REFERENCE GUIDE TO THE BASIC IMMIGRATION CONSEQUENCES OF SELECT VIRGINIA OFFENSES

DATED: OCTOBER 2007

IMPORTANT ADVISAL: The following analysis of the basic immigration consequences of select Virginia offenses. It should not be relied upon as providing a definitive analysis of the issues discussed and is *not* a substitute for a practitioner's own research and analysis. Immigration consequences of crimes are a complex, unpredictable, and constantly changing area of law where there are few guarantees. Feedback is appreciated and should be directed to Mary Holper at the Boston College Immigration and Asylum Project, holper@bc.edu, (617) 552-0593.

Acknowledgments
Mary Holper is the principal author of this reference guide. I would like to thank Matt Sadler and numerous other interns for their research assistance, as well as Dan Kesselbrenner, Dan Kanstroom, Lory Rosenberg, Norton Tooby, and Paromita Shah for their many significant contributions to this research. I would like to thank the staff at the Capital Area Immigrants' Rights (CAIR) Coalition, the Catholic Legal Immigration Network, Inc. (CLINIC), Boston College Law School and the BC Center for Human Rights and International Justice for their support. I would also like to thank Equal Justice Works and Baker & McKenzie for funding the fellowship project to write this guide.

KEY CONCEPTS

- Any reference to a sentence imposed includes a suspended sentence. For example, if an offense is an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) because it is a theft offense and the defendant has been sentenced to at least one year, a theft offense with a suspended sentence of at least one year is also an aggravated felony. 8 U.S.C. § 1101(a)(48)(B).
- Most grounds of deportability require a "conviction," which includes any disposition where the defendant has entered a plea of guilty or nolo contendere or has admitted to sufficient facts to warrant and finding of guilt AND the judge has ordered some form of punishment, penalty, or restraint on liberty. 8 U.S.C. § 1101(a)(48)(A). For example, dispositions under Va. Code Ann. §§ 18.2-251 (first time drug offender), 19.2-303.2 (property offense with no priors), and 18.2-57.3 (first time domestic violence offender) are "convictions" under the immigration laws. However, a finding of juvenile delinquency (i.e., a disposition under Va. Code Ann. § 16.1-278.8) is not a conviction for immigration purposes. *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).
- **The analysis of whether a conviction will trigger a particular immigration consequence is conservative; in other words, the analysis takes a "worst case scenario" approach based on existing federal and Board of Immigration Appeals (BIA) case law. Immigration pracitioners in particular are advised to continue challenging designations of particular offenses as aggravated felonies, crimes involving moral turpitude, etc.**

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CRIMES AGAINST THE PERSON

18.2-32 First and second degree murder

Elements

- killing of another
- by:
    - poison, lying in wait, imprisonment, starving, OR
    - by any willful, deliberate, and premeditated killing, OR
    - in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because murder is generally a crime involving moral turpitude. *See, e.g., Matter of Lopez-Amaro*, 20 I&N Dec. 668 (BIA 1993); *Matter of Awaijane*, 14 I&N Dec. 117 (BIA 1972).

Aggravated felony

Murder

A conviction under this statute is an aggravated felony because it is murder, which is an aggravated felony under 8 U.S.C. § 1101(a)(43)(A).

18.2-35 Voluntary manslaughter

Elements

- unlawful killing of another
- without malice
- upon sudden heat, on reasonable provocation, or in mutual combat

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. The case law interpreting this Virginia statute does not clearly define the *mens rea* of the statute. It is clear that the *mens rea* is not malice, since a malicious killing would amount to a murder conviction. *See Comm. v. Mitchell*, 3 Va. (1 Va. Cas.) 116 (Va. Gen. Ct. 1796). The killing could result from mutual combat, or the sudden heat of passion. *See, e.g., Richardson v. Comm.*, 104 S.E. 788 (Va. 1920). The case law describes the offense as an "unlawful killing of another without malice." *King v. Comm.*, 4 Va. (2 Va. Cas.) 78 (Va. Gen. Ct. 1817). Therefore, it is likely that the *mens rea* amounts to intentional conduct, since mutual combat or sudden heat of passion would require that the defendant have an intent to do bodily injury or kill, although the defendant need not kill with malice aforethought. In addition, the Virginia Supreme Court has upheld a conviction for voluntary manslaughter under Va. Code Ann. 18.2-35 when the defendants participated in an attack for which the death of the victim was clearly contemplated by the defendants and was not an improbable consequence. *See Campbell v. Comm.*, 107 S.E. 812 (Va. 1921).

This offense therefore is a crime involving moral turpitude because the statute punishes the intentional infliction of serious bodily injury upon another. *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994); *Matter of Lopez*, 13 I&N Dec. 725 (BIA 1971).

Aggravated felony

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(a) because the statute punishes the intentional causation of injury. *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002); *but see Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (holding that a statute punishing the intentional causation of injury, without an element that the use of force cause such injury, was not a crime of violence under 18 U.S.C. § 16(a)).

The decision of the BIA in *Matter of Martin* has been undermined, however, by the Supreme Court's 2004 ruling in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). In *Leocal*, the Supreme Court decided that a DUI statute that punished the causation of serious bodily injury was not a crime of violence under 18 U.S.C. § 16(a). The Supreme Court's ruling is not exactly on point with the Virginia voluntary manslaughter statute, however, because the Supreme Court held that a statute with no *mens rea* was not a crime of violence because it was impossible to accidentally use force against the person or property of another. The cases interpreting this Virginia statute indicate that the *mens rea* amounts to intentional conduct. *See, e.g., Richardson v. Comm.*, 104 S.E. 788 (Va. 1920); *King v. Comm.*, 4 Va. (2 Va. Cas.) 78 (Va. Gen. Ct. 1817); *Comm. v. Mitchell*, 3 Va. (1 Va. Cas.) 116 (Va. Gen. Ct. 1796).

Because the *mens rea* of the Virginia manslaughter statute is a high enough level as to make the holding in *Leocal* partially inapplicable, the only directly applicable case law is *Matter of Martin*, under which this offense constitutes a crime of violence under 18 U.S.C. § 16(a).

Crime of violence - 18 U.S.C. § 16(b)

A conviction under this statute is a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The BIA has held that a manslaughter statute that punishes the intent to cause bodily injury and the actual causation of death is a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). *See Matter of Vargas-Sarmiento*, 23 I&N Dec. 651 (BIA 2004). The Virginia statute follows the common law for voluntary manslaughter, which generally requires that the defendant have some intent to harm the victim. *See, e.g., Campbell v. Commonwealth*, 107 S.E. 812 (Va. 1921) (defendants had intent to attack the victim, not intent to kill the victim, and they were guilty of voluntary manslaughter when the victim's death resulted from that attack). The Second Circuit has upheld the BIA's decision and reasoned that the New York manslaughter statute interpreted by the BIA, which punished the causation of serious injury or death while intending to cause death or serious injury, was a crime of violence under 18 U.S.C. § 16(b). *Vargas-Sarmiento v. U.S.D.O.J.*, 448 F.3d 159 (2d Cir. 2006). The Second Circuit reasoned that even though such an offense would not necessarily be a crime of violence under 18 U.S.C. § 16(a) pursuant to its reasoning in

Chrzanoski v. Ashcroft, 327 F.3d 188 (2d Cir. 2003), it would be a crime of violence under 18 U.S.C. § 16(b) because the focus of 18 U.S.C. § 16(b) is the nature of the offense and not only the elements of the offense. By this reasoning, therefore, this Virginia conviction is a crime of violence under 18 U.S.C. § 16(b).

18.2-36 Involuntary manslaughter

Elements
- accidental killing
- which is the proximate result of negligence so gross, wanton and culpable as to show a reckless disregard of human life

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because the Virginia statute punishes the reckless causation of death, which the BIA has held is a crime involving moral turpitude. *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), and *Matter of Wojtkow*, 18 I&N 111 (BIA 1981).

Involuntary manslaughter in Virginia is defined as the killing of one accidentally contrary to the intention of the parties, in the prosecution of some unlawful, but not felonious act, or in the improper performance of a lawful act. *See Comm. v. Jones*, 28 Va. (1 Leigh) 598 (Va. Gen. Ct. 1829). The *mens rea* of the Virginia involuntary manslaughter statute is criminal negligence, not recklessness. The Virginia courts define the *mens rea* of criminal negligence as: acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct would cause injury to others. *See Craig v. Comm.*, 538 S.E.2d 355 (Va. Ct. App. 2000). The Virginia negligence definition is similar to the recklessness definition in the statutes interpreted by the BIA in *Matter of Franklin* and *Matter of Wojtkow*. Moreover, the Fourth Circuit has decided that this statute has a *mens rea* of recklessness when deciding whether a conviction under the statute was an aggravated felony. *See Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005).

Therefore, since Va. Code Ann. § 18.2-36 punishes reckless conduct that results in death, a conviction for involuntary manslaughter under this statute is a crime involving moral turpitude.

Aggravated felony

Murder

A conviction under this statute is not an aggravated felony under 8 U.S.C. §1101(a)(43)(A) because it is not murder, but manslaughter.

Crime of violence

A conviction under this statute is not an aggravated felony under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. §1101(a)(43)(F) if the sentence imposed is at least one year. A convcition under this statute does not meet the definitinon of a crime of violence under 18 U.S.C. § 16(a) because the statute has no element of the use, attempted use, or threatened use of physical force against the person or property of another.

The Fourth Circuit has decided that a conviction under this statute is not a crime of violence under 18 U.S.C. § 16(b) because the intrinsic nature of the statute is not such that there is a substantial risk that force may be used against person or property to effectuate the offense. *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005).

18.2-36.1 Certain conduct punishable as involuntary manslaughter (vehicular homicide)

Elements

(causing death by DUI)

- as a result of simple DUI or other listed DUI offenses
- unintentionally
- causes the death of another person

(aggravated involuntary manslaughter)

- as a result of simple DUI or other listed DUI offenses
- acts so gross, wanton and culpable as to show a reckless disregard for human life
- causes the death of another person

Crime involving moral turpitude

(A) Causing death by DUI

A conviction under section (A) of the statute is not a crime involving moral turpitude because the elements include *unintentionally* causing the death of another by driving under the influence. Unlike a conviction for involuntary manslaughter under Va. Code Ann. § 18.2-36, which has a *mens rea* of recklessness, in a prosecution under this section of Va. Code Ann. § 18.2-36.1, the Commonwealth only needs to prove that the defendant drove under the influence pursuant to one of cited statutes. Because the *mens rea* of this section of the statute is strict liability, a conviction under this section is not a crime involving moral turpitude. *See Matter of Serna*, 20 I&N Dec. 579 (BIA 1992). The BIA in *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996), held that an offense that involves reckless conduct and the causation of serious bodily injury is a crime involving moral turpitude. Although this offense has as an element the causation of death, there is no recklessness *mens rea* and therefore it is not a crime involving moral turpitude under the BIA's reasoning in *Matter of Fualaau*.

(B) Aggravated involuntary manslaughter

A conviction under section (B) is a crime involving moral turpitude. The *mens rea* under this section of the statute is similar to the *mens rea* of the manslaughter statute which the BIA held was a crime involving moral turpitude in *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994). *Compare* Va. Code Ann. § 18.2-36.1(B) (*mens rea* of acting "so gross, wanton and culpable as to show a reckless disregard for human life), *with Matter of Franklin* (*mens rea* of "conscious disregard for substantial and unjustifiable risk"). Moreover, the Fourth Circuit has decided that a statute containing a similar *mens rea*, Va. Code Ann. § 18.2-36, was a *mens rea* of recklessness when deciding whether a conviction under the statute was an aggravated felony. *See Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005). Therefore, a conviction for aggravated involuntary manslaughter under this section of the statute is a crime involving moral turpitude.

