for the purpose of preventing violent or threatening acts of domestic violence.'" *Matter of Obshatko*, 27 I&N Dec. 173, 177 (BIA 2017) (quoting 8 U.S.C. § 1227(a)(2)(E)(ii)). To determine whether conduct falls within this grounds, an immigration judge is not bound by the categorical approach, even if a conviction underlies the charge. *Matter of Obshatko*, 27 I&N Dec. at 176–77. Rather, the judge may consider all probative and reliable evidence regarding the protective order violation and the state court's determination of this violation. *Id.* Some protective order violations prohibited by Va. Code §§ 16.1-253.2(A), (B) and 18.2-60.4, such as family abuse, presence on protected premises (when armed with a deadly weapon), and/or nonconsensual contact with the protected party, falls within the ambit of 8 U.S.C. § 1227(a)(2)(E)(ii). *See Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011). Other conduct prohibited by Va. Code §§ 16.1-253.2(A), (B) and 18.2-60.4 such as a general violation, criminal offenses unrelated to the protected party (when armed with a deadly weapon), consensual contact with the protected party, isolated, one-off contact with the protected party, and/or contact with the protected party's family members may not. Effort should be made to minimize evidence of violations that *Matter of Strydom* identifies as falling within the scope of 8 U.S.C. § 1227(a)(2)(E)(ii).

[4] An immigration attorney may argue that neither of Va. Code §§ 16.1-253.2(B), 18.2-60.4(B) is categorically a CIMT since violating a provision of a protective order is not a CIMT and possession of a weapon only involves moral turpitude if accompanied by the intent to commit a crime involving moral turpitude. *See Matter of Serna*, 20 I&N Dec. 579, 584 (BIA 1992) *modified on other grounds by Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979). In Virginia, the crime of violating a provision of a protective order also appears to be a strict liability offense and so lacks the requisite culpable mental state to be a CIMT. *See Sotnikau v. Lynch*, 846 F.3d 731, 735–36 (4th Cir. 2017) (holding that a CIMT requires two essential elements: a culpable mental state and reprehensible conduct).

[5] An immigration attorney may argue that Va. Code § 16.1-253.2(B) is not categorically an explosives aggravated felony under 8 U.S.C. § 1101(a)(43)(E) via 18 U.S.C. § 844 (h)(2). While *U.S. v. Davis*, holds that ammunition is an explosive thereby bringing firearms under the ambit of an explosives aggravated felony, *see* 202 F.3d 212 (4th Cir. 2000), Va. Code § 16.1-253.2(B) also prohibits violating a protective order when armed with a non-explosive deadly weapon such as a knife. DHS may rebut this by arguing that Va. Code § 16.1-253.2(B) is divisible by weapon, i.e., that being armed with a firearm and being armed with a deadly weapon are alternative elements of distinct offenses, rather than alternative means of committing a single offense. If the immigration judge agrees, she may look

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at the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine the identity of the weapon is involved and what "offense" was committed. If she finds that a firearm was involved, an immigration attorney may respond that violating a protective order while armed with a firearm is still not categorically an explosives aggravated felony via 18 U.S.C. § 844 (h)(2) since violating a protection order when armed with an unloaded firearm falls within the ambit of Va. Code § 16.1-253.2(B) and an unloaded firearm is not an explosive. However, judge may require a showing that there is a realistic probability of the Va. Code § 16.1-253.2(B) firearm offense being applied to unloaded firearms and an immigration attorney may have difficulty finding the evidence necessary to make this showing. Effort should therefore be made to use the phrase deadly weapon instead of the term firearm in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.

[6] An immigration attorney may argue that Va. Code § 16.1-253.2(B) is not categorically a firearms offense under 8 U.S.C. § 1227(a)(2)(C) since the statute prohibits violating a protective order when armed with a non-firearm deadly weapon such as a knife. The government could attempt to rebut this argument by alleging that Va. Code § 16.1-253.2(B) is divisible by weapon, i.e., that being armed with a firearm and being armed with a deadly weapon are alternative elements of distinct offenses, rather than alternative means of committing a single offense. If the immigration judge agrees, she may look at the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine the identity of the weapon is involved and what "offense" was committed. If she finds that a firearm was involved, an immigration attorney may respond that deadly weapons whose knowing possession Va. Code § 16.1-253.2(B) criminalizes is broader than the definition of firearm in 18 U.S.C. § 921(a)(3), since at minimum it does not contain an exemption for antique firearms. However, the BIA will likely require a showing of a realistic probability that Virginia uses Va. Code § 18.2-253.2(B) to prosecute violating a protective order when armed with an antique firearm to find the statute overbroad on this basis. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 357 (BIA 2014). An immigration attorney may have difficulty finding the evidence necessary to make this showing. Effort should therefore be made to use the phrase deadly weapon instead of the term firearm in the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact.

[7] An immigration attorney may argue that neither of Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) is categorically CIMTs because stalking, one of the four acts trigger a protective order violation under them is not a CIMT. *See infra* n. 69. DHS may argue that Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) are divisible, i.e., that assault and battery causing injury, stalking, furtively entering the protected party's home when she is there, and entering the protected party's home in her absence and remaining there until her arrival are alternative elements of distinct offenses rather than different means of satisfying an element of a single offense. If the immigration judge agrees, she will be able to review the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine which act was committed and find the following:

- If the committed act was stalking, the judge should find that the Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) offense is a CIMT. *See infra* n. 69.
- If the committed act was assault and battery resulting in injury, the judge should find that the Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) offense is a CIMT. *See Matter of Garcia-Hernandez*, 23 I&N Dec. 590, 592 (BIA 2003) (holding that willful infliction of bodily harm on a family member is CIMT); *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996) (same). *Cf Matter of Sergas*, 21 I&N Dec. 236, 238 (holding that assaulting and battering a family or household member under Va. Code § 18.2-57.2 is not a CIMT since a conviction "does not require the actual infliction of physical injury and may include any touching, however slight").
- If the act committed was furtively entering the home of a protected party while the party is present or entering the home of the protected party and remaining there until she arrives, the immigration judge may find that the Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) offense is a CIMT. Under *Uribe v. Sessions* and *Matter of Louissaint*, the Fourth Circuit and the BIA have found that conduct relating to breaking and entering a person's dwelling is a CIMT since it violates a person's justifiable expectation for privacy and security. 855 F.3d 622, 626–27 (4th Cir. 2017); 24 I&N Dec. 754, 758–59 (BIA 2009). An immigration practitioner, however, may argue that neither furtive entry or entering and remaining in the protected parties' home under Va. Code §§ 16.1-

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253.2(C), 18.2-60.4(C) necessarily involves unlawful breaking. The attorney, however, may have difficulty showing there is a realistic probability of prosecuting conduct that does not unlawful breaking under Va. Code §§ 16.1-253.2(C), 18.2-60.4(C), which the BIA requires to hold these offenses to not be CIMTs. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 831–33 (BIA 2016).

[8] An immigration attorney may argue that Va. Code § 16.1-253.2(C) is not categorically a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since none of stalking, furtively entering the protected party's home, and entering the home of the protected party and remaining there until she arrives have as an element the "use, attempted use, or threatened use of force capable of causing physical injury *against a person or property of another*." DHS may argue that Va. Code § 16.1-253.2(C) is divisible, i.e., that assault and battery causing injury, stalking, furtively entering the protected party's home when she is there, and entering the protected party's home in her absence and remaining there until her arrival are elements of different offenses rather than means of satisfying an element of a single offense. If the immigration judge agrees, he able to review the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine which act was committed. If the committed act was assault and battery resulting in injury, the judge will likely find Va. Code § 16.1-253.2(C) a crime of violence aggravated felony since it categorically has an element the use of physical force capable of causing physical pain to a person. *See Johnson v. United States*, 559 U.S. 133 (2010); *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 716 (BIA 2016).

[9] 8 U.S.C. § 1227(a)(2)(E)(i) renders removable a noncitizen who is convicted of (a) a crime of stalking; (b) a crime of child abuse, neglect, or abandonment; or (c) a crime involving as an element the use, attempted use, or threatened use of physical force capable of causing physical pain that is committed against a person by a current spouse, former spouse, cohabitual spouse, or individual with whom the person shares a child, or an individual similarly situated to a spouse. *See* 8 U.S.C. § 1227(a)(2)(E)(i); 18 U.S.C. § 16(a); *Johnson v. United States*, 559 U.S. 133 (2010); *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 716 (BIA 2016). An immigration attorney may argue that Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) do not categorically implicate 8 U.S.C. § 1227(a)(2)(E)(i) since a stalking offense in Virginia does not implicate 8 U.S.C. § 1227(a)(2)(E)(i), *see infra* n. 69, and neither furtively entering the protected party's home, nor entering the home of the protected party and remaining there until she arrives implicates one of the crimes 8 U.S.C. § 1227(a)(2)(E)(i) itemizes. DHS may argue that Va. Code Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) is divisible, i.e., that assault and battery causing injury, stalking, furtively entering the protected party's home when she is there, and entering the protected party's home in her absence and remaining there until her arrival are elements of different offenses rather than means of satisfying an element of a single offense. If the immigration judge agrees, she will be able to review the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine which act was committed. If the committed act was assault and battery resulting in injury, the judge will likely find that Va. Code §§ 16.1-253.2(C), 18.2-60.4(C) are crimes of domestic violence since each have as an element the use of physical force capable of causing physical pain to a person by a current spouse, former spouse, cohabitual spouse, or individual with whom the person shares a child, or an individual similarly situated to a spouse. *See* 8 U.S.C. § 1227(a)(2)(E)(i); 18 U.S.C. § 16(a); *Johnson*, 559 U.S. at 140; *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 716 (BIA 2016).

[10] An offense is a domestic violence offense under 8 U.S.C. § 1227(a)(2)(E)(i) if (1) the offense constitutes a crime of violence; and (2) the victim is a protected person, i.e., the perpetrator and the victim share a child or the perpetrator is the victim's current spouse, the victim's former spouse, the victim's cohabitual spouse, or an individual similarly situated to a spouse of the victim. The Fourth Circuit and the BIA use a circumstance specific approach to determine whether the victim is a protected person, which allows them to consider evidence outside the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. *See Hernandez-Zavala v. Lynch*, 806 F.3d 259 (4th Cir. 2015); *Matter of Estrada*, 26 I&N Dec. 749, 750–54 (BIA 2016); *Matter of Milian*, 25 I&N Dec. 197, 200 (BIA 2010). Effort should be made to keep the relationship between the perpetrator and victim out of the charging document, written plea agreement, transcript of plea colloquy, judicial findings of fact, and other documentation.

[11] Second degree murder is categorically a murder aggravated felony under 8 U.S.C. § 1101(a)(43)(A) since it is equivalent to the generic federal offense that the BIA has defined for murder. *Compare Matter of M-W-*, 25 I&N Dec. 748, 752–53 (BIA 2012) (defining the generic federal murder offense as "the unlawful killing of a human being with malice aforethought" *with Pugh v. Commonwealth*, 292 S.E.2d 339, 341 (Va. 1982) (defining second degree murder as homicide committed

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with malice). Both these offenses include reckless conduct that manifests indifference to human life. *Compare Matter of M-W-*, 25 I&N Dec. at 752–53 (affirming a murder aggravated felony finding for acts that demonstrated reckless and wanton disregard for human life) *with Pierce v. Commonwealth*, 115 S.E. 686 (affirming a second degree murder conviction for acts that demonstrated wanton and reckless indifference to human life).

[12] Second degree murder is not categorically a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(E) via 18 U.S.C. § 16(a) since Virginia courts have affirmed second degree murder convictions for recklessly causing death and recklessness is an insufficiently culpable mens rea for a crime of violence. *Borden v. United States*, 141 S. Ct. 1817, 1825 (2021). While the Virginia Code does not define murder, Virginia courts have held that it is homicide committed with malice, either express or implied. *Pugh v. Commonwealth*, 292 S.E.2d 339, 341 (Va. 1982) (citing *Biddle v. Commonwealth*, 141 S.E.2d 710, 714 (Va. 1965)). Express malice exists "when 'one person kills another with a sedate, deliberate mind, and formed design.'" *Pugh*, 292 S.E.2d at 341 (quoting *McWhirt v. Commonwealth*, 44 Va. (3 Gratt.) 594, 604 (1846)). Implied malice exists "when any purposeful, cruel act is committed by one individual against another without any, or without great provocation" or when one "willfully or purposefully […]embark[s] upon a course of wrongful conduct likely to cause death or great bodily harm." *Essex v. Commonwealth*, 322 S.E.2d 216, 220 (Va. 1984); *Pugh*, 292 S.E.2d at 341. Virginia has prosecuted reckless conduct for second degree murder under the doctrine of implied malice. *See Pierce v. Commonwealth*, 115 S.E. 686 (Va. 1923) (affirming a second degree murder conviction for demonstrating wanton and reckless indifference to human life by setting a trap gun in a store despite knowing the danger it posed to innocent persons like the police officer whom it killed); *Whiteford v. Commonwealth*, 27 Va. (Rand) 71, (Va. 1828) (finding in dicta that a hypothetical "workman throwing timber from a house into the street of a populous city, without warning" commits second degree murder). The Supreme Court has held that offenses committed with a minimum mens rea of recklessness do not constitute crimes of violence under 18 U.S.C. § 16(a). *Borden*, 141 S. Ct. at 1825.

[13] Voluntary manslaughter is not murder under 8 U.S.C. § 1101(a)(43)(A) since the generic federal murder offense requires malice afterthought and voluntary manslaughter in Virginia does not involve malice by definition. *Compare Matter of M-W-*, 25 I&N Dec. 748, 752–53 (BIA 2012) (defining the generic federal murder offense as "the unlawful killing of a human being with malice aforethought" *with Avent v. Commonwealth*, 688 S.E.2d 244, 258–59 (Va. 2010) (citing *Jenkins v. Commonwealth*, 423 S.E.2d 360, 368 (Va. 1992)) (defining voluntary manslaughter as "the unlawful killing of another without malice").

[14] In *Sotnikau v. Lynch*, the Fourth Circuit held that Virginia involuntary manslaughter is not a CIMT because it extends to punishing conduct committed through "criminal negligence," which is a mens rea lower than the specific intent or recklessness requisite for a CIMT finding. 846 F.3d 731, 736 (4th Cir. 2017).

[15] Involuntary manslaughter is not a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(A) via 18 U.S.C. § 16(a) since it lacks the requisite mens rea. In *Bejarano-Urrutia v. Gonzales*, the Fourth Circuit held that "although the crime of violating Va.Code Ann. § 18.2-36 intrinsically involves a substantial risk that the defendant's actions will cause physical harm, it does not intrinsically involve a substantial risk that force will be applied "as a means to an end." 413 F.3d 444, 446–47 (4th Cir. 2005). While Virginia Code does not define involuntary manslaughter, Virginia courts hold that its mens rea is criminal negligence. *See, e.g.*, *Commonwealthv. Gregg*, 811 S.E.2d 254, 256 (Va. 2018). Negligent or accidental conduct, even if it involves the use of physical force against the person or property of another, is not a crime of violence under 18 U.S.C. § 16(a). *Leocal v. Ashcroft*, 543 U.S. 1, 9–10 (2004); *see also Borden v. United States*, 141 S. Ct. 1817, 1825 (2021) (holding that reckless conduct, which involves a more culpable mental state than negligence, is not a crime of violence under 18 U.S.C. § 16(a)).

[16] Aggravated vehicular involuntary manslaughter is causing the death of another person by driving under the influence in a manner that is so gross, wanton, and culpable as to show reckless disregard for human life. Va. Code § 18.2-36.1(B). It is murder under 8 U.S.C. § 1101(a)(43)(A) since the BIA has held that generic federal murder offense is "the unlawful killing of a human being with malice aforethought" and "malice can be shown by proving a reckless and wanton disregard for human life." *See Matter of M-W-*, 25 I&N Dec. 748, 752–58 (BIA 2012).

[17] Aggravated vehicular involuntary manslaughter is not a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since it lacks the requisite mens rea. The mens rea for aggravated vehicular involuntary manslaughter is recklessness. Va. Code § 18.2-36.1(B). The Supreme Court has held that

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offenses committed with a minimum mens rea of recklessness do not constitute crimes of violence under 18 U.S.C. § 16(a). *Borden v. United States*, 141 S. Ct. 1817, 1825 (2021).

[18] While there is no precedent on point, an immigration attorney should be able to establish that Va. Code § 18.2-42 lacks sufficiently reprehensible minimum culpable conduct to constitute a CIMT for two reasons. First, Virginia assault and battery is not a CIMT since it "does not require the actual infliction of physical injury and may include any touching, however slight." *Matter of Jing Wu*, 27 I. & N. Dec. 8, 10–11 (BIA 2017) (holding that Virginia's assault and battery statute is not a CIMT); *Matter of Sejas*, 24 I&N Dec. 236, 238 (BIA 2007) (citing *Adams v. Commonwealth*, 534 S.E.2d. 347, 351 (Va. Ct. App. 2000)). Second, even if Virginia assault and battery were a CIMT, the perpetrator only has to be a member of a mob that commits assault and battery to fall within the ambit of Va. Code § 18.2-42; he does not have to commit assault and battery itself. *Hamilton v. Commonwealth*, 688 S.E.2d 168, 174 (Va. 2010) (quoting *Harrell v. Commonwealth*, S.E.2d 680, 683 (Va. Ct. App. 1990) ("'Every person composing the mob becomes criminally culpable even though the member may not have actively encouraged, aided, or countenanced the act' of assault or battery."). Mere mob membership extends beyond the preparatory offenses that *Matter of Gonzalez Romo* held to be CIMTs if their underlying offense was a CIMT. *See* 26 I&N Dec. 743, 746 (BIA 2016). A practitioner may use "a petty offense exception" under inadmissibility grounds if this is the only conviction, and the individual otherwise meets all the requirements under INA 212(a)(2)(A)(ii)(II).

[19]While there is no precedent on point, an immigration attorney should be able to establish that Va. Code § 18.2-42 is not a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18. U.S.C. § 16(a). Virginia assault and battery is not a crime of violence since it does not categorically have as an element the use, attempted use, or threatened use of physical force against another. *See United States v. Carthorne*, 726 F.3d 503, 513 (4th Cir. 2013) (holding that assault and battery of a police officer under Va. Code § 18.2-57(C) is not a crime of violence); *United States v. White*, 606 F.3d 144, (4th Cir. 2010) (finding that assault and battery of a family member under Va. Code § 18.2-57.2(A) is not a crime of violence), *abrogated on other grounds by United States v. Castleman*, 134 S. Ct. 1405, 1413, (2014). Moreover, while the Supreme Court has held that "aiding and abetting" an aggravated felony is an aggravated felony, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189–90 (2007), the minimum culpable conduct of Va. Code § 18.2-42 extends beyond preparatory offenses to mere membership in the mob. *Hamilton v. Commonwealth*, 688 S.E.2d 168, 174 (Va. 2010) (quoting *Harrell v. Commonwealth*, S.E.2d 680, 683 (Va. Ct. App. 1990) ("'Every person composing the mob becomes criminally culpable even though the member may not have actively encouraged, aided, or countenanced the act' of assault or battery.").

[20] There could also be an argument that this is a Class 1 misdemeanor and since punishment for Class 1 misdemeanor in Virginia is "12 months," a practitioner could argue that "12 months" is not the same as "1 year" as required under aggravated felony based on "crime of violence" under INA, pursuant to *Belcher v. Commonwealth*, S.E.2d 2022 WL 4472825 (Va. Ct. App. Sept. 27, 2022).

[21] While *Matter of Gonzalez Romo* holds that a preparatory offense may be CIMT, 26 I&N Dec. 743, 746 (BIA 2016), an immigration attorney may argue that Va. Code § 18.2-42.1 is not a CIMT since its minimal culpable conduct, membership in a mob that commits an act of violence, extends beyond a preparatory offense. *See Hamilton v. Commonwealth*, 688 S.E.2d 168, 174 (Va. 2010) (quoting *Harrell v. Commonwealth*, S.E.2d 680, 683 (Va. Ct. App. 1990) ("'Every person composing the mob becomes criminally culpable even though the member may not have actively encouraged, aided, or countenanced the act' of assault or battery."). An immigration attorney may also argue that even if Va. Code 18.2-42.1 were akin to a preparatory offense, it is an indivisible statute whose act of violence element is categorically overbroad in that it includes acts such as unlawfully/malicious causing bodily injury by means of caustic substance which may not be a CIMT. *See infra* n. 39; *cf. Cabrera v. Barr*, No. 18-1314 2019, WL 3242032, at *6 n. 5 (4th Cir. July 19, 2019) Cabrera v. Barr, 930 F.3d 627 (4th Cir. 2019) (holding that Va. Code § 18.2-46.2 is not divisible by predicate act because the predicate acts listed in Va. Code § 18.2-46.1 are alternative means of satisfying the predicate act element). If the immigration judge disagrees about the divisibility of Va. Code § 18.2-42.1, however, the judge may consult to the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine what act of violence was committed and assess whether Va. Code § 18.2-42.1 is a CIMT on that basis.

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[22] While *Gonzales v. Duenas-Alvarez* holds that a preparatory offense is an aggravated felony if the principal offense is one, 549 U.S. 183 (2007), an immigration attorney may argue that Va. Code § 18.2-42.1 is not a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since its minimal culpable conduct, membership in a mob that commits an act of violence, extends beyond a preparatory offense. *See Hamilton v. Commonwealth*, 688 S.E.2d 168, 174 (Va. 2010) (quoting *Harrell v. Commonwealth*, S.E.2d 680, 683 (Va. Ct. App. 1990) ("'Every person composing the mob becomes criminally culpable even though the member may not have actively encouraged, aided, or countenanced the act' of assault or battery."). An immigration attorney may also argue that even if Va. Code 18.2-42.1 were akin to a preparatory offense, it is an indivisible statute whose act of violence element is categorically overbroad in that it includes acts such as kidnapping which is not a crime of violence aggravated felony. *See infra* n. 26; *cf. Cabrera v. Barr*, No. 18-1314, 2019 WL 3242032, at *6 n. 5 (4th Cir. July 19, 2019) *Cabrera v. Barr*, 930 F.3d 627 (4th Cir. 2019)(holding that Va. Code § 18.2-46.2 is not divisible by predicate act because the predicate acts listed in Va. Code § 18.2-46.1 are alternative means of satisfying the predicate act element). If the immigration judge disagrees about the divisibility of Va. Code § 18.2-42.1, however, the judge may consult to the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine what act of violence was committed and assess whether Va. Code § 18.2-42.1 is an aggravated felony on that basis.

[23] In *Cabrera v. Barr*, the Fourth Circuit held that Va. Code § 18.2-46.2 is indivisible and not a CIMT. *See* No. 18-1314, 2019 WL 3242032, at *6–9 (4th Cir. July 19, 2019).