Aggravated felony

(A) Causing death by DUI

Murder

A conviction under this statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(A) because it is not murder, but manslaughter.

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. §1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this section of the statute is not a crime of violence under the definition at 18 U.S.C. § 16(a) because the statute has no element of the use, attempted use, or threatened use of physical force against the person or property of another. The Supreme Court held that for an offense to be a crime of violence under 18 U.S.C. § 16(a), there must be a *mens rea*, since it is not possible for a defendant to accidentally *use* force against the person or property of another. *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Because a conviction under this section of the statute has no *mens rea*, it is not a crime of violence under 18 U.S.C. § 16(a).

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16(b) because it is not a felony that, by its nature, involves the substantial risk that force will be used against person or property of another in the commission of the offense. The Supreme Court reasoned in *Leocal* that a DUI offense which has no *mens rea* or a *mens rea* of negligence is not a crime of violence under 18 U.S.C. § 16(b). This Virginia statute does not require that the Commonwealth prove any *mens rea* to convict under the statute; a defendant may be punished for committing a DUI that results in another person's death. Therefore, it is not a crime of violence under 18 U.S.C. § 16(b).

(B) Aggravated involuntary manslaughter

Murder

A conviction under this statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(A) because it is not murder, but manslaughter.

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. §1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this section of the statute is not a crime of violence under the definition at 18 U.S.C. § 16(a) because the statute has no element of the use, attempted use, or threatened use of physical force against the person or property of another. The offense has a *mens rea* of recklessness, which the BIA has held is insufficient to amount to a crime of violence under 18 U.S.C. § 16(a). *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002).

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(b) because it is not a felony that, by its nature, involves the substantial risk that force will be used against person or property of another in the commission of the offense. In *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005), the Fourth Circuit decided that a conviction or involuntary manslaughter under Va. Code Ann. § 18.2-36 was not a crime of violence because the *mens rea* was recklessness and not intentional conduct. The *mens rea* of Va. Code Ann. § 18.2-36 (involuntary manslaughter) can not be

distinguished from the *mens rea* of Va. Code Ann. § 18.2-36.1 (aggravated involuntary manslaughter). Under both statutes, the *mens rea* is acting "so gross, wanton and culpable as to show a reckless disregard for human life." Va. Code Ann. § 36.1(B); *King v. Comm.*, 231 S.E.2d 312 (Va. 1977) (interpreting *mens rea* of involuntary manslaughter under Va. Code Ann. § 18.2-36). The only additional element of the aggravated involuntary manslaughter statute is that the defendant drive under the influence of alcohol as proscribed by Va. Code Ann. § 18.2-266. This added factor does not require that the defendant have a more guilty mind, since Va. Code Ann. § 18.2-266 does not have a *mens rea* requirement. Therefore, under the Fourth Circuit's decision in *Bejarano-Urrutia*, a conviction under this section of the statute is not a crime of violence as defined by 18 U.S.C. § 16(b).

Other immigration consequences

A conviction under this statute can be a crime relating to a controlled substance that renders a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(B). The statute is divisible, however. Only convictions punishing the operation of a vehicle while under the influence of a narcotic drug are offenses relating to a controlled substance. Therefore, it will depend on the record of conviction whether a non-citizen is deportable for a conviction under this statute. The only exception to this ground is simple possession for one's own use of 30 grams or less of marijuana. Because this statute does not punish possession, a conviction under this statute will not fit within the exception if the non-citizen is deportable under this ground.

18.2-41 Wounding by mob

Elements

- any person composing a mob
- maliciously or unlawfully shoot
- stab, cut, or wound any person, or
- by any means cause him bodily injury
- with intent to maim, disable, disfigure, or kill him
- is guilty of a Class 3 Felony

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because the statute punishes the intentional causation of bodily injury, since the defendant must act with the intent to maim, disable, disfigure, or kill the victim and the wounding must cause bodily injury. *See Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994); *Matter of P*, 7 I&N Dec. 376 (BIA 1956).

Aggravated felony

Crime of violence – 18 U.S.C. § 16(a)

A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(a) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(a) because the statute punishes the intentional causation

of injury. *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002); *but see Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (holding that a statute punishing the intentional causation of injury, without an element that the use of force caused such injury, was not a crime of violence under 18 U.S.C. § 16(a)).

The decisions of the BIA in *Matter of Martin* has been undermined, however, by the Supreme Court's 2004 ruling in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). In *Leocal*, the Supreme Court decided that a DUI statute that punished the causation of serious bodily injury was not a crime of violence under 18 U.S.C. § 16(a). The Supreme Court's ruling is not exactly on point with the Virginia voluntary manslaughter statute, however, because the Supreme Court held that a statute with no *mens rea* was not a crime of violence because it was impossible to accidentally "use force" against the person or property of another. The *mens rea* of the Virginia statute is intentional conduct.

Because the *mens rea* of the Virginia manslaughter statute is a high enough level as to make the holding in *Leocal* partially inapplicable, the only directly applicable case law is *Matter of Martin*, under which this offense constitutes a crime of violence under 18 U.S.C. § 16(a).

Crime of violence - 18 U.S.C. § 16(b)

A conviction under this statute is a crime of violence under 18 U.S.C. § 16(b). The BIA has held that a manslaughter statute that punishes the intent to cause bodily injury and the actual causation of injury (or death) is a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). *See Matter of Vargas-Sarmiento*, 23 I&N Dec. 651 (BIA 2004). The Second Circuit has upheld the BIA's decision and reasoned that the New York manslaughter statute interpreted by the BIA, which punished the causation of serious injury or death while intending to cause death or serious injury, was a crime of violence under 18 U.S.C. § 16(b). *Vargas-Sarmiento v. U.S.D.O.J.*, 448 F.3d 159 (2d Cir. 2006). The Second Circuit reasoned that even though such an offense would not necessarily be a crime of violence under 18 U.S.C. § 16(a) pursuant to its reasoning in *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003), it would be a crime of violence under 18 U.S.C. § 16(b) because the focus of 18 U.S.C. § 16(b) is the nature of the offense and not only the elements of the offense. By this reasoning, therefore, this Virginia conviction is probably a crime of violence under 18 U.S.C. § 16(b).

Firearms

A conviction under this statute is not necessarily a firearms offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(E). The aggravated felony definition at 8 U.S.C. § 1101(a)(43)(E) lists several federal statutes, one of which is 18 U.S.C. § 844(h)(1), which punishes the use of explosives to commit any felony.

The Fourth Circuit in *U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2002), decided that "use of an explosive" as defined under 18 U.S.C. § 844(j) means discharging a firearm. The Court was deciding whether a defendant's discharge of a firearm was a "use" of an "explosive" within the meaning of USSG § 2K1.4. The court referenced the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition at 8 § 1101(a)(43)(E)(i). The Fourth Circuit reasoned in *Davis* that the definition at 18 U.S.C. § 844(j) included gunpowders as an "explosive." Therefore,

discharging a firearm involves the use of an explosive because shooting the firearm requires an explosion to expel a projectile from a firearm.

18 U.S.C. § 844(h)(1) punishes the use of fire or an explosive to commit any felony that may be prosecuted in a court of the United States. A conviction under Va. Code Ann. § 18.2-41 is a felony that may involve the discharge of a firearm. Therefore, a conviction under this statute is a firearms aggravated felony if the record of conviction reflects that the defendant shot a firearm to commit the offense.

Other immigration consequences

A conviction under this statute would render a non-citizen deportable under U.S.C. § 1227(a)(2)(C) if the defendant shoots a firearm as defined by 18 U.S.C. § 921(a). It is necessary to look to the record of conviction to determine whether the defendant shot a firearm as defined by 18 U.S.C. § 921(a) in order to determine if the defendant is deportable under this ground.

18.2-42 Assault and battery by mob

Elements

- any and every person composing a mob
- which shall commit a simple assault or battery

Crime involving moral turpitude

A conviction under this statute is probably not a crime involving moral turpitude. Simple assault is not a crime involving moral turpitude. *See, e.g., Matter of Fualaau*, 21 I&N Dec. 475; *Matter of Short*, 20 I&N Dec. 136 (BIA 1989). Generally, assault statutes involve moral turpitude if there is an aggravating factor such as the use of a weapon or the causation of serious bodily injury. *See, e.g., Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of Medina*,16 I&N Dec. 611 (BIA 1976). None of these aggravating factors are elements of this Virginia statute; it is unlikely that the commission of the offense by a mob would raise the conviction to a crime involving moral turpitude. Therefore, a conviction under this statute is probably not a crime involving moral turpitude.

Aggravated felony

A conviction under this statute is not necessarily a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. *See* analysis for Va. Code Ann. § 57(A) (simple assault and battery).

18.2-46.3 Recruitment of persons for criminal street gang

Elements

(A) class 1 misdemeanor

- solicits, invites, recruits, encourages, or otherwise causes or attempts to cause another
- to actively participate in or become a member
- of what he knows to be a criminal street gang

- class 6 felony if recruits juvenile to be member of a criminal street gang

(B) class 6 felony

- in order to join or a criminal street gang or remain as a participant or member in the street gang or to submit to a demand made by a criminal street gang to commit a felony
- uses force against the individual or a member of his family or household or threatens force against the individual or a member of his family or household
- which threat would place any person in reasonable apprehension of death or bodily injury

Crime involving moral turpitude

(A) Misdemeanor/felony recruitment

A conviction under section (A) of this statute is probably not a crime involving moral turpitude because it is a regulatory offense. *See Matter of P*, 6 I&N Dec. 795 (BIA 1955). The statute punishes recruitment of persons into a gang, but does not require that the defendant actually commit any gang activity or other crimes. Being a gang member is not a crime involving moral turpitude because it is a status offense, not an offense that requires anyone to do anything wrong. Therefore, inviting or recruiting another to join such a gang should not be a crime involving moral turpitude. *See Matter of Martinez,* 16 I&N Dec. 336 (BIA 1977) (aiding and abetting is a crime involving moral turpitude if the underlying offense is a crime involving moral turpitude).

(B) Felony recruitment through force

A conviction under section (B) of the statute is probably a crime involving moral turpitude because it involves threats of use of force or using force against the person of another in order to encourage the individual to join a gang. *See Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004) (threatening a crime of violence is a crime involving moral turpitude); *Matter of Ajami,* 22 I&N Dec. 949 (BIA 1999) (making several credible threats against a victim is a crime involving moral turpitude). The actual use of force against the person of another can be a crime involving moral turpitude if there is intentional or reckless causation of serious physical injury. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996). Since the statute does not include as an element the causation of serious bodily injury, it is possibly not a crime involving moral turpitude according to the BIA's reasoning under the simple assault line of cases. *See id.*; *Matter of Perez-Contreras,* 20 I&N Dec. 615 (BIA 1992).

However, a conviction under section (B) is probably a crime involving moral turpitude because an immigration judge could determine that using force against a person to recruit them into a gang is inherently bad. *See, e.g., De Lucia v. Flagg*, 297 F.2d 58 (7th Cir. 1961), *cert. denied*, 369 U.S. 837 (1962) (stating that the prevalent standards should be used to decide what constitutes a crime involving moral turpitude). Moreover, because the offense involves credible threats of violence, it is probably a crime involving moral turpitude. *See Matter of Ajami,* 22 I&N Dec. 949.

Aggravated felony

(A) Misdemeanor/felony recruitment

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The offense is a misdemeanor and therefore should be analyzed under 18 U.S.C. § 16(a), which requires that the offense have as an element the use, attempted use, or threatened use of physical force against the person or property of another. A conviction under this section of the statute has no element of the use, attempted use, or threatened use of physical force against the person or property of another. Rather, it criminalizes the recruitment of a person into a gang. The defendant need not use any physical force to recruit that person into a gang.