[24] Knowingly and willfully participation in a predicate criminal act committed for the benefit of, at the direction of, or in association with any criminal street gang is not categorically an aggravated felony since the definition of predicate criminal act in Va. Code § 18.2-46.2 is overbroad. *Cf Cabrera v. Barr*, No. 18-1314, 2019 WL 3242032, at *6–9 (4th Cir. July 19, 2019) (holding Va. Code § 18.2-46.2 is not a CIMT since it reaches conduct that does not necessarily involve moral turpitude). The predicate offense definition in Va. Code § 18.2-46.1 includes offenses such as assault and battery (18.2-57) and trespass upon a church or school property (18.2-128), that are not aggravated felonies. *See infra* n. 49; *cf. Cabrera*, No. 18-1314 2019, WL 3242032, at *6–9 (holding that Va. Code § 18.2-46.2 is not a CIMT since its predicate offense definition includes the offense of trespass upon a church, which is not a CIMT); *Matter of Jose Luis Castillo-Hercules*, No. AXXX XX1 867, 2017 WL 4118893 (BIA June 29, 2017) (affirming DHS' concession that neither assault and battery by a mob under Va. Code § 18.2-42 nor participation in a criminal gang act under Va. Code § 18.2-46.2 is an aggravated felony under current case law). Va. Code § 18.2-46.2 is also indivisible, so the BIA may not apply the modified categorical approach to identify which predicated offense was committed. *See Cabrera*, No. 18-1314, 2019 WL 3242032, at *6 n. 5.

[25] In *Cabrera v. Barr*, the Fourth Circuit held that an act "committed in association with a gang by someone who actively participated in the gang" does not necessarily involve moral turpitude" since neither participation in gang nor acting in association with a gang is sufficiently reprehensible conduct. No. 18-1314, 2019 WL 3242032, at *8 (4th Cir. July 19, 2019) (internal quotations omitted). DHS may distinguish Va. Code § 18.2-46.3 from *Cabrera* by arguing that recruiting or attempting to recruit an adult to actively participate in or become a member of a gang is turpitudinous conduct. However, dicta in *Cabrera* indicates that the Fourth Circuit is unlikely to find this argument persuasive. *See id.* (citing *Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 802 (9th Cir. 2015)) (emphasizing that Va. Code § 18.2-46.3 "do[es] not require an intent to injure, actual injury, […] a protected class of victims[, or] the use of any violence) (internal quotations omitted). Even if a conviction under Va. Code § 18.2-46.3 may not be a CIMT, a criminal defense attorney should still seek to avoid it at all costs, as any conviction involving (or mere allegation of) gang activity will make a case a top enforcement priority for DHS and will serve as a severely negative factor for all forms of discretionary immigration relief.

[26] In *Cabrera v. Barr*, the Fourth Circuit held that an act "committed in association with a gang by someone who actively participated in the gang" does not necessarily involve moral turpitude" since neither participation in gang nor acting in association with a gang is sufficiently reprehensible conduct. No. 18-1314, 2019 WL 3242032, at *8 (4th Cir. July 19, 2019) (internal quotations omitted). However, dicta indicates that the Fourth Circuit may consider recruiting or attempting to recruit a child into a criminal street gang is turpitudinous conduct since it involves a child, a member of a protected class of victims. *Cf. Id.* (citing *Hernandez-*

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Gonzalez v. Holder, 778 F.3d 793, 802 (9th Cir. 2015)) (emphasizing that Va. Code § 18.2-46.2 "do[es] not require an intent to injure, actual injury, […] a protected class of victims[, or] the use of any violence) (internal quotations omitted). Regardless, conviction under Va. Code § 18.2-46.3 should still be avoid at all costs, as any conviction involving (or mere allegation of) gang activity will make a case a top enforcement priority for DHS and will serve as a severely negative factor for all forms of discretionary immigration relief.

[27] In *Cabrera v. Barr*, the Fourth Circuit held that an act "committed in association with a gang by someone who actively participated in the gang" does not necessarily involve moral turpitude" since neither participation in gang nor acting in association with a gang is sufficiently reprehensible conduct. No. 18-1314, 2019 WL 3242032, at *8 (4th Cir. July 19, 2019) (internal quotations omitted). However, dicta indicates that the Fourth Circuit may consider the use (or threatened use) of force against an individual or an individual's family member to encourage an individual to join a gang, remain a gang member, or commit a crime is turpitudinous conduct since it involves the use of violence. *Cf. Id.* (citing *Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 802 (9th Cir. 2015)) (emphasizing that Va. Code § 18.2-46.2 "do[es] not require an intent to injure, actual injury, […] a protected class of victims[, or] the use of any violence) (internal quotations omitted).

[28] The BIA has held that Va. Code § 18.2-47 "is categorically a CIMT." *See Matter of Yerson Jack Mauricio-Vasquez*, No. AXXX XX6 043, 2017 WL 4946917 (BIA Sep. 14, 2017), *overturned on other grounds by Mauricio-Vasquez v. Whitaker*, 910 F.3d 134, 136 n.2 (4th Cir. 2018) (declining to rule on whether Va. Code § 18.2-47 is a CIMT). A federal district court has also found Va. Code § 18.2-47 a CIMT in dicta. *See U.S. v. Brown*, 127 F. Supp. 2d 392, 408 (W.D.N.Y. 2001). While the Ninth and Fifth Circuits have held that certain state kidnapping offenses not are not CIMTs, those offenses did not include a specific intent to injure. *See Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1213–14 (9th Cir. 2013); *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 626 (9th Cir. 2010); *Hamdan v. INS*, 98 F.3d 183, 187–89 (5th Cir. 1996). An immigration practitioner could argue to the Fourth Circuit that VA § 18.2-47 is not a crime involving moral turpitude since the offense does not require intent to harm or injury. DHS, however, will argue that intent to deprive the victim of personal liberty, intent to conceal the victim from any person, authority, or institution lawfully entitled to his charge, or intent to subject the victim to forced labor or services is an intent to injure. *See Fuentes-Cruz v. Gonzales*, 489 F.3d 724, 726–27 (5th Cir. 2007) (finding that a Texas kidnapping statute is a CIMT since it required "intent to conceal [the victim] from law enforcement authorities").

[29] In *Mauricio-Vasquez v. Whitaker*, the Fourth Circuit noted in dicta that it agreed with DHS' concession that 18.2-47 is no longer a crime of violence aggravated felony under 18 USC 16(b) after *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018).910 F.3d 134, 136 n. 1 (4th Cir. 2018) because 18 USC 16(b) was deemed unconstitutionally vague under Dimaya. Also note that in *In Re: Jaime Benjamin Rodriguez-guzman*, 2011 WL 1570457, at *5 (BIA 2010) (unpublished decision), the BIA has held that 18.2-47 of the Virginia Code requires the use of force, intimidation or deception in the abduction of another person and also requires an "intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge." *Medina v. United States*, 259 F.3d 220, 227 (4th Cir. 2001) ("Moral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general."), ruling that it is a crime of violence under 18 USC 16(b).

[30] For a crime related to ransom payments under 8 U.S.C. § 1101(a)(43)(H), an offense must include a demand for or receipt of ransom, neither of which are elements of Virginia's abduction and kidnapping statute.

[31] While there does not appear to be any Fourth Circuit or BIA case law on point, an immigration attorney may argue that the knowing, wrongful, and intentional engaging in conduct in a clear and significant violation of a custody or visitation order (be it withholding of a child from a parents or legal guardian or otherwise) is not categorically a CIMT since the act is not inherently reprehensible conduct. Reprehensible conduct entails evil intent. *Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135–36 (4th Cir. 2018) (citing *Matter of Gonzalez Romo*, 26 I&N Dec. 743, 746 (BIA 2016)); *Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980). *See*

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also Castrijon-Garcia v. Holder, 704 F.3d 1205, 1213 (9th Cir. 2013); *Hamdan v. INS*, 98 F.3d 183, 188 (5th Cir. 1996). Va. Code § 18.2-49.1 has no element of evil intent and is arguably not a CIMT. *Cf Castrijon-Garcia*, 704 F.3d at 1213–14 (holding that the simple kidnapping offense of Cal. Penal Code § 207(a) is not a CIMT since it does not involve the actual infliction of harm upon someone, or an action that affects a protected class of victim); *Hamdan v. INS*, 98 F.3d at 188–89 (holding that the simple kidnapping offense of La. Stat. Ann. § 14:45 is not a CIMT since it does not necessarily have an element of evil intent). DHS may argue, however, that reprehensible conduct also adheres where the action affects a protected class of victim, e.g., a child. *See Betansos v. Barr*, No. 15-72347, 2019 WL 2896367, at *5 (9th Cir. July 5, 2019) (citing *Nunez v. Holder*, 594 F.3d 1124, 1132 (9th Cir. 2010)). *But see Menendez v. Whitaker*, 908 F.3d 467, 473 (9th Cir. 2018) ("Not all criminal statutes intended to protect minors establish crimes involving moral turpitude."); But, while Va. Code § 18.2-49.1 has as an element an act affecting a child, an immigration attorney may argue that withholding a child from a parent or legal guardian in clear and significant violation of a custody or visitation order does not rise to level of reprehensibility of acts that have been recognized as CIMTs under this theory. *Cf Gonzalez-Cervantes v. Holder*, 709 F.3d 1265, 1267 (9th Cir. 2013) (sexual abuse of a minor is a CIMT); *Morales v. Gonzales*, 478 F.3d 972, 978 (9th Cir. 2007) (communication with a minor for immoral purposes is a CIMT).

[32] The difference between malicious and unlawful wounding is one of mental state, wherein the mental state of the latter is the equivalent to voluntary manslaughter, i.e., an intentional act done in the heat of passion. *See Barrett v. Commonwealth*, 341 S.E.2d 190, 192 (Va. 1986). Several federal district courts have found that Va. Code § 18.2-51 is divisible into "four separate crimes: (1) malicious wounding; (2) maliciously causing bodily injury; (3) unlawful wounding; and (4) unlawfully causing bodily injury." *Al-Muwwakkil v. United States*, No. 4:16CV91, 2017 WL 745563, at *5 (E.D. Va. Feb. 24, 2017); *Land v. United States*, 201 F. Supp. 3d 776, 780 (E.D. Va. 2016); *Lee v. United States*, 89 F. Supp. 3d 805, 811 (E.D. Va. 2015); *United States v. Carter*, No. 3:11CV212-HEH, 2013 WL 5353055, at *2 (E.D. Va. Sep. 24, 2013). The Fourth Circuit, however, found an identical statute divisible into two crimes: (1) malicious wounding; and (2) unlawful wounding. *See United States v. Covington*, 880 F.3d 129, 133 (4th Cir. 2018). Relying on these decisions, the immigration judge will review the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact determine which of the aforementioned offenses was committed.