(B) Felony recruitment through force

Crime of violence

A conviction under this section of the statute is a crime of violence under 18 U.S.C. § 16(a) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The offense requires that the defendant either use force against a person of another or threaten the use of force against the person of another. Therefore, the offense has as an element the use or attempted use of force, which is a crime of violence under under 18 U.S.C. § 16(a).

18.2-47 Abduction and kidnapping

Elements

(A) class 5 felony
- by force, intimidation, or deception
- and without legal justification or excuse
- seizes, takes, transports, or detains or secretes another
- with the intent to deprive person of liberty or to withhold or conceal him from any person, authority or institution in charge of him

(B) class 1 misdemeanor
- such offense committed by parent of person abducted

(B) class 6 felony
- such offense committed by parent and person is removed from Commonwealth by abducting parent

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude. A case interpreting this statute has dictum indicating that a conviction under this statute is a crime involving moral turpitude. *U.S. v. Brown*, 127 F. Supp. 2d 392 (W.D.N.Y. 2001).

The BIA has reasoned that the taking of a person without the consent of the legal guardian is not a crime involving moral turpitude because it is not an act that is inherently wrong or base or depraved. *See Matter of Farinas*, 12 I&N Dec. 467 (BIA 1967). The Fifth Circuit also held that a kidnapping statute was not necessarily a crime involving moral turpitude because it was possible to be convicted under the statute if a parent kidnapped a child. *See Hamdan v. INS*, 98 F.3d 183 (5th Cir. 1996). For this reason, it is

possible that a conviction for parental kidnapping is not a crime involving moral turpitude.

However, the Virginia statute punishes an abduction that is accomplished through force, intimidation, or deception and with the intent to deprive the person of liberty or to conceal him from another person or legal authority. If the acts are accomplished through force or intimidation, it is probably a crime involving moral turpitude *See Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004) (threatening a crime of violence is a crime involving moral turpitude); *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999) (making several credible threats against a victim is a crime involving moral turpitude). It is also likely to be a crime involving moral turpitude if the acts are committed with the intent to deceive, since crimes of deception are often crimes involving moral turpitude. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951).

Aggravated felony

(A) Kidnapping by force, intimidation or deception (class 5 felony)

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this section of the statute is probably not a crime of violence under 18 U.S.C. § 16(a) and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16(a) because there is not necessarily an element of use, attempted use, or threatened use of physical force against the person or property of another. A defendant can be convicted under this statute for kidnapping a person by deception and not by force or intimidation. *Johnson v. Comm.*, 412 S.E.2d 731 (Va. Ct. App. 1992). Indeed, the Court of Appeals of Virginia in *Johnson* held that the offenses of assault and kidnapping are different because assault requires proof of force whereas abduction can be accomplished through force but also through intimidation or deception. Therefore, not all convictions are crimes of violence under 18 U.S.C. § 16(a) because the statute does not require that the prosecution prove as an element the use, attempted use, or threatened use of physical force.

It is necessary to consult the record of conviction to determine the offense for which the defendant was convicted. If the conviction is accomplished through deception, it is not a crime of violence under 18 U.S.C. § 16(a).

Crime of violence - 18 U.S.C. § 16(b)

A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(b). *See Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003). The Second Circuit in *Dickson* held that an unlawful imprisonment statute was an offense that, by its nature, involved a substantial risk of the use of force against the person of another. The statute examined by the Second Circuit had the following elements: (1) restrain the victim by (2) intentionally and (3) unlawfully (4) moving or confining the victim in a way that interferes substantially with the victim's liberty, (5) without the victim's consent (6) with the knowledge that the act is unlawful and (7) under circumstances that expose the victim to a risk of serious physical injury. The definition of "restrain" under the statute interpreted by the Second Circuit was moving or confining a person without consent when such act is accomplished by either (a) physical force, intimidation or deception, or (b) by any means whatever, including acquiescence of the victim, if he is a child under 16 or an incompetent person and the guardian has not acquiesced.

The Second Circuit in *Dickson* held that unlawful imprisonment completed by force, intimidation or deception is a crime of violence under 18 U.S.C. § 16(b). The Court reasoned that even when a defendant unlawfully restrains a victim by deception, i.e., tricking a victim into a room and closing the door, the defendant has imposed physical barriers of forcible restraint. Therefore, the offense, by its nature, is such that there is a substantial risk that force will be used against the person or property of another. Following this reasoning, the Virginia felony kidnapping statute is probably a crime of violence because it contains the same means of action: abducting a person by force, intimidation, or deception.

Fraud offense

A conviction under this section of the statute may be an aggravated felony under 8 U.S.C. § 1101(a)(43)(M) as an offense that involves fraud or deceit if the act is done by deception and the loss to the victim is more than $10,000. Because the loss under this statute is usually liberty and not money, a conviction under this statute is probably not an aggravated felony under 8 U.S.C. § 1101(a)(43)(M).

Offense relating to the demand for receipt of ransom

A conviction under this statute is not an aggravated felony under 8 U.S.C. §1101(a)(43)(H), an offense relating to the demand for or receipt of ransom, because the Virginia kidnapping statute does not require that the defendant demand the receipt of ransom for the victim.

(B) Kidnapping by force, intimidation or deception by parent (class 1 misdemeanor)

Crime of violence

A conviction under this section of the statute is probably not a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute will is not a crime of violence under 18 U.S.C. § 16(b) because it is not a felony. A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16(a) because there is not necessarily an element of the use, attempted use, or threatened use of physical force against the person or property of another. A defendant can be convicted of this statute for kidnapping a person by deception and not by force or intimidation. *Johnson v. Comm.*, 412 S.E.2d 731 (Va. Ct. App. 1992). In *Johnson*, the Court of Appeals of Virginia held that the offenses of assault and kidnapping are different because assault requires proof of force whereas abduction can be accomplished through force but also through intimidation or deception. Therefore, not all convictions are crimes of violence under 18 U.S.C. § 16(a) because the statute does not require that the prosecution prove as an element the use, attempted use, or threatened use of physical force.

Therefore, it is necessary to consult the record of conviction to determine the offense for which the defendant was convicted. If the conviction is accomplished through deception, it is not a crime of violence under 18 U.S.C. § 16(a).

Fraud offense

A conviction under this section of the statute may also be an aggravated felony under 8 U.S.C. § 1101(a)(43)(M) as an offense that involves fraud or deceit if the act is done by deception and the loss to the victim is more than $10,000. Because the loss

under this statute is usually liberty and not money, a conviction under this statute is probably not an aggravated felony under 8 U.S.C. § 1101(a)(43)(M).

Offense relating to the demand for receipt of ransom

A conviction under this section of the statute is not an aggravated felony under 8 U.S.C. §1101(a)(43)(H), an offense relating to the demand for or receipt of ransom, because the Virginia kidnapping statute does not require that the defendant demand the receipt of ransom for the victim.

(B) Kidnapping by force, intimidation or deception by parent when parent removes child from Commonwealth (class 6 felony)

Crime of violence

A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. Like a conviction for non-parental kidnapping under this statute, this offense is likely to be a crime of violence under 18 U.S.C. § 16(b). The statute punishes abduction by force, intimidation or deception. The Second Circuit found that an unlawful restraint statute that punished the unlawful restraint of a person by force, intimidation or deception was a crime of violence under 18 U.S.C. § 16(b). *See Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003).

Fraud offense

A conviction under this statute may be an aggravated felony under 8 U.S.C. § 1101(a)(43)(M) as an offense that involves fraud or deceit if the act is done by deception and the loss to the victim is more than $10,000. Because the loss under this statute is usually liberty and not money, a conviction under this statute is probably not an aggravated felony under 8 U.S.C. § 1101(a)(43)(M).

Offense relating to the demand for receipt of ransom

A conviction under this section of the statute is not an aggravated felony under 8 U.S.C. §1101(a)(43)(H), an offense relating to the demand for or receipt of ransom, because the Virginia kidnapping statute does not require that the defendant demand the receipt of ransom for the victim.

18.2-49 Threatening, attempting or assisting in abduction

Elements

- threatens or attempts
- to abduct any other person
- with intent to extort money, or pecuniary benefit

OR

- assists or aids
- in the abduction of
- or threatens to abduct any person
- with intent to defile such person

OR

- assists or aids
- in the abduction of
- or threatens to abduct

- any female under sixteen years of age
- for the purpose of concubinage or prostitution

Crime involving moral turpitude

Abduction for ransom

A conviction under this statute is a crime involving moral turpitude if the person is punished for aiding and abetting or attempting to abduct someone for ransom. *See Matter of P*, 5 I&N Dec. 444 (BIA 1953) (kidnapping and transporting a person and holding that person for ransom is a crime involving moral turpitude).

Abduction with intent to defile or for purposes of prostitution or concubinage

A conviction under this statute is a crime involving moral turpitude if the defendant is convicted under the portion of the statute that punishes the attempt or aiding another to abduct a person with the intent to defile the person or with intent to make a girl a prostitute or concubine. The offense is different from abduction offenses that have not been held to be crimes involving moral turpitude by the BIA. *See Matter of Farinas*, 12 I&N Dec. 467 (BIA 1967) (holding that the taking of a female under the age of 18 for the purpose of marriage, without her consent, is not a crime involving moral turpitude); *Matter of R*, 6 I&N Dec. 444 (BIA 1954) (transportation of a female across state lines for the purpose of fornication, even if consensual, is not a crime involving moral turpitude). The BIA has found that abduction offenses where the statute punishes abduction for consensual fornication and marriage without parent's consent are not crimes involving moral turpitude.

The Virginia statute, however, punishes the attempt or assistance in abduction with intent to defile a person or make her a concubine or prostitute. Because it is in the intent that moral turpitude inheres, the intent of either section would amount to a crime involving moral turpitude. If defendant assists in an abduction with intent to defile a person, this is probably an intent to commit a lewd act, which has been found to be a crime involving moral turpitude. *See Matter of Alfonso-Bermudez*, 12 I&N Dec. 225 (BIA 1967) (disorderly conduct statute is a crime involving moral turpitude because it punishes lewd and lascivious acts). Also, if a defendant assists in an abduction with the intent to make a young female a prostitute or concubine, this is probably a crime involving moral turpitude. *See Matter of W*, 4 I&N Dec. 401 (BIA 1951) (prostitution is a crime involving moral turpitude).

Attempt/Aiding and abetting

A conviction under this statute is a crime involving moral turpitude. The offense of attempt or aiding and abetting is a crime involving moral turpitude if the underlying offense is a crime involving moral turpitude. *See Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977). In this statute, all underlying offenses are crimes involving moral turpitude. *See* analysis for Va. Code Ann. §§ 18.2-47 (abduction); 18.2-59 (extortion).

Aggravated felony

Abduction for ransom

Extortion

A conviction under this statute for attempting to abduct a person for ransom is an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(H) (offense relating to the demand for or receipt of ransom) and (U) (attempt).

Abduction with intent to defile

Crime of violence

A conviction under this statute for attempting to abduct someone with the intent to defile such person is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(F) and (U) if the sentence imposed is at least one year. Although this Virginia statute does not contain any definition of abduction, it is likely that the statute refers to the the definition of abduction at Va. Code Ann. § 18.2-47. Because a conviction for abduction under Va Code Ann. § 18.2-47 is probably a crime of violence under 18 U.S.C. § 16(b), this offense is probably a crime of violence. *See* analysis for Va. Code Ann. § 18.2-47.

Sexual abuse of a minor

A conviction under this statute is an aggravated felony as sexual abuse of a minor under 8 U.S.C. § 1101(a)(43)(A) if the facts reflect that the victim of the abduction was a minor. *See Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007) (no need to consult record of conviction for factual element of deportation ground).

Abduction for prostitution or concubinage

Prostitution

A conviction under this statute for aiding and abetting or attempting to abduct someone for the purposes of concubinage or prostitution is an aggravated felony under 8 U.S.C. § 1101(a)(43)(K)(ii) if the offense is committed for commercial advantage. The statutes referenced in this aggravated felony definition include 18 U.S.C. § 2421 (offense relating to transportation for the purpose of prostitution) and 18 U.S.C. § 2423 (offense relating to transporting minors for the purpose of prostitution). Although the Virginia offense does not have an explicit element of the transportation of an individual as does 18 U.S.C. §§ 2421 and 2423, that element is implied in the definition of abduction because the Virginia statute punishing abduction, Va. Code Ann. § 18.2-47, requires proof of asportation or detention. *See Johnson v. Comm.*, 412 S.E.2d 731 (Va. Ct. App. 1992). Moreover, the element of transporting across state lines is merely a jurisdictional hook for the federal statutes used in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(K)(ii). The missing jurisdictional element thus does not affect the comparison of the substantive elements of the statute for the purposes of determining whether a state statute is an aggravated felony. *See Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002). Therefore, a conviction under this section of the statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(K)(ii) if it is committed for commercial advantage.

Attempt/ Aiding and abetting

A conviction under this statute for attempt or aiding and abetting is an aggravated felony if the underlying offense is an aggravated felony. 8 U.S.C. § 1101(a)(43)(U); *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2005).

18.2-49.1 Violation of court order regarding custody and visitation

Elements

(A) class 6 felony

- knowingly, wrongfully and intentionally
- withholds a child from either of a child's parents or other legal guardian
- in a clear and significant violation of a court order respecting the custody or visitation of such child, provided such child is withheld outside of the Commonwealth

(B) class 3 misdemeanor

- knowingly, wrongfully and intentionally
- engages in conduct that constitutes a clear and significant violation of a court order respecting the custody or visitation of a child

Crime involving moral turpitude

A conviction under this statute is probably not a crime involving moral turpitude. The BIA has reasoned that the taking of a person without the consent of the legal guardian is not a crime involving moral turpitude because it is not an act that is inherently wrong or base or depraved. *See Matter of Farinas*, 12 I&N Dec. 467 (BIA 1967). The Fifth Circuit also held that a kidnapping statute was not necessarily a crime involving moral turpitude because it was possible to be convicted under the statute if a parent kidnapped a child. *See Hamdan v. INS*, 98 F.3d 183 (5th Cir. 1996).

The Virginia statute punishes conduct that is committed knowingly, wrongfully, and intentionally. However, the *mens rea* requirement of the statute is not enough to conclude that a conviction under this statute is a crime involving moral turpitude because the acts punished do not involve moral turpitude. In *Hamdan*, the kidnapping statute punished the intentional taking, enticing, or decoying away of a child by a parent who did not have proper custody. Despite the *mens rea* of intentional conduct, the Fifth Circuit reasoned that the actions punishable under the statute were not morally turpitudinous and therefore, the conviction was not a crime involving moral turpitude. By this reasoning, a conviction under this statute is probably not a crime involving moral turpitude.

Aggravated felony

(A) Felony

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. §1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this section is not a crime of violence because there is no element of the use, attempted use, or threatened use of physical force against the person or property of another as required by 18 U.S.C. § 16(a). The statute only punishes the wrongful and intentional withholding a child from the child's parent or legal guardian. The statute does not require as an element that a person

withhold such child through the use, attempted use, or threatened use of physical force against the person of another.

Crime of violence - 18 U.S.C. § 16(b)

A conviction under this section, which is a felony, is probably not a crime of violence under 18 U.S.C. § 16(b) because it is not an offense that, by its nature, involves a substantial risk that force will be used against the person or property of another. The offense does not require that the defendant resort to the use of force in order to withhold a child from the child's parent or legal guardian. Rather, a parent can be convicted of this offense for keeping a child beyond the time allowed under the custody order or refusing to relinquish custody of a child formerly in her custody. *See, e.g., Dunn v. Comm.*, No. 1689-02-1 (Va. Ct. App. 2003) (unpublished).

The Second Circuit has held that the offense of unlawful imprisonment of a child without the consent of the parent or legal guardian is not a crime of violence under 18 U.S.C. § 16(b). *See Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003). The statute under which the non-citizen in *Dickson* was convicted punished the unlawful imprisonment by "any means whatsoever, including acquiescence of the victim, if… the [custodial parent or institution] has not acquiesced in the movement or confinement." The Court reasoned that such an offense could be accomplished without using force against the victim and therefore it was not an offense that, by its nature, involved a substantial risk that force would be used against the person or property of another as required by 18 U.S.C. § 16(b). Using this reasoning, a conviction under this section of the Virginia statute is probably not a crime of violence.

(B) Misdemeanor abduction

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. §1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under section (B) of the statute, which is punishable as a misdemeanor, is not a crime of violence because there is no element of the use, attempted use, or threatened use of physical force against the person or property of another as required by 18 U.S.C. § 16(a). The statute only punishes the wrongful and intentional violation of a court order; a person can violate this statute in many ways that do not involve the use, attempted use, or threatened use of physical force against the person of another.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. §1227(a)(2)(E)(ii), violation of a restraining order, if the non-citizen violates a portion of the restraining order that protects the victim against credible threats of violence, repeated harassment, or bodily injury.

18.2-51 Unlawful or malicious wounding

Elements
- unlawfully or maliciously
- shoot, stab, cut, or wound any person
- or by any means cause him bodily injury
- with the intent to maim, disfigure, disable, or kill

Crime involving moral turpitude

A conviction for malicious or unlawful wounding is a crime involving moral turpitude because the statute punishes the intentional causation of bodily injury, since the defendant must act with the intent to maim, disable, disfigure, or kill the victim and the wounding must cause bodily injury. *See Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994); *Matter of P*, 7 I&N Dec. 376 (BIA 1956).

Aggravated felony

Crime of violence – 18 U.S.C. § 16(a)

A conviction under this statute for malicious or unlawful wounding is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(a) because the statute punishes the intentional causation of injury. *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002); *but see Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (holding that a statute punishing the intentional causation of injury, without an element that the use of force caused such injury, was not a crime of violence under 18 U.S.C. § 16(a)).

The decision of the BIA in *Matter of Martin* has been undermined, however, by the Supreme Court's 2004 ruling in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). In *Leocal*, the Supreme Court decided that a DUI statute that punished the causation of serious bodily injury was not a crime of violence under 18 U.S.C. § 16(a). The Supreme Court's ruling is not exactly on point with the Virginia voluntary manslaughter statute, however, because the Supreme Court held that a statute with no *mens rea* was not a crime of violence because it was impossible to accidentally "use force" against the person or property of another. The *mens rea* of the Virginia statute is intentional conduct.

Because the *mens rea* of the Virginia manslaughter statute is a high enough level as to make the holding in *Leocal* partially inapplicable, the only directly applicable case law is *Matter of Martin*, under which this offense constitutes a crime of violence under 18 U.S.C. § 16(a).

Crime of violence - 18 U.S.C. § 16(b)

A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(b). The BIA has held that a manslaughter statute that punishes the intent to cause bodily injury and the actual causation of injury (or death) is a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). *See Matter of Vargas-Sarmiento*, 23 I&N Dec. 651 (BIA 2004). The Second Circuit has upheld the BIA's decision and reasoned that the New York manslaughter statute interpreted by the BIA, which punished the causation of serious injury or death while intending to cause death or serious injury, was a crime of violence under 18 U.S.C. §

16(b). *Vargas-Sarmiento v. U.S.D.O.J.*, 448 F.3d 159 (2d Cir. 2006). The Second Circuit reasoned that even though such an offense would not necessarily be a crime of violence under 18 U.S.C. § 16(a) pursuant to its reasoning in *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003), it would be a crime of violence under 18 U.S.C. § 16(b) because the focus of 18 U.S.C. § 16(b) is the nature of the offense and not only the elements of the offense. By this reasoning, therefore, this Virginia conviction is probably a crime of violence under 18 U.S.C. § 16(b).

Firearms

A conviction under this statute is not necessarily a firearms offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(E). The definition of a firearms offense at 8 U.S.C. § 1101(a)(43)(E) references several federal statutes, one of which is 18 U.S.C. § 844(h).

The Fourth Circuit in *U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2002), decided that "use of an explosive" as defined under 18 U.S.C. § 844(j) means discharging a firearm. The Court was deciding whether a defendant's discharge of a firearm was a "use" of an "explosive" within the meaning of USSG § 2K1.4. The court referenced the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition at 8 § 1101(a)(43)(E)(i). The Fourth Circuit reasoned in *Davis* that the definition at 18 U.S.C. § 844(j) included gunpowders as an "explosive." Therefore, discharging a firearm involves the use of an explosive because shooting the firearm requires an explosion to expel a projectile from a firearm.

18 U.S.C. § 844(h)(1) punishes the use of fire or an explosive to commit any felony that may be prosecuted in a court of the United States. A conviction for Va. Code Ann. § 18.2-51 is a felony that may involve the discharge of a firearm. Therefore, a conviction under this statute is a firearms aggravated felony if the defendant shoots to commit the offense.

Other immigration consequences

A conviction under this statute could render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(C) for an offense relating to firearms if the non-citizen is convicted for shooting a firearm that is listed in 18 U.S.C. § 921(a).

18.2-51.2 Aggravated malicious wounding

Elements

- maliciously shoots, stabs, cuts or wounds any other person or pregnant woman
- or by any means causes bodily injury
- with the intent to maim, disfigure, disable or kill

Crime involving moral turpitude

A conviction under this Virginia statute is a crime involve moral turpitude because the offense has as an element intentional and malicious conduct and the purpose of such conduct is to cause bodily injury. *See Matter of P*, 7 I&N Dec. 376 (BIA 1956) (maiming or wounding by assault and battery is unquestionably a crime involving moral turpitude).

Aggravated felony

Crime of violence – 18 U.S.C. § 16(a)

A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The crime of aggravated malicious or unlawful wounding is probably a crime of violence under 18 U.S.C. § 16(a) because the statute punishes the intentional causation of injury. *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002); *but see Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (holding that a statute punishing the intentional causation of injury, without an element that the use of force caused such injury, was not a crime of violence under 18 U.S.C. § 16(a)).

The decision of the BIA in *Matter of Martin* has been undermined, however, by the Supreme Court's 2004 ruling in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). In *Leocal*, the Supreme Court decided that a DUI statute that punished the causation of serious bodily injury was not a crime of violence under 18 U.S.C. § 16(a). The Supreme Court's ruling is not exactly on point with the Virginia voluntary manslaughter statute, however, because the Supreme Court held that a statute with no *mens rea* was not a crime of violence because it was impossible to accidentally use force against the person or property of another. The *mens rea* of the Virginia statute is intentional conduct.

Because the *mens rea* of the Virginia manslaughter statute is a high enough level as to make the holding in *Leocal* partially inapplicable, the only directly applicable case law is *Matter of Martin*, under which this offense would constitute a crime of violence under 18 U.S.C. § 16(a).

Crime of violence - 18 U.S.C. § 16(b)

A conviction under this statute is a crime of violence under 18 U.S.C. § 16(b). The BIA has held that a manslaughter statute that punishes the intent to cause bodily injury and the actual causation of injury (or death) is a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). *See Matter of Vargas-Sarmiento*, 23 I&N Dec. 651 (BIA 2004). The Second Circuit has upheld the BIA's decision and reasoned that the New York manslaughter statute interpreted by the BIA, which punished the causation of serious injury or death while intending to cause death or serious injury, was a crime of violence under 18 U.S.C. § 16(b). *Vargas-Sarmiento v. U.S.D.O.J.*, 448 F.3d 159 (2d Cir. 2006). The Second Circuit reasoned that even though such an offense would not necessarily be a crime of violence under 18 U.S.C. § 16(a) pursuant to its reasoning in *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003), it would be a crime of violence under 18 U.S.C. § 16(b) because the focus of 18 U.S.C. § 16(b) is the nature of the offense and not only the elements of the offense. By this reasoning, therefore, a conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(b).