[33] In *Moreno-Osorio v. Garland*, the Fourth Circuit held that Virginia unlawful wounding is a 16(a) crime of violence aggravated felony because "the minimum conduct necessary for conviction under § 18.2-51 is 'causing a person bodily injury' by any means and 'with the intent to maim, disfigure, disable, or kill.'" 2 F.4th 245, 253 (4th Cir. 2021) (*citing U.S. v. Rumley*, 952 F.3d 538, 550 (4th Cir. 2020) (holding that a conviction of Virginia Code § 18.2-51 is a violent felony for the purpose of applying ACCA's sentencing enhancement, as it involves "the use of physical force . . . ."); *see also Jenkins*, 719 F. App'x at 244–46 ("[T]he minimum conduct necessary to sustain a conviction for unlawful wounding requires the attempted or threatened use of physical force . . . ."). Because malicious wounding contains all of the same elements as unlawful wounding, plus the added element of malice, the Fourth Circuit explicitly stated in *U.S. v. Jenkins*, 719 Fed. Appx. 241, 244 (4th Cir. 2018) (unpublished), that it was unnecessary to further examine malicious wounding after having already determined that unlawful wounding was a violent felony under the ACCA. ("[I]f, as we conclude, unlawful wounding qualifies categorically as a violent felony, then it follows that the more serious wounding offenses, requiring proof of the same as well as additional elements, also qualify."). It is also clear that "the use of physical force" includes force applied directly or indirectly. *See United States v. Castleman*, 572 U.S. 157, 170–71 (2014) (construing "use of physical force" in § 921(a)(33)(A)(ii)); *see also United States v. Reid*, 861 F.3d 523, 529 (4th Cir. 2017) (concluding that "ACCA's phrase 'use of physical force' includes force applied directly or indirectly") dispensing of the issues as to whether the "use of poison" met the physical force definition. Additionally, in *Matter of Khattak*, the BIA held that maliciously causing bodily injury is a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C § 16(a). *See* No. AXXX XX4 454, 2017 WL 4418305, at *3 (BIA July 31, 2017). The Virginia Supreme Court has defined both the actus reus and the specific mental state required for a malicious wounding conviction. *Commonwealth v. Perkins*, 812 S.E.2d 212, 217 (Va. 2018) (internal citations omitted) ("[T]he Commonwealth must prove that the defendant maliciously stabbed, cut, or wounded 'any person *or* by any means cause[d] him bodily injury, with the intent to maim, disfigure, disable, or kill. . . .' The mens rea of the crime is an 'intent to maim, disfigure, disable or kill. . . . ' [A] person must also intend to permanently, not merely temporarily, harm another person."). Other Virginia case

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law has specifically emphasized how the mens rea in cases where defendants were convicted of malicious wounding surpassed mere recklessness. *See Fary v. Commonwealth*, 1079-21-2, 2022 WL 3588373, at *3, 4 (Va. App. Aug. 23, 2022) (upholding a conviction for attempted malicious wounding in the context of a boating accident because the defendant had "committed an 'intentional and malicious act,'" where the defendant conceded that he had behaved recklessly, but had argued that recklessness "is not the specific intent required to convict [him] of . . . attempted maiming"); *Knight v. Cmmw.*, 733 S.E.2d 701, 705 (Va. App. 2012) ("Appellant's actions were more than simply reckless, grossly negligent behavior. . . . [T]he evidence was sufficient to support the finding that the totality of appellant's volitional actions were such that a rational fact finder could infer implied malice."). Even though the Supreme Court has held that offenses committed with a minimum mens rea of recklessness do not constitute crimes of violence under 18 U.S.C. § 16(a). *Borden*, 141 S. Ct. at 1825, immigration practitioners may have difficulty arguing that that maliciously causing bodily injury under Va. Code § 18.2-51 is not categorically a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since it does not necessarily have an intentional mens rea, *see Borden v. United States*, 141 S. Ct. 1817, 1825 (2021). There is some support from VA courts on expressed and implied intent, The latter "exists where when any purposeful, cruel act is committed by one individual against another without any, or without great provocation." *Pugh v. Commonwealth*, 332 S.E.2d 216, 220 (Va. 1984), an implied intent "exists where when any purposeful, cruel act is committed by one individual against another without any, or without great provocation." *Pugh v. Commonwealth*, 332 S.E.2d 216, 220 (Va. 1984). However, considering the Fourth Circuit's decision in *Moreno-Osorio v. Garland*, where the court analyzed the same statute, but addressed unlawful wounding. Since malicious wounding contains all the elements of unlawful wounding, the argument that malicious wounding is not an AF is likely foreclosed by this decision.

[34] *See Supra* Note 33.

[35]The Fourth Circuit has held that unlawful wounding under Virginia Code § 18.2-51 is crime of violence because it has "physical force" element, thus counting as an aggravated felony. *See Moreno-Osorio v. Garland*, 2 F.4th 245 (4th Cir. 2021); *United States v. Jenkins*, 719 F. App'x 241, 244–46 (4th Cir. 2018) (unpublished); *United States v. James*, 718 F. App'x 201, 203–06 (4th Cir. 2018). The Fourth Circuit also held in *United States v. Covington* that unlawful wounding under W. Va. Code § 61-2-9(a), whose statutory language is virtually identical to that of Va. Code § 18.2-5, is categorically a crime of violence. 880 F.3d at 133–34. Applying *Jenkins* and *Covington*, the BIA has held that unlawful wounding under Va. Code § 18.2-51 is a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C § 16(a). *See Matter of Rose*, No. A096-561-732 (BIA June 28, 2019) (unpublished) *appeal docketed*, *Rose v. Barr*, No. 19-01726 (4th Cir. July 11, 2019). *But see Commonwealth v. Gore*, No. CR12000084-00 (Va. Cir. Ct. Mar. 5, 2012) (entering a guilty plea under Va. Code § 18.2-51 for caging and neglecting a disabled child). *Commonwealth v. Gore*, No. CR12000083-00 (Va. Cir. Ct. Mar. 5, 2012) (same).

[36] See *United States v. Rumley*, 2020 WL 1222681 (4th Cir. Mar. 13, 2020) (holding that 18.2-51 is categorically a crime of violence because it "involves 'the use of physical force'").

[37] An immigration attorney may analogize Va. Code § 18.2-51.3 to assault with intent to cause injury under Va. Code § 18.2-57, which the BIA has held not a CIMT since it "does not require the actual infliction of physical injury" and its specific intent to cause injury "may be to the feelings or mind, as well as to the corporeal person.'" *See Matter of Sejas*, 24 I&N Dec. 236, 238 (BIA 2007) (citing *Wood v. Commonwealth*, 140 S.E. 114, 115 (Va. 1927)) (finding that assault and battery in Virginia is not a CIMT); *Matter of Sanudo*, 23 I&N Dec. 968, 970–71 (BIA 2006). However, *Wood* does not compel the finding that the specific intent to cause injury in Va. Code § 18.2-51.3 is inclusive of noncorporeal injury and there appears to be no case law on whether the term "injury" in Va. Code § 18.2-51.3 is inclusive of such injury. Nonetheless, the BIA may still find Va. Code § 18.2-51.3 not a CIMT since while it entails an intent to cause injury, it does not require any injury to occur. *Cf Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007) (holding that finding an assault to be a CIMT "involves an assessment of both the state of mind and the level of harm required to complete the offense" and that "intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous"); *Matter of Sanudo*, 23 I&N Dec. at 971 (recognizing that "assault and battery offenses that necessarily involved the intentional infliction of serious bodily injury on another have been held to involve moral turpitude"). DHS may analogize

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Va. Code § 18.2-51.3 assault with a deadly/dangerous weapon, which the BIA and Fourth Circuit have recognized as a CIMT, and argue that Va. Code § 18.2-51.3 is a CIMT since it involves an "object capable of causing injury." *See Yousefi v. INS*, 260 F.3d 318, 326–27 (4th Cir. 2001); *Matter of Medina*, 15 I&N Dec. 611, 614 (BIA 1976). An immigration attorney, however, could rebut this argument by emphasizing that an object capable of causing [injury to another]" in Va. Code § 18.2-51.3 is broader than the deadly/dangerous weapon necessary for a CIMT finding. *Cf Yousefi*, 260 F.3d at 326 (Weapon was "likely to produce death or serious bodily injury."); *Matter of Wu*, 27 I&N Dec. 8, 15 n. 11 (BIA 2017) (Weapon was "capable of producing and likely to produce, death or great bodily injury."); *Matter of Goodalle*, 12 I&N Dec. 106, 107 (BIA 1967) (Weapon was "likely to produce grievous bodily harm.") *Matter of G-R-*, 21 I&N Dec. 733, 735 (BIA 1946) (Weapon was "likely to produce great bodily injury."). The immigration attorney, however, may have difficulty finding evidence necessary to establish a realistic probability that Virginia prosecutes the throwing of objects capable of causing injury but not great bodily injury under Va. Code § 18.2-51.3.

[38] An offense is a crime of violence if it has as elements scienter and the attempted use of force capable of causing physical injury to another person. *See Johnson v. United States*, 559 U.S. 133, 140 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 447 (4th Cir. 2005). Va. Code § 18.2-51.3 satisfies the scienter requirement since its mens rea is "intent to cause injury to another." An immigration judge will likely find that Va. Code satisfies the attempted use of force capable of causing physical injury to another person since its actus reus is throwing an object capable of causing injury. An immigration practitioner may argue, however, that Va. Code § 18.2-51.3 does not necessarily entail the attempted use of force capable of causing *physical* injury since the thrown object may only be intended to or capable of causing a noncorporeal injury, e.g., a small water balloon thrown to cause someone to feel fear/embarrassment. *Cf Wood v. Commonwealth*, 140 S.E. 114, 115 (Va. 1927) (holding that the injury element for a Virginia battery offense may satisfied by injury "to the feelings or mind, as well as to the corporeal person"). However, the practitioner may have difficulty finding the necessary evidence to establish a realistic probably that Virginia prosecutes throwing such an object under Va. Code § 18.2-51.3.

[39] An immigration practitioner may argue that maliciously causing bodily injury by means of an explores, fire, or caustic substance is not categorically a CIMT since maliciously causing bodily injury in Virginia includes recklessly causing bodily injury and a recklessness assault is not a CIMT unless "involve[es] the infliction of *serious* bodily injury". *See Matter of Fualau*, 21 I&N Dec. 475, 478 (BIA 1996) (citing *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976)) (emphasis added). Virginia common law recognizes two types of malice: expressed and implied. *Knight v. Commonwealth*, 733 S.E.2d 701, 705 (Va. Ct. App. 2012) (citing *Essex v. Commonwealth*, 322 S.E.2d 216, 220 (Va. 1984) and *Canipe v. Commonwealth*, 491 S.E.2d 747, 753 (Va. Ct. App. 1997)). "Implied malice exists where when any purposeful, cruel act is committed by one individual against another without any, or without great provocation." *Pugh v. Commonwealth*, 332 S.E.2d 216, 220 (Va. 1984). It "may be inferred from 'conduct likely to cause death or great bodily harm, willfully or purposefully undertaken' [and] is equivalent to 'constructive malice;' that is, 'malice as such does not exist but the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist.'" *Knight*, 733 S.E..2d at 705 (quoting Essex, 322 S.E.2d at 220, *Pugh*, 292 S.E.2d at 341, and *Canipe*, 491 S.E.2d at 753). Virginia has used the doctrine of implied malice to prosecute reckless conduct that causes bodily injury, albeit under Va. Code § 18.2-51 rather than Va. Code § 18.2-52. *See Synan v. Commonwealth*, 795 S.E.2d 464, 471 (affirming a conviction of maliciously causing bodily injury since "directing [a] van into oncoming traffic, off the road, and into an embankment could certainly be interpreted as 'conduct which [would] necessarily result in injury'"); *Knight*, 733 S.E.2d at 705–07 (affirming a conviction of maliciously causing bodily injury because the defendant's highspeed driving in an urban area was sufficiently reckless and dangerous for a factfinder to infer malice). Relying on *Matter of Fualaau*, an immigration practitioner may therefore argue that Va. Code § 18.2-52 is not categorically a CIMT since its elements encompass reckless conduct and only require bodily injury rather than severe bodily injury. *See* 21 I&N Dec. at 478; *see also Matter of O-D-F-P*, No. AXXX XXX 070 (BIA Feb. 7, 2019) (unpublished) ("Recklessly causing mere "physical injury" is not morally turpitudinous."). However, the dearth of cases on Va. Code § 18.2-52 may make it difficult for an immigration practitioner to establish the realistic probability of prosecuting reckless conduct under this statute, a finding that the BIA requires to hold that the statute is not a CIMT. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 831–33 (BIA 2016). Moreover even if the immigration practitioner succeeds in establishing this possibility, DHS may distinguish Va. Code § 18.2-52 from the simple assault in *Matter of Fualaau*, arguing

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that the statute is a CIMT because the use of fire, an explosive, or a caustic substance like acid or lye is akin to the use of a deadly weapon, making it an aggravating factor demonstrating a "heightened propensity for violence and indifference to human life." *Cf Matter of Wu*, 27 I&N Dec. 8, 11–12 (BIA 2017) (citing *Matter of Medina*, 15 I&N Dec. at 612–14) (holding that assault with a deadly weapon is a CIMT).