Firearms

A conviction under this statute is not necessarily a firearms offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(E). The definition of a firearms offense at 8 U.S.C. § 1101(a)(43)(E) references several federal statutes, one of which is 18 U.S.C. § 844(h).

The Fourth Circuit in *U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2002), decided that "use of an explosive" as defined under 18 U.S.C. § 844(j) means discharging a firearm. The Court was deciding whether a defendant's discharge of a firearm was a "use" of an

"explosive" within the meaning of USSG § 2K1.4. The court referenced the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(E)(i). The Fourth Circuit reasoned in *Davis* that the definition at 18 U.S.C. § 844(j) included gunpowders as an "explosive." Therefore, discharging a firearm involves the use of an explosive because shooting the firearm requires an explosion to expel a projectile from a firearm.

18 U.S.C. § 844(h)(1) punishes the use of fire or an explosive to commit any felony that may be prosecuted in a court of the United States. A conviction under Va. Code Ann. § 18.2-51.2 is a felony that may involve the discharge of a firearm. Therefore, a conviction under this statute is a firearms aggravated felony if the defendant shoots to commit the offense.

Other immigration consequences

A conviction under this statute would render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(C) for an offense relating to firearms if the non-citizen is convicted for shooting a firearm that is listed in 18 U.S.C. § 921(a).

18.2-51.3 Prohibition against reckless endangerment of others by throwing objects from places higher than one story

Elements

- with intent to cause injury to another
- intentionally throw from balcony, roof top, or other place more than one story above ground level
- any object capable of causing any such injury

Crime involving moral turpitude

This statute is probably a crime involving moral turpitude because it requires that the defendant intend to cause bodily injury. *See Matter of P*, 3 I&N Dec. 5 (BIA 1947) (assault with intent to do great bodily harm is a crime involving moral turpitude)

Aggravated felony

Crime of violence

A conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. §1101(a)(43)(F) if the sentence imposed is at least one year. The offense could be read to include the use of force as an element because the statute punishes intending to cause injury and throwing an object that is capable of causing such injury. *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002) (simple assault statute is a crime of violence under 18 U.S.C. § 16(a) because the statute punishes the intentional causation of bodily injury). The Virginia statute can be distinguished from the statute in *Matter of Martin*, however, because the Virginia statute does not require that injury actually result.

The throwing of this object could be considered using force against the person or property of another. A defendant may have to use some force to push an object capable of causing injury off a balcony or roof top. However, this is *de minimus* force that is required, since a small, relatively light object, can be pushed off a roof top and cause

injury once it reaches the ground. *See Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003) (statute punishing *de minimus* use of force is not crime of violence under 18 U.S.C. § 16(a)).

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(b) because it is not a felony that, by its nature, involves the substantial risk that force will be used against the person or property of another. Rather, the statute punishes acts which have a substantial risk of causation of injury to another. The Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held that 18 U.S.C. § 16(b) does not encompass offenses where there is a risk of resulting physical injury only. Rather, 18 U.S.C. § 16(b) requires that the offense, by its nature, involve the risk of the use of force against the person or property of another. Since such a risk is not present, given the inherent nature of this statute, a conviction under this statute is not a crime of violence under 18 U.S.C. § 16(b).

18.2-55.1 Hazing of youth gang members

Elements

- cause bodily injury
- by hazing any member of a criminal street gang or person seeking to become a member of the gang

For the purposes of this section, "hazing" means to recklessly or intentionally endanger the health or safety of a person or to inflict bodily injury on a person in connection with or for the purpose of initiation, admission into or affiliation with or as a condition for continued membership in a youth gang or criminal street gang regardless of whether the person so endangered or injured participated voluntarily in the relevant activity.

Crime involving moral turpitude

Recklessly hazing

A conviction under this statute for recklessly hazing is not a crime involving moral turpitude. The statute has a *mens rea* of recklessness. The BIA has held that for a statute punishing a reckless act to be a crime involving moral turpitude, the recklessness *mens rea* must be coupled with the causation of serious bodily injury. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996). This statute requires that the victim suffer bodily injury, but not serious bodily injury. Therefore, a conviction under this statute is not a crime involving moral turpitude.

Intentional hazing

A conviction under this statute for intentional hazing is a crime involving moral turpitude because the offense involves the intentional causation of bodily injury. *See Matter of P*, 3 I&N Dec. 5 (BIA 1947) (assault with intent to do great bodily harm is a crime involving moral turpitude).

Aggravated felony

Recklessly hazing

Crime of violence

A conviction for recklessly hazing is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. §1101(a)(43)(F) if the sentence imposed is at least one year. The offense is a misdemeanor, and therefore is only analyzed under 18 U.S.C. § 16(a). A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(a) because it is not an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another. The BIA has held that intentionally causing bodily injury is a crime of violence under 18 U.S.C. § 16(a). *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002). This statute can be distinguished because the statute punishes the reckless causation of bodily injury, not the intentional causation of bodily injury. *See id.*; *see also U.S. v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004) (holding that a statute punishing intoxicated assault that has as an element the causation of injury does not have as an element the use, attempted use or threatened use of physical force against the person of another because the statute does not punish the intentional causation of bodily injury).

Intentional hazing

Crime of violence

A conviction for intentionally hazing under this statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. §1101(a)(43)(F) if the sentence imposed is at least one year. The offense is a crime of violence under 18 U.S.C. § 16(a) because the offense involves intentional use of force and causation of bodily injury. *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002) (holding that assault statute which punishes intent to cause bodily injury and causation of bodily injury has as an inherent element the use, attempted use, or threatened use of physical force against the person of another); *but see Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (holding that a statute punishing the intentional causation of injury, without an element that the use of force caused such injury, was not a crime of violence under 18 U.S.C. § 16(a)).

The Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), undermines the reasoning of the BIA in *Matter of Martin*, which held that intentional causation of bodily injury is enough to read in the element of the use of physical force. The Supreme Court in *Leocal* decided that a statute punishing causation of physical injury without an element of the use of force where the *mens rea* was negligence was not a crime of violence. However, this statute is not exactly on point because the Supreme Court's decision was based party on the fact that the statute it was deciding has no *mens rea*. Because the *mens rea* of the Virginia intentional hazing statute is a high enough level as to make the holding in *Leocal* partially inapplicable, the only directly applicable case law is *Matter of Martin*, under which this offense constitutes a crime of violence under 18 U.S.C. § 16(a).

18.2-57(A) Assault and battery

Crime involving moral turpitude

Simple assault is not a crime involving moral turpitude because there is no aggravating dimension. The statute identifies misconduct that simply causes bodily injury, not serious bodily injury. Moreover, the statute does not involve the use of a weapon or any other aggravating factor. *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989).

Aggravated felony

Crime of violence

A conviction under this statute is not necessarily a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence is at least one year. The statute is a misdemeanor only and therefore is not analyzed under U.S.C. § 16(b). Simple assault and battery may not be a crime of violence under 18 U.S.C. § 16(a) because it does not necessarily have as an element the use, attempted use, or threatened use of physical force against the person or property of another.

Simple assault

The Virginia Supreme Court has defined simple assault as an act done with intent to put another in fear or apprehension of bodily harm, without causing harm. *Burgess v. Comm.*, 118 S.E. 273 (Va. 1923). Because simple assault under the Virginia statute requires that the defendant threaten to cause bodily harm, a conviction for simple assault is probably a crime of violence under 18 U.S.C. § 16(a) as an offense that has as an element the threatened use of physical force. *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002) (intentionally causing bodily injury is a crime of violence under 18 U.S.C. § 16(a) because the statute contains, as an element, the use of force).

Simple battery

The offense of simple battery is probably not a crime of violence under 18 U.S.C. § 16(a) because a conviction under the Virginia battery statute requires only that a minimum amount of injury be caused. *See Adams v. Comm.*, 534 S.E. 2d 347 (Va. Ct. App. 2000). Several Circuit courts have held that the "use of force" element in 18 U.S.C. § 16(a) requires that the defendant use more than *de minimus* force. *See, e.g., U.S. v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006), *citing U.S. v. Rodriguez-Guzman*, 56 F.3d 18 (5th Cir. 1995) (" 'force,' as used in the statutory definition of a crime of violence, is 'synonymous with destructive or violent force'"); *Singh v. Ashcroft*, 386 F.3d 1228 (9th Cir. 2004), *citing U.S. v. Ceron-Sanchez*, 222 F.3d 1169, 1172 (9th Cir. 2000) and *Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000) ("We have squarely held 'that the force necessary to constitute a crime of violence [ ] must actually be violent in nature.'"); *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003) ("To avoid collapsing the distinction between violent and non-violent offenses, we must treat the word 'force' as having a meaning in the legal community that differs from its meaning in the physics community."); *see also Matter of Sanudo*, 23 I&N Dec. 986 (BIA 2006) (holding, in a case arising in the Ninth Circuit, that an assault offense was not a crime of violence because it was following the Ninth Circuit's decision in *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006)); *but see U.S. v. Nason*, 269 F.3d 10 (1st Cir. 2001) (holding

that an assault statute punishing offensive physical contact is a crime of violence under 18 U.S.C. § 922(g)(9), which defines a crime of domestic violence as "an offense that has, as an element, the use or attempted use of physical force, or threatened use of a deadly weapon committed by a current or former spouse…"). Because many circuit courts have held that battery statutes punishing *de minimus* force are not crimes of violence under 18 U.S.C. § 16(a), a conviction for simple battery under this Virginia statute is probably not a crime of violence.

Other immigration consequences

A conviction under this statute may be a crime of domestic violence that renders a non-citizen deportable under 8 U.S.C § 1227(a)(2)(E) if the facts reflect that the victim is a current or former spouse, partner, or other person protected by the domestic violence laws of Virginia. *See Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007) (no need to consult record of conviction for factual element of deportation ground). In addition, the the conviction must be a crime of violence under 18 U.S.C. § 16 in order to render a non-citizen deportable on this ground.

18.2-57(C) Assault on a police officer

Elements

- commits assault and battery
- knowing or having reason to know that victim is a judge, law enforcement officer, correctional officer, firefighter, etc.

Crime involving moral turpitude

Assault and battery on a police officer is a crime involving moral turpitude because of the required element that the defendant know that the person assaulted was a police officer acting in the performance of his or her duties. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (assault on police officer is crime involving moral turpitude because bodily injury is an essential element, which distinguishes the offense from simple assault, and another element is knowledge that victim is police officer and intentionally interfering with his lawful duties shows deliberate disregard for the law and therefore is a violation of the accepted rules of morality); *see also Matter of O*, 4 I&N Dec. 301 (BIA 1951) (reasoning that assault on a police officer is a crime involving moral turpitude if the statute requires knowledge on the part of the accused that the person assaulted was a police officer engaged in the performance of his duties).

Aggravated felony

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this section may not be a crime of violence under 18 U.S.C. § 16(a) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. *See* analysis for Va. Code Ann. § 18.2-57(A).

Crime of violence - 18 U.S.C. § 16(b)

A conviction under this statute is probably not an aggravated felony under 18 U.S.C. § 16(b) because it is not necessarily a felony that, by its nature, involves a substantial risk that force will be used against the person or property of another in order

to effectuate the offense. Because a defendant may be punished under this statute for simple battery, which involves *de minimus* force, it is unlikely that the statute punishes crimes that, by their nature, involve the substantial risk that force will be used against person or property. *See U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001) (reasoning that a statute punishing the making of markings on another's property was not a crime of violence under 18 U.S.C. § 16(b) because there was no substantial risk that force would be used against the person or property of another when all that was punishable was the use of *de minimus* force against the property).