[40]An immigration practitioner may argue that maliciously causing bodily injury under Va. Code § 18.2-52 is not categorically a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(E) via 18 U.S.C. § 16(a) since it does not necessarily have an intentional mens rea, *see Borden v. United States*, 141 S. Ct. 1817, 1825 (2021), and causing bodily injury does not necessarily require the use of physical force. *See United States v. Torres-Miguel*, F.3d 165, 168–69 (4th Cir. 2012) *abrogated on other grounds by United States v. Castleman*, 572 U.S. 157 (2014). *See also United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018); *United States v. Covington*, 880 F.3d 129, 134 n. 4 (4th Cir. 2014). With respect to mens rea, Virginia common law recognizes two types of malice: expressed and implied. *Knight v. Commonwealth*, 733 S.E.2d 701, 705 (Va. Ct. App. 2012) (citing *Essex v. Commonwealth*, 322 S.E.2d 216, 220 (Va. 1984) and *Canipe v. Commonwealth*, 491 S.E.2d 747, 753 (Va. Ct. App. 1997)). The latter "exists where when any purposeful, cruel act is committed by one individual against another without any, or without great provocation." *Pugh v. Commonwealth*, 332 S.E.2d 216, 220 (Va. 1984). It "may be inferred from 'conduct likely to cause death or great bodily harm, willfully or purposefully undertaken' [and] is equivalent to 'constructive malice;' that is, 'malice as such does not exist but the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist.'" *Knight*, 733 S.E..2d at 705 (quoting Essex, 322 S.E.2d at 220, *Pugh*, 292 S.E.2d at 341, and *Canipe*, 491 S.E.2d at 753). Virginia has used the doctrine of implied malice to prosecute reckless conduct that causes bodily injury, albeit under Va. Code § 18.2-51 rather than Va. Code § 18.2-52. *See Synan v. Commonwealth*, 795 S.E.2d 464, 471 (affirming a conviction of maliciously causing bodily injury since "directing [a] van into oncoming traffic, off the road, and into an embankment could certainly be interpreted as 'conduct which [would] necessarily result in injury'"); *Knight*, 733 S.E.2d at 705–07 (affirming a conviction of maliciously causing bodily injury because the defendant's highspeed driving in an urban area was sufficiently reckless and dangerous for a factfinder to infer malice). The Supreme Court has held that offenses committed with a minimum mens rea of recklessness do not constitute crimes of violence under 18 U.S.C. § 16(a). *Borden*, 141 S. Ct. at 1825. With respect to physical force, the Fourth Circuit held in *United States v. Torres-Miguel* that "willfully threatening to commit a crime that will result in death or great bodily injury to another" was not a crime of violence since the indirect use of force was not physical force and causing injury was not equivalent to using physical force. 701 F.3d at 168–69. *Castleman* did not interpret the phrase "physical force" as used in the definition of a crime of violence and left open the question of whether causing bodily injury necessitated use of violent force in the crime of violence sense, 527 U.S. at 163, 170 (noting that Justice Scalia's concurrence "suggests that [causing a cut, abrasion, bruise, burn or disfigurement, physical pain or temporary illness, or impairment of the function of bodily member, organ, or mental faculty] necessitate violent force under *Johnson*'s definition of that phrase" but holding that "whether or not that is so [is] a question we do not decide."). However, Fourth Circuit has repeatedly read it to abrogate *Torres-Miguel*'s direct versus indirect use of force distinction for a crime of violence. *See United States v. Battle*, 927 F.3d 160, 165–66 (4th Cir. 2019) *United States v. Middleton*, 883 F.3d 485, 492 (4th Cir. 2018); *United States v. Covington*, 880 F.3d 129, 134 (4th Cir. 2018); *United States v. Reid*, 861 F.3d 523, 529 (4th Cir. 2017); *United States v. Burns-Johnson*, 864 F.3d 313, 318 (4th Cir. 2017); *In re Irby*, 858 F.3d 231, 236–38 (4th Cir. 2017). But, the Fourth Circuit has also confirmed that the *Torres-Miguel* distinction between causation and use of physical force remains good law. *See Middleton*, 883 F.3d at 491; *Covington*, 880 F.3d at 134 n. 4. An immigration practitioner may therefore argue that maliciously causing bodily injury by fire, explosive, or caustic substance is not categorically a crime of violence because could encompass actions which "may result in death or serious injury without involving the use of physical force." *See Covington*, 880 F.3d at 134 n. 4 (citing *Torres-Miguel*, 701 F.3d at 168). However, the practitioner may have trouble identifying such actions and establishing the realistic probability that Virginia punishes them Va. Code § 18.2-52, which the Fourth Circuit requires to hold Va. Code § 18.2-52 overbroad. *See Covington*, 880 F.3d at 135.

[41] While no caselaw is directly on point, an immigration judge could find that Va. Code § 18.2-52 is an explosives aggravated felony under 8 U.S.C. § 1101(a)(43)(E) or a firearms offense under 8 U.S.C. § 1227(a)(2)(C) if he held that the statute is divisible by the substance used to cause bodily injury and the record of conviction

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(the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact) established that a firearm was used to commit the offense. An immigration practitioner, however, could argue that the statute that the statute is indivisible since a plain text reading of the statute indicates that the substance used to cause bodily is a means of commission a single offense.

[42] Unlawfully causing bodily injury by fire, an explosive, or a caustic substance such as acid or lye under Va. Code § 18.2-52 is a CIMT since it entails both a specific intent to injure and causation of bodily injury. *See Matter of Solon*, 24 I&N Dec. 239, 246 (BIA 2007). In *Matter of Solon*, the BIA held that causing physical injury to a person with the intent to cause such injury to that person is a CIMT since the offense requires a specific intent to physically injure another person and meaningfully physical injury to that person. *Id.* at 245–46 (defining meaningful physical injury as "impairment of physical condition or substantial pain"). Like *Matter of Solon*, Va. Code § 18.2-52 has as an element specific intent to cause bodily injury because unlawfully causing bodily injury is equivalent to intentionally causing bodily injury in the heat of passion. *See Barrett v. Commonwealth*, 341 S.E.2d 190, 192 (Va. 1986). Likewise, Va. Code § 18.2-52 also has as an element the causation of physical impairment or substantial pain since Virginia courts have defined bodily injury as "any bodily injury whatsoever […] includ[ing] an act of damage or harm or hurt that relates to the body; […] impairment of a function of a bodily member, organ, or mental faculty; or […] of impairment of a physical condition." *Ricks v. Commonwealth*, 778 S.E.2d 332, 336 (Va. 2015); *See also Bryant v. Commonwealth*, 53 S.E.2d 54, 57 (Va. 1949) ("Bodily injury comprehends, it would seem, any bodily hurt whatsoever.").

[43] Unlawfully causing bodily injury by fire, an explosive, or a caustic substance such as acid or lye under Va. Code § 18.2-52 is likely a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(E) via 18 U.S.C. § 16(a). It has the requisite intentional mens rea, *see Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), since an unlawful act is one done intentionally but in the heat of passion. *See Barrett v. Commonwealth*, 341 S.E.2d 190, 192 (Va. 1986). DHS will likely argue that the offense has requisite force element since intentionally causing bodily injury by fire, explosive, or caustic substance in the heat of passion likely entails the use of force capable of causing physical pain or injury to another. *See Johnson v. United States*, 559 U.S. 133, 140 (2010). An immigration practitioner may argue otherwise, emphasizing that causing bodily injury does not necessarily require the use of physical force. *See United States v. Torres-Miguel*, F.3d 165, 168–69 (4th Cir. 2012) *abrogated on other grounds by United States v. Castleman*, 572 U.S. 157 (2014). *See also United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018); *United States v. Covington*, 880 F.3d 129, 134 n. 4 (4th Cir. 2014). However, an immigration practitioner may have trouble establishing the realistic probability that Virginia prosecutes an intentional act done in the heat of passion that causes bodily injury by fire, explosive, or caustic substance without using physical force, a prosecution that the Fourth Circuit requires to hold Va. Code § 18.2-51 overbroad. *See Covington*, 880 F.3d at 135.

[44] While no caselaw is directly on point, an immigration judge could find that Va. Code § 18.2-52 is an explosives aggravated felony under 8 U.S.C. § 1101(a)(43)(E) or a firearms offense under 8 U.S.C. § 1227(a)(2)(C) if he held that the statute is divisible by the substance used to cause bodily injury and the charging document, written plea agreement, transcript of plea colloquy, or judicial findings of fact established that a firearm was used to commit the offense. An immigration practitioner, however, could argue that the statute that the statute is indivisible since a plain text reading of the statute indicates that the substance used to cause bodily is a means of commission a single offense.

[45] In *United States v. Reid*, the Fourth Circuit held that Va. Code § 18.2-55 is categorically a violent felony under 18 U.S.C. § 924(e)(1). 861 F.3d 523, (4th Cir. 2017). As the test for a violent felony under 18 U.S.C. § 924(e)(2)(B)(i) is equivalent to a crime of violence under 18 U.S.C. 16(a), Va. Code § 18.2-55 is a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a).

[46] Va. Code § 18.2-55.1 is likely not CIMT since its least culpable conduct is causing bodily injury by recklessly endangering the health or safety of a person in connection with continued membership in a gang. Generally, simple battery committed with recklessness or general intent and not causing serious bodily harm is not a CIMT. *See Matter of Wu*, 27 I&N Dec. 8, 10–11 (BIA 2017) (citing *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 466 (BIA 2011) and *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996)). "But, this general rule does not apply where a statute contains elements that deviate from those associated with simple assault and battery and involves some aggravating factor that indicates the perpetrator's moral depravity." *Matter of Jing Wu*, 27 I&N Dec. at 11 (citing *Matter of*

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Ahortalejo-Guzman, 25 I&N Dec. at 466); *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006). Aggravating factors include the use of a deadly weapon, the intentional infliction of serious bodily harm, and infliction of bodily harm on a member of a class of persons society views as deserving of special protection. *See Matter of Sanudo*, 23 I&N Dec. at 971. Causing bodily injury by recklessly endangering the health or safety of a person in connection with continued membership in a gang has no aggravating factor and lacks the serious harm necessary to make its reckless act a CIMT. *See Matter of Wu*, 27 I&N Dec. at 10–11. DHS, however, may argue that its attendant circumstance – commission in connection with or for the purpose of initiation, admission into or affiliation with a gang – is an aggravating factor. *Cf Matter of E.E. Hernandez*, 26 I&N Dec. 397, 402 (BIA 2014) (holding that maliciously defacing, damaging, or destroying property for the benefit of a criminal street gang in order to promote gang member criminal conduct is inherently reprehensible). *But see Cabrera v. Barr* No. 18-1314, 2019 WL 3242032, at * 8 (4th Cir. July 19, 2019) (rejecting *Matter of E.E. Hernandez* and holding that gang association is not an aggravating factor). DHS may also cite *Matter of Leal* for the proposition that recklessly endangering another person is a CIMT. *See* 26 I&N Dec. (BIA 2012). However, endangerment in *Leal* required a substantial risk of imminent death, which is absent from Va. Code § 18.2-55.1. *Compare id.* at 22 ("A person commits endangerment by recklessly endangering another person with a *substantial risk of imminent death or physical injury*.") (emphasis added) *with* Va. Code § 18.2-55.1 ("'Hazing' means to recklessly or intentionally endanger the health or safety of a person.)

[47] Causing bodily injury by hazing is not a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since it lacks the requisite mens rea. The minimum mens rea for causing bodily injury by hazing is recklessness. *See* Va. Code § 18.2-55.1. The Supreme Court has held that offenses committed with a minimum mens rea of recklessness do not constitute crimes of violence under 18 U.S.C. § 16(a). *Borden v. United States*, 141 S. Ct. 1817, 1825 (2021).

[48] In *Matter of Sejas*, the BIA held that assault and battery in Virginia is not a CIMT since it "does not require the actual infliction of physical injury and may include any touching, however slight." *See* 24 I&N Dec. 236, 238 (BIA 2007). This is consistent with the BIA's general stance that an assault and battery conviction absent an aggravating factor does not constitute a CIMT because it requires only general intent and *de minimis*, if any, physical contact. *See Matter of Solon*, 24 I&N Dec. 239 (BIA 2007).

[49] In *United States v. Carthorne*, the Fourth Circuit held that assault and battery offenses in Virginia are not crime of violence under the force clause because they may be accomplished with the "slightest touching." 726 F.3d 503, 513 (4th Cir. 2013) (citing *United States v. White*, 606 F.3d 144, 148 (4th Cir. 2010), *abrogated on other grounds by United States v. Castleman*, 134 S. Ct. 1405, 1413 (2014)); *Johnson v. United States*, 559 U.S. 133, 139–42 (2010)). Physical force requires more than mere touching. *Johnson*, 559 U.S. at 139. Assault and battery is not a crime of violence under the residual clause since that clause is unconstitutionally vague. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018).

[50] In *United States v. Carthorne*, the Fourth Circuit held that assault and battery of a police officer is not a crime of violence under the force clause because "assault and battery in Virginia may be accomplished with the "slightest touching." 726 F.3d 503, 513 (4th Cir. 2013) (citing *United States v. White*, 606 F.3d 144, 148 (4th Cir. 2010), *abrogated on other grounds by United States v. Castleman*, 134 S. Ct. 1405, 1413 (2014); *Johnson v. United States*, 559 U.S. 133, 139–42 (2010)). Assault and battery of a police officer is not a crime of violence under the residual clause since that clause is unconstitutionally vague. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018).

[51] In *Matter of Sejas*, the BIA held that "assault and battery against a family or household member in violation of section 18.2-57.2 of the Virginia Code is not categorically a crime involving moral turpitude." 24 I&N Dec. 236, 238 (BIA 2007). *Ayaz Khan*, A071 801 450 (BIA Oct. 12, 2017) (unpublished)(misdemeanor assault and battery under Va. Code 18.2-57 and misdemeanor assault on a family member under Va. Code 18.2-57.2 are not CIMTs).

[52] In *United States v. White*, the Fourth Circuit held that VA assault and battery of a family or household member is an overbroad statute since "physical force, [force capable of causing physical pain or injury to another person], is not an element of assault and battery under the well-established law of Virginia." 606 F.3d

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144, 153 (4th Cir. 2010), *abrogated on other grounds by United States v. Castleman*, 134 S. Ct. 1405, 1413, (2014). *Seel also Matter of DANG, 28 I&N Dec. 541 (BIA 2022) (Supreme Court's construction of "physical force" in Johnson v. United States, 559* U.S. 133 (2010), and *Stokeling v. United States*, 139 S. Ct. 544 (2019), controls BIA's interpretation of BIA's interpretation of 18 U.S.C. § 16(a) and 8 U.S.C. § 1227(a)(2)(E)(i); misdemeanor domestic abuse battery with child endangerment under section 14:35.3(I) of the Louisiana Statutes extends to mere offensive touching, it is overbroad with respect to § 16(a) and therefore is not categorically a crime of domestic violence under section 237(a)(2)(E)(i) of the INA, 8 U.S.C. § 1227(a)(2)(E)(i). However, in *Winston v. Holder*, 439 Fed.Appx. 249, 250, 2011 WL 2783855, at *1 (4th Cir. 2011), the Fourth Circuit found that this was a Crime of Violence under 8 U.S.C. § 1227(a)(2)(E)(ii) after applying a modified categorical approach (stating, that in this case, the immigration judge examined the charging documents and found that Winston pled guilty to grabbing his wife during an argument, attempting to choke her, and punching a wall. This meets the definition of a "crime of violence," and thus Winston's guilty plea renders him deportable).

[53] *See Supra* Note 52.

[54] Va. Code § 18.2-58 "prescribes the punishment for robbery but does not define the offense." *Commonwealth v. Hudgins*, 611 S.E.2d 362, 365 (Va. 2005). The common law defines robbery as '"the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation."' *Id.* (quoting *Johnson v. Commonwealth*, 163 S.E. 2d 570, 572–73 (Va. 1968)). Its elements therefore are (1) the use of violence, or the threat thereof, against the victim, and (2) the theft of property from his person or in his presence. *Briley v. Commonwealth*, 273 S.E.2d 48, 55 (Va. 1980). The Board of Immigration Appeals ("BIA") has defined "theft offense" as a crime that "consists of the taking of, or exercise of control over, property without consent whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent." *Castillo v. Holder*, 776 F.3d 262, 267 (4th Cir.2015) (quoting *In re Garcia–Madruga*, 24 I. & N. Dec. 436, 440 (BIA 2008))

[55] This includes any taking without consent, or where the "consent" was coerced through force, fear, or threats. See *Matter of Ibarra* 26 I&N Dec. 809, 812 (BIA 2016). Similarly, *Tung v. Johnson*, 159 F.Supp.3d 677, 683 (E.D.Va., 2016) found that the statute qualifies as an aggravated felony under 8 U.S.C. § 1101 (a)(43)(G). (stating that "[a] comparison of the elements of Virginia common law robbery with § 16(a) demonstrates that plaintiff's conviction easily falls within the definition of a "crime of violence." Robbery requires the use of "violence or intimidation," while § 16(a) includes any offense that involves the "attempted use, or threatened use of physical force against the person or property of another." The Fourth Circuit has found, in interpreting the Armed Career Criminal Act that because "[v]iolence is the use of force" and "[i]ntimidation is the threat of the use of force," "robbery in Virginia has as an element the use or threatened use of force." *United States v. Presley*, 52 F.3d 64, 69 (4th Cir.1995). ")

[56] In *United States v. Winston*, the Fourth Circuit held that Va. Code § 18.2-58 was not a crime of violence since "Virginia common law robbery can be committed when a defendant uses only a 'slight' degree of force that need not harm a victim" and so "does not necessarily include the use, attempted use, or threatened use of 'violent force ... capable of causing physical pain or injury to another person.'" 850 F.3d 677, 685 (4th Cir. 2017) (quoting *United States v. Johnson*, 559 U.S. 133, 140 (2010)). DHS may cite *Stokeling v. United States* for the proposition that Va. Code § 18.2-58 is a crime of violence since it is a robbery. *See* 139 S. Ct. 544, 555 (2019) (holding that a Florida robbery conviction is a crime of violence). However, the Supreme Court only reached its decision in *Stokeling* since Florida courts had clarified that the Florida robbery offense required "'resistance by the victim that is overcome by the physical force of the offender'" and that "'mere snatching of property from another' [would] not suffice." *Id.* (quoting *Robinson v. State*, 692 So. 2d 883, 886 (Fl. 1997)). Va. Code § 18.2-58 requires no resistance by the victim and may be satisfied by a mere snatching. *See Winston*, 850 F.3d at 684–85.

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[57] Virginia courts have held that the statute only has two elements: (1) act of violence or threat thereof; and (2) theft. *See* n. 55. As such, the statute is not divisible by the means through which the act of violence was committed.

[58] The elements of carjacking under Va. Code § 18.2-58.1 are: "(i) the victim was in possession or control of a motor vehicle; (ii) the perpetrator intentionally seized, or seized control of, the vehicle, either temporarily or permanently; and (iii) the perpetrator so deprived the victim of possession or control of the vehicle by means of one or more of the specifically prohibited acts—which includes the use of a firearm." *Hilton v. Commonwealth*, 797 S.E.2d 781, 784 (Va. 2017).

[59] An immigration practitioner may argue that carjacking is not a CIMT because it punishes de minimis takings. The BIA historically held that theft offenses like robbery are CIMTs if and only if they were committed with the intent to *permanently* deprive an owner of property. *See, e.g.*, *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973); *Matter of P-*, 2 I&N Dec. 887, 887 (BIA 1947); *Matter of D-*, I&N Dec. 143, 145–46 (BIA 1941). In *Matter of Diaz-Lizarraga*, the BIA reinterpreted its theft jurisprudence to hold that a theft offense is a CIMT "if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded" rather than "a de minimis taking." 26 I&N Dec. 847, 852–54 (BIA 2016). It clarified that joyriding or "borrowing" an item without permission for temporary, short-term use exemplify de minimis takings, while taking an item without permission for several years or returning a taken item in damaged condition or "after its value or usefulness to the owner has been vitiated" illustrate substantial erosions of property rights. *Id*. at 853–854. Virginia Code § 18.2-58.1 may include de minimis takings since it criminalizes the intentional seizure or seizure of control of a motor vehicle of another with intent to […] temporarily deprive another in possession or control of the vehicle. However, an immigration practitioner may have difficulty establishing that there is a realistic probability of Virginia prosecuting de minimis takings under Virginia Code § 18.2-58.1, a finding that the BIA requires to hold that the statute is not a CIMT. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 831–33 (BIA 2016); *But see Martinez v. Sessions*, 892 F.3d 655, 662 (4th Cir. 2018) (finding a Maryland theft statute broader than the *Diaz-Lizarraga* standard because it permitted possible persecution of de minimis, temporary takings like joyriding without assessing whether there was a realistic probability of such prosecutions).

[60] Carjacking under Va. Code § 18.2-58 is not categorically a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since it encompasses acts such as taking a vehicle via intimidation that do not have as an element the use, attempted use, or threatened use of force capable of causing physical injury to a person. *See Pressley v. Commonwealth*, 679 S.E.2d 551, 555 (Va. Ct. App. 2009) (affirming a carjacking conviction accomplished by means of intimidation). In *Pressley*, the defendant, "[wore] a mask that obscured the lower half of his face, ran toward the victim with "a great degree of speed," demanded his possessions, and pressed the victim for his keys until victim surrender them since he was afraid and believed appellant "could do anything." 679 S.E.2d at 555. The Court held that a taking "by assault or by otherwise placing a person in fear of serious bodily harm" may be accomplished via intimidation, which occurs "when the words or conduct of the accused exercise such domination and control over the victim as to overcome the victim's mind and overbear the victim's will, placing the victim in fear of bodily harm." *Id.* at 554 (citing *Anderson v. Commonwealth*, 664 S.E.2d 514, 517 (Va. Ct. App. 2008)). It also noted that "threats of violence or bodily harm are not an indispensable ingredient of intimidation [rather] [i]t is only necessary that the victim actually be put in fear of bodily harm by the willful conduct or words of the accused." *Pressley*, 679 S.E.2d at 554 (citing *Harris v. Commonwealth*, 351 S.E.2d 356, 357 (Va. Ct. App. 1986)).