In addition, if a defendant is convicted under this statute for assault, the actions do not indicate a substantial risk of use of force since the defendant need only act with the intent to place the victim in fear of bodily harm. The defendant need not touch or use any force against the victim in order to be convicted for assault under this statute. Moreover, the statute does not punish a defendant for injuring a police officer while intentionally preventing the officer from performing his or her duties, which the Second Circuit found to be a crime of violence under 18 U.S.C. § 16(b) in *Canada v. Gonzales*, 448 F.3d 560 (2d Cir. 2006). For these reasons, a conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16(b).

18.2-57.2 Assault on a family member

Elements

- assault and battery
- against a family or household member

"Family or household member" means (i) the person's spouse, whether or not he or she resides in the same home with the person, (ii) the person's former spouse, whether or not he or she resides in the same home with the person, (iii) the person's parents, stepparents, children, stepchildren, brothers, sisters, half-brothers, half-sisters, grandparents and grandchildren, regardless of whether such persons reside in the same home with the person, (iv) the person's mother-in-law, father-in-law, sons-in-law, daughters-in-law, brothers-in-law and sisters-in-law who reside in the same home with the person, (v) any individual who has a child in common with the person, whether or not the person and that individual have been married or have resided together at any time, or (vi) any individual who cohabits or who, within the previous 12 months, cohabited with the person, and any children of either of them then residing in the same home with the person. Va. Code Ann. § 16.1-228.

Crime involving moral turpitude

A conviction under this statute is probably not a crime involving moral turpitude. In *Matter of Sejas*, 24 I&N Dec. 236 (BIA 2007), the BIA decided that a conviction under this Va. Code Ann. § 18.2-57.2 was not a crime involving moral turpitude because the statute punished any touching, however slight. *Id.*, *quoting Adams v. Comm.*, 534 S.E.2d 347 (Va. App. 2000). Although the statute generally punishes harm to a person with a special relationship to the defendant, it does not punish the actual infliction of physical injury on such a person. *Medina v. U.S.*, 259 F.3d 220 (4th Cir. 2001); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996).

In addition, not all people covered in the definition of "family or household member" are persons with whom the defendant would necessarily have a special relationship as required for the offense to be a crime involving moral turpitude. *See* Va. Code Ann. § 16.1-228. For example, in-laws or mere step or half children are not necessarily persons with whom the defendant has a special relationship.

Therefore, it is unlikely that a conviction under this statute is a crime involving moral turpitude.

Aggravated felony

Crime of violence

A conviction under this section may not be a crime of violence under 18 U.S.C. § 16(a) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. *See* analysis of Va. Code Ann. § 18.2-57(A). A conviction for this offense is a misdemeanor only, so it is not analyzed under 18 U.S.C. § 16(b). The only instance in which the offense would be punishable as a felony is if defendant has previously been convicted of domestic violence or other violent offenses. A conviction for a felony offense is probably not an aggravated felony under 18 U.S.C. § 16(b). *See* analysis of Va Code Ann. § 18.2-57(C).

Other immigration consequences

A conviction under this statute may not be a crime of domestic violence that renders a non-citizen deportable under 8 U.S.C § 1227(a)(2)(E). *See* analysis under Va. Code Ann. § 18.2-57(A) for why the offense of assault and battery is possibly a crime of violence under 18 U.S.C. § 16. If the offense is a crime of violence under 18 U.S.C. § 16, then it is a crime of domestic violence under 8 U.S.C. §1227(a)(2)(E). *Marya v. Gonzales*, 147 Fed.Appx. 336 (4th Cir. 2005) (unpublished) (holding that a conviction under Va. Code Ann. § 18.2-57.2 is a crime of domestic violence under 8 U.S.C. §1227(a)(2)(E)). The crime would be a crime of domestic violence because the immigration definition of "domestic" includes a spouse or cohabitant and any individual similarly situated to a spouse under the domestic or family violence laws of the jurisdiction where the offense occurs. *See* 8 U.S.C. § 1227(a)(2)(E).

18.2-58 Robbery

Elements

- taking with intent to deprive owner permanently of personal property
- from his person or in his presence
- against the will of the person
- by partial strangulation, or suffocation, or by striking or beating, or by other violence to the person, or by assault or otherwise putting the person in fear of serious bodily harm, or by threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. Robbery has consistently been held to involve moral turpitude. *See, e.g., Matter of Martin*, 18 I&N Dec. 226 (BIA 1982); *Matter of G-R-*, 2 I&N Dec. 733 (BIA 1946). The statute has as an element the intent to permanently deprive the owner of the rights and benefits of ownership. *See Matter of M*, 2 I&N Dec. 686 (BIA 1946). This Virginia offense has been found to be a crime involving moral turpitude. *See U.S. v. Brown*, 127 F. Supp. 2d 392 (W.D.N.Y. 2001).

Aggravated felony

Crime of violence – 18 U.S.C. § 16(a)

A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(a) and therefore an aggravated felon under 8 U.S.C. §1101(a)(43)(F) if the sentence is at least one year. *See U.S. v. Wilson*, 951 F.2d 586 (4th Cir. 1991) (common law robbery in Maryland, which has the element of felonious taking and carrying away of the personal property of another from his person by the use of violence or by putting in fear, is a crime of violence under 18 U.S.C. § 16(a)). All of the means of accomplishing the robbery involve the use of force, with the possibly exception of assault. *See* analysis for Va. Code Ann. § 18.2-57(A). Therefore, it is necessary to look at the record of conviction to determine if the defendant used, threatened to use, or attempted to use physical force against the person or property of another.

Crime of violence – 18 U.S.C. § 16(b)

A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(b) because the offense is one that, by its nature, involves a substantial risk that force will be used against the person or property of another in the commission of the offense. The Fourth Circuit has held that a conviction for larceny from the person is an offense that, by its nature, presents a serious risk that physical injury against a person will result. *See U.S. v. Smith*, 359 F.3d 662 (4th Cir. 2004) (reasoning that taking property from the immediate control of a victim could like result in the escalation of the offense to a violent one). Although the Fourth Circuit's decision in *Smith* concerned whether an offense was a crime of violence under U.S.S.G. § 4B1.2(a), which defines crime of violence by risk of injury and not risk of use of force, the reasoning of the Fourth Circuit in *Smith* could still apply to an analysis under 18 U.S.C. § 16(b). Because of the confrontational nature of robbing a person, it is a crime where there is a substantial likelihood that force will be used against the person or property of another. Therefore, a conviction for larceny from the person is probably a crime of violence under 18 U.S.C. § 16(b).

Theft offense

A conviction under this statute is a theft offense and therefore an aggravated felony under 8 U.S.C. §1101(a)(43)(G) if the sentence is at least one year. The offense involves the taking of property with the criminal intent to deprive the owner of the rights and benefits of ownership, which meets the BIA's definition of a theft offense under 8 U.S.C. § 1101(a)(43)(G). *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000).

Other immigration consequences

A conviction under this statute may render a non-citizen deportable under U.S.C. § 1227(a)(2)(C). The list of weapons that a defendant under this statute may use to

commit this offense is broader than the federal list at 18 U.S.C. § 921(a), so it is necessary to look to the record of conviction to determine what weapon was used.

18.2-58.1 Carjacking

Elements
- intentional seizure of control of a motor vehicle of another
- with intent to permanently or temporarily deprive another in possession or control of the vehicle of that possession or control
- by means or partial strangulation, or suffocation, or by striking or beating, or by other violence to the person, or by assault or otherwise putting a person in fear of serious bodily harm, or by the threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude. The statute does not punish a permanent taking of the motor vehicle and therefore is not necessarily a crime involving moral turpitude under the reasoning of certain BIA cases. *See Matter of M*, 2 I&N Dec. 686 (BIA 1946); *Matter of D-*, 1 I&N Dec. 143 (BIA 1941). If the record of conviction reflects that the defendant intended to permanently deprive the owner of the property, the offense is a crime involving moral turpitude. In addition, many of the means by which someone carjacks a vehicle under this statute could amount to a crime involving moral turpitude. *See, e.g.*, *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976) (assault with a deadly weapon is a crime involving moral turpitude); *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996) (intentionally causing serious physical injury is a crime involving moral turpitude). However, simple assault is not a crime involving moral turpitude. *See Matter of Short*, 20 I&N Dec. 136 (BIA 1989). Therefore, should someone be convicted under this statute for simple assault upon a victim while trying to temporarily deprive that person of a vehicle, this conviction would not necessarily be a crime involving moral turpitude. Nonetheless, an immigration judge could reason that assaulting a person with intent to even temporarily take a vehicle is inherently bad and therefore a crime involving moral turpitude. *See, e.g., De Lucia v. Flagg*, 297 F.2d 58 (7th Cir. 1961), *cert. denied*, 369 U.S. 837 (1962) (stating that the prevalent standards should be used to decide what constitutes a crime involving moral turpitude).

Aggravated felony

Crime of violence

A conviction under this statute is a crime of violence under 18 U.S.C. § 16 and therefore an an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The definition of "carjacking" is the intentional seizure or seizure of control of a motor vehicle of another with intent to permanently or temporarily deprive another in possession or control of the vehicle of that possession or control by means of partial strangulation, or suffocation, or by striking or beating, or by other violence to the person, or by assault or otherwise putting a person in fear of serious bodily harm, or by the threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever. This offense is a crime of violence under 18 U.S.C. § 16(a)

because the offense is one that has as an element the use, attempted use, or threatened use of physical force against the person of another.

Theft offense

A conviction under this statute is a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence is at least one year. The offense involves the taking of property with the criminal intent to deprive the owner of the rights and benefits of ownership, even if the taking is less than permanent. The elements of this offense meet the BIA's definition of a theft offense under 8 U.S.C. § 1101(a)(43)(G). *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000).

Other immigration consequences

A conviction under this statute may render a non-citizen deportable under U.S.C. § 1227(a)(2)(C). The list of weapons that a defendant under this statute may use to commit this offense is broader than the federal list at 18 U.S.C. § 921(a), so it is necessary to look to the record of conviction to determine what weapon was used.

18.2-59 Extorting money by threats

Elements

- threaten injury to:
  - character or
  - person or
  - property of another person
  - or accuse him of any offense
  - or threaten to report him for being illegal present in the U.S.
- and thereby extort money, property, or pecuniary benefit

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. The BIA has repeatedly held that extortion offenses are crimes involving moral turpitude. *See, e.g., Matter of C*, 5 I&N Dec. 370 (BIA 1953) (holding that the unlawful taking of the property of another by force or threats is a crime so vile that it unquestionably involved moral turpitude); *Matter of F*, 3 I&N Dec. 361 (BIA 1948) (holding that using the mail as a means to deliver a threat with the intent to commit extortion is a crime involving moral turpitude). In addition, cases involving threats have also been held to be crimes involving moral turpitude when these threats are directed at doing physical violence to the victim. *See, e.g., Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999) (holding that the transmission of several threats is evidence of a vicious motive or corrupt mind and therefore a crime involving moral turpitude).

Aggravated felony

Extortion

A conviction under this statute is an extortion offense and therefore an aggravated felony under 8 U.S.C. §1101(a)(43)(H). The elements of this offense are described in 18 U.S.C. § 1202, which is one of the statutes listed in 8 U.S.C. §1101(a)(43)(H). The

Virginia statute, requiring the extortion of money or property is similar to 18 U.S.C. §1202, which punishes the receipt of any money or property delivered as ransom. Therefore, a conviction under this statute is an aggravated felony under 8 U.S.C. §1101(a)(43)(H).

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this statute is possibly a crime of violence under 18 U.S.C. § 16(a). If the defendant is convicted for extorting money through the act of threatening injury to person or property, this is probably a crime of violence. *See U.S.A. v. De la Fuente*, 353 F.3d 766 (9th Cir. 2003) (holding that mailing threatening communications is a crime of violence under 18 U.S.C. § 16(a) as a threatened use of force); *Bovkun v. Ashcroft*, 283 F.3d 166 (3d Cir. 2002) (holding that a conviction for making terroristic threats was a crime of violence under 18 U.S.C. § 16(a) because the intended result of the threats was to terrorize).

However, since the language of Va. Code Ann. § 18.2-59 uses the phrase "threaten injury" and does not mention use of force specifically, a court may find that a conviction under the statute is not a crime of violence. *See Chrzanoski v. Ashcroft*, 327 F.2d 188 (2d Cir. 2003) (finding a conviction for third-degree assault under a Connecticut statute required only "that the defendant intended to cause physical injury to another," and this requirement was insufficient to meet the plain language "use of force" requirement to qualify as a crime of violence); *but see Matter of Martin*, 23 I&N Dec. 491 (BIA 2002) (a conviction for assault was a crime of violence, even though the statute required intentional infliction of injury to another person and did not specifically mention the use of force to cause such injury). Therefore, a conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(a) if the defendant threatens injury to person or property of another.

A conviction under this statute is not a crime of violence if the defendant threatens injury to the victim's character because this offense does not necessarily have as an element the use, attempted use, or threatened use against the person or property of another. *See* 18 U.S.C. § 16(a). Therefore, it is necessary to consult the record of conviction to determine whether a conviction under this statute is a crime of violence.

Crime of violence - 18 U.S.C. § 16(b)

A conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16(b) because it is not an offense that, by its nature, involves a substantial risk of use of force against the person or property of another. The defendant must threaten injury to person, property, or character in order to be convicted under this offense. There is not a substantial risk that force will be used in order to threaten injury. The Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held that 18 U.S.C. § 16(b) does not encompass offenses that involve a risk of resulting physical injury only. Rather, in order for an offense to be a crime of violence under 18 U.S.C. § 18(b), the offense must be one that involves the risk of use of force against the person or property of another.

18.2-60 Threats of death or bodily injury to a person or member of his family

Elements

(A1) (class 6 felony):
- knowingly communicating
- in writing or email
- a threat to kill or do bodily injury to a person or person's family member
- threat places such person in reasonable apprehension of death or bodily injury to himself or family member
- intent to commit act of terrorism = class 5 felony

(A2): same as (A1), but on school premises (class 6 felony)
- threat would place person who is object in reasonable apprehension of death or bodily harm

(B) (class 1 misdemeanor):
- orally makes threat
- to employee of school while on school bus or property or activity
- to kill or do bodily injury to such person

Crime involving moral turpitude

(A1) and (A2)

Threats that place victim in reasonable apprehension of death or bodily injury

A conviction under either of these sections of the Virginia statute is probably a crime involving moral turpitude because the majority of the case law has interpreted statutes involving threats to be crimes involving moral turpitude. S*ee Matter of G-T-*, 4 I&N Dec. 446 (a conviction for sending threatening letters through the mail with intent to extort money from the addressee was a crime involving moral turpitude); *but see Matter of M*, 2 I&N Dec. 196 (BIA 1944) (holding that the same statute interpreted by the BIA in *Matter of G-T-* was not a crime involving moral turpitude when the defendant was convicted for merely placing the letters in the mail because the basis of the crime was not uttering the threatening statements, but using the U.S. postal facilities for their transmission). In other cases decided subsequently to *Matter of M*, 2 I&N Dec. 196, the BIA decided that the making of threats could be a crime involving moral turpitude. *See, e.g., Matter of B*, 6 I&N Dec. 98 (BIA 1954) (usury by intimidation and threats of bodily harm is a crime involving moral turpitude); *Matter of C*, 5 I&N Dec. 370 (BIA 1953) (threats to take property by force is a crime involving moral turpitude); *Matter of F*, 3 I&N Dec. 361 (BIA 1949) (mailing of menacing letters that demanded property and threatened violence to the recipient is a crime involving moral turpitude).

In a more recent case, the BIA held that threatening behavior can be an element of a crime involving moral turpitude. *See Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999). The BIA interpreted a Michigan stalking statute that punished stalking where the course of conduct included the making of one or more credible threats against a victim, or member of the victim's family or another living in the victim's household. The BIA reasoned that the intentional transmission of threats is evidence of a vicious motive or a corrupt mind and therefore a statute punishing such behavior is a crime involving moral turpitude. *See id.*; *see also Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004)

(holding that a statute punishing making threats with the purpose to terrorize the victim was a crime involving moral turpitude).

(B) Threats to kill or do bodily injury where the victim is not placed in reasonable apprehension of death or bodily injury

A conviction under this section of the statute is probably not a crime involving moral turpitude because this section of the statute does not require that the victim be placed in reasonable apprehension of death or bodily injury. *See Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999). In *Matter of Ajami*, the BIA's holding that a stalking statute was a crime involving moral turpitude relied partially on the fact that the acts punished by the statute must cause another to feel great fear. Va. Code Ann. § 18.2-60(B) does not require that the victim feel great fear or any fear. Rather, the statute punishes only the transmission of threats. Because Va. Code Ann. § 18.2-60(B) does not require that the defendant make credible threats, but only that the defendant make some threat, it is probably not a crime involving moral turpitude. However, the BIA's decision in *Matter of Ajami* also relied on a line of cases in which the making of any threats amounted to a crime involving moral turpitude. Therefore, it is possible, but unlikely, that a conviction under Va. Code Ann. § 18.2-60(B) is a crime involving moral turpitude.

Aggravated felony

(A) Felony threat to kill or do bodily injury that places person in reasonable apprehension

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(a) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under Va. Code Ann. § 18.2-60(A) requires that the threats place the victim in reasonable apprehension of death or bodily injury. *See Bovkun v. Ashcroft*, 283 F.3d 166 (3d Cir. 2002) (holding that a conviction for making terroristic threats was a crime of violence under 18 U.S.C. § 16(a) because the intended result of the threats was to terrorize); *Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003) (a statute punishing the willful threatening to commit a crime which would result in death or great bodily injury to another person with the specific intent that the statement is to be taken as a threat was a crime of violence because the statute had as an element the threatened use of physical force against the person of another); *cf. U.S. v. Martinez-Mata*, 393 F.3d 625 (5th Cir. 2004) (holding that a statute did not contain as an element the use, attempted use, or threatened use of physical force against the person of another because the law at issue prohibited committing or threatening to commit "harm," which was defined as anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested).

The BIA has held that intentionally causing serious bodily injury, without any explicit element of the use of force to cause such injury, is a crime of violence under 18 U.S.C. § 16(a). *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002). In *Matter of Martin*, the BIA read in the use of force element because there was an element of causation of injury and intent to cause such injury. Va Code Ann. § 18.2-60 punishes the causation of reasonable apprehension of death or bodily injury by knowingly communicating a threat. By analogy, Va. Code Ann. § 18.2-60 has as an element the

threatened use of physical force to cause such apprehension of bodily injury, and therefore would be a crime of violence under the BIA's reasoning in *Matter of Martin*.

However, the Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), reasoned that a statute punishing the causation of bodily injury was not a crime of violence under 18 U.S.C. § 16(a) because there was no element of the use of force to cause such injury. This holding potentially undermines the BIA's reasoning in *Matter of Martin* and the Ninth Circuit's decision in *Rosales-Rosales*. Following the reasoning of *Leocal*, the mere causation of fear by the victim may not be sufficient to conclude the defendant must use physical force or threaten the use of physical force to cause such fear of bodily injury.

Nonetheless, the *Leocal* decision was based partly on the fact that the statute it interpreted contained no *mens rea*, whereas the Va. Code Ann. § 18.2-60 has a *mens rea* of knowingly making the threat. Therefore, a conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(a).

Crime of violence - 18 U.S.C. § 16(b)

A conviction under this statute for felony threats is probably not a crime of violence under 18 U.S.C. § 16(b). There is not a substantial risk that force will be used in order to threaten injury. The Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held that 18 U.S.C. § 16(b) does not encompass offenses that involve a risk of resulting physical injury only. Rather, the statute applies to offenses that involve a risk of the use of force against the person or property of another. By analogy, 18 U.S.C. § 16(b) does not encompass offenses that involve only the risk of resulting apprehension of injury.

Va. Code Ann. § 18.2-60(A) requires that the threats place the person in reasonable apprehension of death or bodily injury. This is an element of many statutes interpreted by the BIA; in each case, the crime was held to be a crime of violence under 18 U.S.C. § 16(b). *Matter of Malta-Espinoza*, 23 I&N Dec. 656 (BIA 2004); *Matter of Aldabesheh*, 22 I&N Dec. 983 (BIA 1999); *Matter of S-S-*, 21 I&N Dec. 900 (BIA 1997). However, the BIA's decisions in *Matter of Aldabesheh* and *Matter of S-S-* intepreted statutes which required that the defendant use a weapon in threatening the victim, which is not an element of the Virginia statute.

In *Matter of Malta-Espinoza*, 23 I&N Dec. 656 (BIA 2004), the respondent was convicted of a stalking offense. The BIA found that the nature of the offense was such that there was a substantial risk of use of force. The defendant had been convicted for making a credible threat that placed another in fear for his or her safety through a course of conduct. The BIA acknowledged that it is possible to violate California's stalking statute without the use of force, such as through the use of a computer, a telephone, or mail. Nevertheless, the BIA found that when a course of conduct that is both serious and continuing in nature is coupled with a credible threat to another's safety, there is a substantial risk that physical force may be used over the duration of the commission of the crime. Therefore, the conviction was a crime of violence under 18 U.S.C. § 16(b). The BIA language suggests that without the course of conduct that is both serious and continuing in nature, the credible threat does not present a substantial risk that physical force will be used against the person or property of another.

All of the published BIA decisions mentioned above can be distinguished from the Virginia statute because the statutes interpreted in the BIA cases punished threats that cause reasonable fear of bodily harm, plus another element. *See Malta-Espinoza*, 23 I&N Dec. 656 (pattern of threats); *Matter of Aldabesheh*, 22 I&N Dec. 983 (threat plus

weapon); *Matter of S-S-*, 21 I&N Dec. 900 (threat plus weapon). No such secondary element is present in Va. Code Ann. § 18.2-60. Therefore, a conviction under this section of the statute is probably not a crime of violence under 18 U.S.C. § 16(b).

(B) Misdemeanor threat to kill or do bodily harm without the victim having reasonable apprehension of death or bodily harm

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. Because the offense is a misdemeanor, it is analyzed under 18 U.S.C. § 16(a) only. A conviction under Va. Code Ann. § 18.2-60(B) is probably a crime of violence because the statute has as an element the threatened use of physical force against the person or property of another. Va. Code Ann. § 18.2-60(B) requires that the defendant make a threat to kill or do bodily injury to another person, but that threat need not place that person in reasonable apprehension of death or bodily harm. If the threat is not credible, it is possible that the offense does not have as an element the threatened use of physical force. Nothing more than the utterance of a threat is necessary for conviction under this statute. *See Keyes v. Comm.*, 572 S.E.2d 512 (Va. Ct. App. 2002).

However, the Ninth Circuit has held that a threat statute was a crime of violence under 18 U.S.C. § 16(a). *Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003). The statute under which the defendant was convicted included the elements of willfully threatening to commit a crime that would result in death or great bodily injury to another person with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out. The Court held that the statute had as an element the threatened use of physical force against the person of another. The statute interpreted in *Rosales-Rosales* is similar to Va. Code Ann. § 18.2-60(B) because neither statute requires that the victim actually be placed in reasonable apprehension of death or bodily injury. Therefore, a conviction under this section of the Virginia statute is probably a crime of violence under 18 U.S.C. § 16(a).