[61] Carjacking under Va. Code § 18.2-58 is categorically a theft aggravated felony under 8 U.S.C. § 1101(a)(43)(F) despite criminalizing temporary takings since the generic definition of theft also encompasses such takings. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007).

[62] Va. Code § 18.2-59 is a theft aggravated felony under 8 U.S.C. § 1101(a)(43)(G) since the generic theft offense "encompasses extortionate takings, in which consent is coerced by the wrongful use of force, fear, or threats." *See Matter of Ibarra*, 26 I&N Dec. 809, 813 (BIA 2016).

[63] A CIMT "requires two essential elements: a culpable mental state and reprehensible conduct." *Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135 (4th Cir. 2018) (citing *Sotnikau v. Lynch*, 846 F.3d 731, 735–36 (4th Cir. 2017)); *Matter of Silva-Trevino*, 26 I&N Dec. 826, 831–33 (BIA 2016). Va. Code § 18.2-60 satisfies the culpable mental state requirements since the statute entails knowingly communicating a threat and a threat has a specific intent to injure the person of another. *See Keyes v. Commonwealth*, 572 S.E.2d 512, 516 (Va. Ct. App. 2002) (citing *Summerlin v. Commonwealth*, 557 S.E.2d 731, 736 (Va. Ct. App. 2002)). Knowingly

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communicating a threat to kill or do bodily injury to a person or any member of his family such that the person is placed in reasonable apprehension of death or bodily injury to himself or his family member is reprehensible conduct. *See Matter of Ajami*, 22 I&N Dec. 949, 952 (BIA 1999) (holding that stalking under Mich. Comp. L § is a CIMT since it involves a willful course of conduct that causes another to feel great fear); *See also Latter-Singh v. Holder*, 669 F.3d 1156, 1161–1163 (9th Cir. 2012) (finding willfully threatening to commit a crime which will result in death or great bodily injury to another person is a CIMT since it entails a specific intent to injure and only encompasses threats that convey a gravity of purpose and an immediate prospect of execution of the threat to the threatened person and cause this person to reasonably fear for his or her own safety or that of his immediate family); *Chanmouny v. Ashcroft*, 376 F.3d 810, 813–14 (8th Cir. 2004) (holding that threatening a crime of violence against another person with the purpose of causing extreme fear is a CIMT).

[64] An immigration practitioner may argue that knowingly threatening death or bodily injury to a person or a member of his family is not a crime of violence aggravated felony under 8 U.S.C § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since such a threat does not necessarily entail a threat to use of physical force. *See United States v. Torres-Miguel*, F.3d 165, 168–69 (4th Cir. 2012) (holding that Cal. Penal Code § 422, willfully threatening to commit a crime which will result in death or great bodily injury to another person, is a not a crime of violence), *abrogated on other grounds by United States v. Castleman*, 572 U.S. 157 (2014). *See also United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018); *United States v. Covington*, 880 F.3d 129, 134 n. 4 (4th Cir. 2014). However, the practitioner may have trouble establishing the realistic probability that Virginia prosecutes threats under Va. Code § 18.2-60. *See Covington*, 880 F.3d at 135.

[65] An immigration attorney may argue that Va. Code §§ 18.2-60(A)(2) is not categorically a CIMT since communicating in writing a threat to kill or do bodily harm on a school bus/campus or at a school event such that the object of the threat has a reasonable apprehension of death or bodily harm does might not necessarily entail a sufficiently culpable mental state. *Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135 (4th Cir. 2018) (holding that a CIMT "requires two essential elements: a culpable mental state and reprehensible conduct"). Unlike Va. Code § 18.2-60(A)(1), Va. Code § 18.2-60(A)(2) does not specify the mental state with which this threat must be communicated so it is possible the statute is a strict liability offense or includes negligent conduct, neither of which entail a sufficiently culpable mental state for the statute to be a CIMT. *See Sotnikau v. Lynch*, 846 F.3d 731, 736 (4th Cir. 2017) (holding that negligence is an insufficiently culpable mental state for a CIMT finding).

[66] An immigration practitioner may argue that communicating in writing a threat to kill or do bodily harm such that the object of the threat has a reasonable apprehension of death or bodily harm is not categorically a crime of violence aggravated felony under 8 U.S.C § 1101(a)(43)(F) via 18 U.S.C. § 16(a) for two reasons. First, Va. Code §§ 18.2-60(A)(2) does not specify the mental state with which its threat must be committed so it is possible the statute is a strict liability offense or encompasses negligent and reckless conduct, none of which are sufficiently culpable for it be a crime of violence. *See Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004); *Borden v. United States*, 141 S. Ct. 1817, 1825 (2021). Second, a threat to kill or do bodily harm does not necessarily entail a threat to use of physical force. *See United States v. Torres-Miguel*, F.3d 165, 168–69 (4th Cir. 2012) (holding that Cal. Penal Code § 422, willfully threatening to commit a crime which will result in death or great bodily injury to another person, is a not a crime of violence), *abrogated on other grounds by United States v. Castleman*, 572 U.S. 157 (2014). *See also United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018); *United States v. Covington*, 880 F.3d 129, 134 n. 4 (4th Cir. 2014). However, the practitioner may have trouble establishing the realistic probability that Virginia prosecutes such threats under Va. Code § 18.2-60. *See Covington*, 880 F.3d at 135.

[67] An immigration attorney may argue that Va. Code §§ 18.2-60(B) is not categorically a CIMT since making an oral threat to school or hospital employee does might not necessarily have a sufficiently culpable mental state. See *Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135 (4th Cir. 2018) (holding that a CIMT "requires two essential elements: a culpable mental state and reprehensible conduct"). Unlike Va. Code § 18.2-60(A)(1), Va. Code § 18.2-60(B) does not specify the mental state with which this threat must be communicated so it is possible the statute is a strict liability offense or includes negligent conduct, neither of which entail a sufficiently culpable mental state for the statute to be a CIMT. See *Sotnikau v. Lynch*, 846 F.3d 731, 736 (4th Cir. 2017) (holding that negligence is an insufficiently culpable mental state for a CIMT finding).

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[68] An immigration practitioner may argue that making an oral threat to school or hospital employee is not a crime of violence aggravated felony under 8 U.S.C § 1101(a)(43)(F) via 18 U.S.C. § 16(a) for two reasons. First, Va. Code §§ 18.2-60(A)(2) does not specify the mental state with which its threat must be committed so it is possible the statute is a strict liability offense or encompasses negligent and reckless conduct, none of which are sufficiently culpable for it be a crime of violence. *See Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004); *Borden v. United States*, 141 S. Ct. 1817, 1825 (2021). Second, a threat to kill or do bodily harm does not necessarily entail a threat to use of physical force. *See United States v. Torres-Miguel*, F.3d 165, 168–69 (4th Cir. 2012) (holding that Cal. Penal Code § 422, willfully threatening to commit a crime which will result in death or great bodily injury to another person, is a not a crime of violence), *abrogated on other grounds by United States v. Castleman*, 572 U.S. 157 (2014). *See also United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018); *United States v. Covington*, 880 F.3d 129, 134 n. 4 (4th Cir. 2014). However, the practitioner may have trouble establishing the realistic probability that Virginia prosecutes such threats under Va. Code § 18.2-60. *See Covington*, 880 F.3d at 135.

[69] Va. Code § 18.2-60.3 is not a categorical CIMT since it includes "conduct directed at another person when [the perpetrator] *knows or reasonably should know* that the conduct places that other person in reasonable fear of death, criminal sexual assault, or bodily injury" and negligence is not a sufficiently culpable mental state for a CIMT. *See Sotnikau v. Lynch*, 846 F.3d 731, 735–36 (4th Cir. 2017); *Matter of Tavdidishvili*, 27 I&N Dec. 142, 144 (BIA 2017). *See also Matter of Daria Shaban*, No. AXXX XX3 979, 2018 WL 3045823, (BIA May 1, 2018) (finding that a Minnesota stalking statute is not a CIMT since it covers offenses where the perpetrator acted with negligence).

[70] The generic definition of "stalking" for purposes of 8 U.S.C. § 1227(a)(2)(E) has three elements: (1) repeated conduct, (2) directed at a specific individual, (3) with the intent to cause that individual or a member of his or her immediate family to be placed in fear of bodily injury or death. *Matter of Sanchez-Lopez*, 26 I&N Dec. 71, 74 (BIA 2012), *vacated on other grounds by* 27 I&N Dec. 256 (BIA 2018). Va. Code § 18.2-60.3 is categorically overbroad since it extends the third element to negligently placing an individual or a member in fear of bodily injury or death.

[71] An immigration attorney may argue that Va. Code §§ 18.2-61(A)(i), 18.2-67.1(A)(2), 18.2-67.3(A)(4) are not categorically crime of violence aggravated felonies under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since their minimum culpable conduct does has a not have as an element the use, attempted use, or threatened use of physical force capable of causing physical pain to a person. *See Johnson v. United States*, 559 U.S. 133 (2010); *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 716 (BIA 2016). The minimum conduct criminalized under Va. Code §§ 18.2-61, 18.2-67.1(A)(2) is sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, or sexual abuse with a victim against her will by intimidation. The Virginia courts have emphasized that "there is a difference between threat and intimidation" and defined the latter as "putting a victim in fear of bodily harm by exercising such domination and control of her as to overcome her mind and overbear her will." *Sutton v. Commonwealth*, 324 S.E.2d 665, 669–70 (Va. 1985) (further noting that "intimidation may be caused by the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure"). *See also Sabol v. Commonwealth*, 553 S.E.2d 533, 537 (Va. Ct. App. 2001) ("Intimidation differs from threat in that it occurs without an express threat by the accused to do bodily harm."). Intimidation does not require the perpetrator to use physical force or threaten to do so. *See Sutton*, 324 S.E.2d at 671 (finding intimidation based on the perpetrator's repeated requests to have sexual intercourse with the victim, the threat that the victim would be returned to her abusive father if she did not do so, and the victim's observations of the perpetrator's violent propensities and anger); *Myers v. Commonwealth*, 400 S.E.2d 803, 804–05 (Va. Ct. App. 1991) (finding intimidation based on the age different between the victim and perpetrator and his threat to leave her in a remote, scary location if she did not have sexual intercourse with him). As such, that Va. Code §§ 18.2-61(A)(i), 18.2-67.1(A)(2), 18.2-67.3(A)(4) are not categorically crime of violence aggravated felonies.

[72] A crime is a domestic violence offense under 8 U.S.C. § 1227(a)(2)(E)(i) if (1) the offense constitutes a crime of violence; and (2) the victim is a protected person, i.e., the perpetrator and the victim share a child or the perpetrator is the victim's current spouse, the victim's former spouse, the victim's co-habitual spouse, or an individual similarly situated to a spouse of the victim. Va. Code §§ 18.2-61, 18.2-67.1(A)(2), 67.3(A)(2) are not categorically crime of violence aggravated felonies. *See supra* n. 71. However, if they were, the Fourth Circuit and the BIA would use a circumstance specific approach to determine whether the victim is a

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protected person, which allows them to consider documents outside the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact. *See Hernandez-Zavala v. Lynch*, 806 F.3d 259 (4th Cir. 2015); *Matter of Estrada*, 26 I&N Dec. 749, 750–54 (BIA 2016); *Matter of Milian*, 25 I&N Dec. 197, 200 (BIA 2010).

[73] Sexual intercourse or sexual abuse through the victim's "mental incapacity or physical helplessness" does not have as an element the use, attempted use, or threatened use of force capable of causing injury to another person, and so is not a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) or a domestic violence offense under 8 U.S.C. § 1227(a)(2)(E)(i). *See* 18 U.S.C. § 16(a); *Johnson v. United States*, 559 U.S. 133 (2010); *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 716 (BIA 2016). A mental capacity is a condition that prevents the victim "from understanding the nature or consequences of the sexual act," while physical helplessness means unconsciousness or any other condition that rendered the victim physically unable to communicate an unwillingness to act. Va. Code §§ 67.3-10(3), (4).

[74] Virginia has no common law mistake of age defense. *Lawrence v. Commonwealth*, 71 Va. 845, 855 (Va. 1878) ("The offence of having carnal knowledge of a female under twelve years of age is entirely independent of and unaffected by […] any belief, or reasonable cause of belief, on [the perpetrator's] part that she was twelve years old.") Therefore, Va. Code §§ 18.2-61(A)(iii), 18.2-63, 18.2-64.1, 18.2-67.1(A)(1), 18.2-67.2(A)(1), 18.2-67.3(A)(1), 18.2-67.3(A)(3), 18.2-67.5 are not categorically CIMTs. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 834 (BIA 2016) (affirming the Attorney General's previous holding in *Matter of Silva-Trevino* that intentional sexual contact between an adult and a minor only involves moral turpitude if the perpetrator knows or reasonably should have known that the victim was a minor). An immigration attorney, however, may have difficulty finding the necessary evidence to establish the realistic probability of Virginia prosecuting acts with a minor whom the perpetrator reasonably believed to be an adult, which the BIA requires to hold the Virginia offenses not to be CIMTs. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 831–33 (BIA 2016).

[75] None of the acts of sexual intercourse, sexual abuse, cunnilingus, fellatio, anilingus, anal intercourse with or inanimate or animate object sexual has as an element the use, attempted use, or threatened use of force capable of causing injury to another person so Va. Code §§ 18.2-61(A)(iii), 18.2-67.1(A)(1), 18.2-67.2(A)(1), and 18.2-67.3(A)(1) are not crime of violence aggravated felonies under 8 U.S.C. § 1101(a)(43)(F). *See* 18 U.S.C. § 16(a); *Johnson v. United States*, 559 U.S. 133 (2010); *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 716 (BIA 2016).

[76] An immigration practitioner could argue that this statute is overbroad than the generic definition under INA because SCOTUS held that "a closely related federal statute, 18 U.S.C. § 2243, provides further evidence that the generic federal definition of sexual abuse of a minor incorporates an age of consent of 16, at least in the context of statutory rape offenses predicated solely on the age of the participant." *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562, 1570 (2017). However, this statute could encompass victims who are over 16 years of age.

[77] In *Davison v. Commonwealth*, 69 Va. App. 321, 819 S.E.2d 440, 443 (2018), Virginia Supreme Court analyzed this statute for ACCA purposes, and held that because "force, physical helplessness, and mental incapacity present 'several possible sets of underlying facts' that determine whether the victim's will was overcome," this statute is indivisible and categorical approach must be applied; *see also United States v. Al-Muwwakkil,o* 983 F.3d 748, 759 (4th Cir. 2020).

[78] Sexual abuse is categorically broader than the generic federal rape offense. *Compare* Va. Code § 18.2-67.10 (defining sexual abuse as the following acts committed with the intent to sexually molest, arouse, or gratify any person: (1) touching the victim's genitalia, anus, groin, breast, or buttocks or material directly covering these body parts; (2) forcing the victim touch another person's genitalia, anus, groin, breast, buttocks or material directly covering these body parts; (3) causing a victim younger than 13 years old to another person's genitalia, anus, groin, breast, buttocks or material directly covering these body parts; or (4) forcing another person to touch the victim's genitalia, anus, groin, breast, buttocks or material directly covering these body parts) with *Matter of Keeley*, 27 I&N Dec. 146, (BIA 2017) (defining "rape" in [8 U.S.C. § 1101(a)(43)(A)] as "(1) an act of vaginal, anal, or oral intercourse or digital or mechanical penetration, no matter how slight, that (2) is committed without consent"). Virginia has successfully prosecuted conduct as sexual abuse that falls outside the generic federal definition of rape.

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See, e.g., *Martin v. Commonwealth*, 630 S.E.2d 291 (Va. 2006) (affirming the conviction under Va. Code § 18.2-67.3 where eight-year-old victim masturbated the defendant after he exposed his penis to her and asked her to do so).

[79] As the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16, Va. Code § 18.2-67.3(a)(3) does not categorically fall within that definition and so is not an aggravated felony. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017).

[80] An immigration attorney may argue that Va. Code § 18.2-67.3(A)(4)(c) is not categorically a firearms offense under 8 U.S.C. § 1227(a)(2)(C) since Virginia does not limit dangerous weapons to those firearms included in the federal definition at 18 U.S.C. § 921(a). Rather, it includes all weapons "able or likely to inflict injury." *See Cabral v. Commonwealth*, 815 S.E.2d 805, 808 (Va. Ct. App. 2018). However, the BIA will likely require a showing of a realistic probability for Virginia prosecuting sexual abuse where the defendant uses or threatens to use a dangerous weapon that is not a firearm to find it overbroad on this basis. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 357 (BIA 2014). An immigration attorney may have difficulty finding the evidence necessary to make this showing.

[81] In the unpublished case *Rivers v. Holder*, the Fourth Circuit held that a conviction under this statute is categorically a crime involving moral turpitude. *See* 496 F. App'x 264 (4th Cir. 2012) (unpublished). *See also Mohamed v. Holder*, 769 F.3d 885, 888 (4th Cir. 2014) (the respondent there had conceded that sexual battery was a CIMT, and holding in dicta that 18.2-67.4 is a CIMT).

[82] The Virginia code defines sexual abuse as, inter alia, causing or assisting a child younger than 13 to touch another person's genitalia, anus, groin, breast, or buttocks or material directly covering these body parts with the intent to sexually molest, arouse, or gratify any person. *See* Va. Code § 18.2-67.10(6)(c). An immigration attorney may argue that these acts fall outside the ambit of the generic federal sexual abuse of a minor offense since they may be done with an intent to sexually molest rather than an intent for sexual gratification. *See Larios-Reyes v. Lynch*, 843 F.3d 146, 159 (4th Cir. 2016) (limiting the generic federal offense for sexual abuse of a minor is "physical or nonphysical misuse or maltreatment of a minor for *a purpose associated with sexual gratification*") (emphasis added).

[83] Immigration practitioners may argue that Va. Code § 18.2-67.4 is not a categorical match for the crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F) via 18 U.S.C. § 16(a) since its minimum culpable conduct does has a not have as an element the use, attempted use, or threatened use of physical force capable of causing physical pain to a person. *See Johnson v. United States*, 559 U.S. 133 (2010) (holding that physical force is not satisfied by mere touching); *Matter of Guzman-Polanco*, 26 I&N Dec. 713, 716 (BIA 2016). The minimum conduct criminalized under Va. Code § 18.2-67.4 is various forms of touching via intimidation or ruse. *See* Va. Code §§ 18.2-67. Intimidation does not require the use or threatened use of physical force. *See supra* n. 71 Neither does ruse. While the Fourth Circuit has held that a conviction under Virginia Code § 18.2-67.4 is a crime of violence aggravated felony, *see Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000), it did so without explaining its rationale and before *Sessions v. Dimaya* found 18 U.S.C. § 16(b) unconstitutionally vague. 138 S. Ct. 1204, 1223 (2018). Interestingly, the BIA has held in an unpublished opinion, that crime under this statute constitute an aggravated felony and involve moral turpitude. *In Re: Seung Min Kim*, 2010 WL 5559141, at *1 (BIA 2010) (unpublished); *see also* USCIS's Administrative Appeals Office has considered this issue in its 2013 decision and determined that 18.2-67.4(A) is an aggravated felony. https://www.uscis.gov/sites/default/files/err/M1%20-%20Application%20for%20Temporary%20Protective%20Status/Decisions_Issued_in_2013/AUG162013_01M1244.pdf. There could also be an argument that this is a Class 1 misdemeanor and since punishment for Class 1 misdemeanor in Virginia is "12 months," a practitioner could argue that "12 months" is not the same as "1 year" as required under aggravated felony based on "crime of violence" under INA, pursuant to *Belcher v. Commonweal*th, S.E.2d 2022 WL 4472825 (Va. Ct. App. Sept. 27, 2022).

[84] The Virginia code defines sexual abuse as, inter alia, causing or assisting a child younger than 13 to touch another person's genitalia, anus, groin, breast, or buttocks or material directly covering these body parts with the intent to sexually molest, arouse, or gratify any person. *See* Va. Code § 18.2-67.10(6)(c). Only the

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conduct in Va. Code § 18.2-67.10(6)(c) falls within the ambit of the generic federal child abuse offense either as a direct act of sexual contact with a minor or more broadly as maltreatment of a person younger than 18 years old since the other conduct defined as sexual abuse is not dependent upon the victim's age. *See Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512–14 (BIA 2008). Whether a conviction under Va. Code § 18.2-67.4 may be found to be a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)(i) depends upon whether the Virginia statute is divisible by type of sexual abuse, i.e., whether it creates a single sexual abuse offense for which the definitions in Va. Code § 18.2-67.10 are different means of commission or whether it creates multiple sexual abuse offenses, one for each definition in Va. Code § 18.2-67.10. The immigration judge and BIA will likely find Va. Code § 18.2-67.4 divisible by type of sexual abuse since Virginia courts have treated Va. Code § 18.2-67.4 as creating distinct offenses for each definition of sexual abuse in Va. Code § 18.2-67.4. *See Gnadt v. Commonwealth*, 497 S.E.2d 887, 889 (Va. Ct. App. 1998) (holding that assault and battery is a lesser-included offense of a sexual battery offense whose elements were "intentional touching administered with the intent to sexually molest, arouse, or gratify"). Such a finding allows the immigration judge to consult the charging document, written plea agreement, transcript of plea colloquy, and judicial findings of fact to determine whether a noncitizen's conviction was under Va. Code § 18.2-67.10(6)(c). If it was, the immigration judge should find the noncitizen deportable for committing a crime of child abuse. Additionally, An immigration practitioner could argue that this statute is overbroad than the generic definition under INA because SCOTUS held that "a closely related federal statute, 18 U.S.C. § 2243, provides further evidence that the generic federal definition of sexual abuse of a minor incorporates an age of consent of 16, at least in the context of statutory rape offenses predicated solely on the age of the participant." *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562, 1570 (2017). However, this statute could encompass victims who are over 16 years of age.

[85] The Fourth Cir has held that "the phrase 'sexual abuse of a minor' means a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification." *Larios-Reyes v. Lynch*, 843 F.3d 146, 158 (4th Cir. 2016).

[86] The predicate offense of Va. Code § 18.2-67.5 is an attempt aggravated felony under 8 U.S.C. § 1101(a)(43)(U) if the underlying principal offense is an aggravated felony. Criminal defense attorneys should therefore consult the chart for the underlying principal offense.

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