18.2-60.3 Stalking

Elements

- engages in conduct on one or more occasion
- directed at another person
- with intent to place that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that person or that person's family or household member
- he knows or reasonably should know that the conduct places that other person in fear

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude because the BIA has held that a similar statute was a crime involving moral turpitude. *See Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999). In *Matter of Ajami*, the BIA interpreted a Michigan stalking statute that punished stalking where the course of conduct included the making of one or more credible threats against a victim, or member of the

victim's family or another living in the victim's household. The BIA reasoned that the intentional transmission of threats is evidence of a vicious motive or a corrupt mind and therefore a statute punishing such behavior is a crime involving moral turpitude. The BIA reasoned that because the violator must act willfully and embark on a course of conduct as opposed to a single act causing another to feel great fear, this type of offense amounts to a crime involving moral turpitude. Also, the BIA cited a line of BIA cases holding in other circumstances that making threats is a crime involving moral turpitude.

The Virginia statute is similar to the statute under which the Respondent was convicted in *Matter of Ajami* because both statutes require that the defendant embark on a course of conduct as opposed to one act and both statutes have a *mens rea* of intentional conduct. To convict under the Virginia statute, there must be proof of the defendant's intent or knowledge to cause fear. *See Bowen v. Comm.*, 499 S.E.2d 20 (Va. Ct. App. 1998). In addition, both statutes require threatening behavior. Therefore, a conviction under this Virginia statute is probably a crime involving moral turpitude.

Aggravated felony

(A) Misdemeanor

Crime of violence

A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(a) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute punishes a defendant for engaging in any conduct on more than one occasion, directed at another person, with intent to place that other person in fear of death, sexual assault, or bodily injury to the victim or a member of the victim's family. The Virginia statute requires that the defendant act with intent to place another in fear; however, the elements do not require that the defendant use force, attempt to use force, or threaten to use force against the victim in order to bring about such fear. *Cf. Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (holding that a statute punishing the intentional causation of injury does not include as an element the use of force to cause such injury).

The BIA has held, contrary to the Second Circuit's decision in *Chrzanoski*, that intentionally causing serious bodily injury, without any explicit element of the use of force to cause such injury, is a crime of violence under 18 U.S.C. § 16(a). *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002). In *Matter of Martin*, the BIA read in the use of force element because there was an element of causation of injury and intent to cause such injury. Va. Code Ann. § 18.2-60.3 punishes the causation of reasonable apprehension of death or bodily injury by engaging in some conduct with the intent to cause such fear. By analogy, Va. Code Ann. § 18.2-60.3 has as an element the threatened use of physical force to cause such apprehension of bodily injury, and therefore would be a crime of violence under the BIA's reasoning in *Matter of Martin*.

However, the Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), reasoned that a statute punishing the causation of bodily injury was not a crime of violence under 18 U.S.C. § 16(a) because there was no element of the use of force to cause such injury. This holding potentially undermines the BIA's reasoning in *Matter of Martin*. Following the reasoning of *Leocal*, the mere causation of fear by the victim may not be sufficient to conclude the defendant must use physical force or threaten the use of physical force to cause such fear of bodily injury. Nonetheless, the *Leocal* decision was based partly on

the fact that the statute it interpreted contained no *mens rea*, whereas the Va. Code Ann. § 18.2-60 has a *mens rea* of knowingly making the threat.

Moreover, decisions interpreting whether stalking statutes had the elements of the use, attempted use, or threatened use of physical force against the person of another have not interpreted identical stalking statutes. In *U.S. v. Jones*, 231 F.3d 508 (9th Cir. 2000), the Ninth Circuit remanded a case to determine whether a stalking statute had as an element the use, attempted use, or threatened use of physical force against the person of another. The remand required that the lower courts determine the significance of a change in interpretation of the law. The statute was previously interpreted to punish conduct that was done with intent to place another person in reasonable fear of death or great bodily injury; the new interpretation punished conduct that was done with intent to place another person in reasonable fear for his safety. *Id.*; *see also U.S. v. Insaulgarat*, 378 F.3d 456 (5th Cir. 2004) (holding that a stalking statute punishing a defendant for engaging in a course of conduct directed at a specific person that causes substantial emotional distress was not an offense that had as an element the use, attempted use, or threatened use of physical force against the person of another). Therefore, a conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(a).

(A) Felony

Crime of violence – 18 U.S.C. § 16(a)

A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(a). *See* analysis for Va. Code Ann. § 18.2-60.3 (stalking misdemeanor).

Crime of violence – 18 U.S.C. § 16(b)

A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(b). The BIA has held that a stalking offense was a crime of violence under 18 U.S.C. § 16(b). *See Matter of Malta-Espinoza*, 23 I&N Dec. 656 (BIA 2004); *but see Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007) (reversing the BIA's decision in *Matter of Malta-Espinoza*). The BIA interpreted a statute that punished the willful, malicious, and repeated following or harassing of another person and making of credible threats with the intent to place that person in reasonable fear for her safety or the safety of her family. The BIA found that the statute was divisible and that the defendant was convicted of harassing, which was defined as knowing and willfully engaging in a course of conduct directed at a person that seriously alarms, annoys, torments, or terrorizes the person and serves no legitimate purposes. The BIA acknowledged that the offense could be accomplished through the use of a telephone or a computer, which would not necessarily risk using force against the person or property of another. However, the BIA found that the harassment was likely to evoke a reaction from the victim and therefore require that the defendant use force against the victim.

The Virginia stalking felony statute is likely to be interpreted in a similar way to the stalking statute found to be a crime of violence in *Matter of Malta* because the Virginia statute, like the California statute, requires that the defendant engage in a course of conduct with the intent to place the victim in fear of bodily injury, sexual assault, or death. For this reason, a conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(b).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(E) (crime relating to stalking).

18.2-60.4 Violation of protective order

Moral turpitude

A conviction under this Virginia statute is not a crime involving moral turpitude. A conviction under this statute is not a crime of moral turpitude because only the act of violating the terms of the protective order is required. The statute does not have a *mens rea*. Where criminal intent is not an essential element of the offense, it is not a crime involving moral turpitude. *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999).

Aggravated felony

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The offense is a misdemeanor, so it cannot be classified as a crime of violence under 18 U.S.C. § 16(b). The offense is not a crime of violence under 18 U.S.C. § 16(a) because there is no use, attempted use, or threatened use of physical force as an element to the statute and therefore it does not meet the definition of crime of violence under 18 U.S.C. § 16(a). The statute does not have a *mens rea*, and therefore cannot qualify as a crime of violence under the Supreme Court's reasoning in *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(E) (violation of protective order) if the non-citizen is found to have violated the portion of the protective order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued.

16.1-253.2 Violation of provisions of protective orders

Elements

- class 1 misdemeanor: violates protective order that prohibits such person from going or remaining upon land, buildings or premises or from further acts of family abuse, or that prohibits contacts between the respondent and the respondent's family or household member as the court deems appropriate
- class 6 felony: commits assault and battery upon person protected by the order resulting in serious bodily injury
- class 6 felony: violates such a protective order by furtively entering the home of any protected party while the party is present, or by entering and remaining in the home of the protected party until the party arrives

Crime involving moral turpitude

Misdemeanor volation of protective order

A conviction under this section of the statute is not a crime involving moral turpitude because it is a regulatory offense; there is no *mens rea* required to violate the protective order. *See Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999).

Assault and battery upon person protected

A conviction under this statute is probably a crime involving moral turpitude. Generally, simple assault is not a crime involving moral turpitude. *Matter of Short*, 20 I&N Dec. 136 (BIA 1989). However, assault against a person with whom the defendant has a special relationship is a crime involving moral turpitude where such assault and battery results in injury. *See Matter of Sejas*, 24 I&N Dec. 236 (BIA 2007); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996); *Medina v. U.S.*, 259 F.3d 220 (4th Cir. 2001). In addition, the BIA has held that a statute punishing assault and battery causing serious bodily injury is a crime involving moral turpitude. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996).

Waiting in home for protected person to arrive

A conviction under this section of the statute is not necessarily a crime involving moral turpitude. Analogizing this offense to breaking and entering or unlawful entry into a dwelling, it is not a crime involving moral turpitude unless the record reflects that the person intended to commit a crime involving moral turpitude. *See Matter of L*, 6 I&N Dec. 666 (BIA 1955); *Matter of M*, 2 I&N Dec. 721 (BIA 1946) (holding that breaking and entering with intent to commit a crime involving moral turpitude is a crime involving moral turpitude). For example, if the record reflects that the defendant intended to cause injury to a person with whom the defendant has a special relationship, the offense is likely to involve moral turpitude. *Matter of Sejas*, 24 I&N Dec. 236 (BIA 2007); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996). Therefore, whether this offense is a crime involving moral turpitude depends on the record of conviction.

Aggravated felony

Violation of protective order

Crime of violence

A conviction under this section is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The offense is a misdemeanor, so it cannot be classified as a crime of violence under 18 U.S.C. § 16(b). A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(a) because there is no use, attempted use, or threatened use of physical force against the person or property of another as required by 18 U.S.C. § 16(a). The statute does not have a *mens rea*, and therefore cannot qualify as a crime of violence under the Supreme Court's reasoning in *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

Assault and battery on person protected

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F)

if the sentence imposed is at least one year. Simple assault and battery may not be a crime of violence because the statute punishes the use of *de minimus* force against the person of another. *See* analysis for simple assault at Va. Code Ann. § 18.2-57(A). However, an assault and battery conviction under Va. Code Ann. § 16.1-253.1 requires that there be serious bodily injury, so the *de minimus* force analysis does not apply.

The BIA in *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002), held that a conviction for intentional causation of bodily injury is a crime that has as an element the use of force, since the BIA would read in this implicit use of force when the statute punishes the intent to injure plus resulting injury. *See id.*; *but see Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (holding that a statute punishing the intentional causation of injury does not include as an element the use of force to cause such injury).

However, the Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), reasoned that a statute punishing the causation of bodily injury was not a crime of violence under 18 U.S.C. § 16(a) because there was no element of the use of force to cause such injury. Therefore, it was error to read in this element and hold that a conviction under such a statute was a crime of violence. This holding potentially undermines the BIA's reasoning in *Matter of Martin*. Following the reasoning of *Leocal*, the mere causation of bodily injury may not be sufficient to conclude the defendant must use physical force or threaten the use of physical force to cause such fear of bodily injury. Nonetheless, the *Leocal* decision was based partly on the fact that the statute it interpreted contained no *mens rea*, whereas a conviction under this Virginia statute has a *mens rea* of intentional conduct. Because the elements of this Virginia require a *mens rea* of intentional conduct and the causation of injury, the offense is very similar to the offense which the BIA held to be a crime of violence under 18 U.S.C. § 16(a) in *Matter of Martin*. Therefore, a conviction under this staute is probably a crime of violence under 18 U.S.C. § 16(a).

Crime of violence - 18 U.S.C. § 16(b)

A conviction under this section of the statute is probably not a crime of violence under 18 U.S.C. § 16(b). In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Supreme Court recognized the distinction between the risk of causation of physical injury and the risk of use of force contemplated by 18 U.S.C. § 16(b). The Court held that 18 U.S.C. § 16(b) does not encompass offenses that involve a substantial risk that injury will result from a person's conduct. The substantial risk in 18 U.S.C. § 16(b) relates to the use of force, not to the possible effect of a person's conduct. The risk that injury may occur from a defendant's actions is not the equivalent to the risk that the individual may use physical force against another in committing an offense. *Id.*; *see also Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005) (an offense that intrinsically involves a substantial risk that the defendant's actions will cause physical harm does not necessarily involve a substantial risk that force will be used); *Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006) (same).

<u>Waiting in home for protected person to arrive</u>

Crime of violence

A conviction under this section of the statute is a crime of violence under 18 U.S.C. § 16(b). The Supreme Court has held that this type of offense is a crime of violence under 18 U.S.C. §16(b) because there is a substantial risk of use of force when a defendant unlawfully enters the dwelling home of another, since the defendant may meet

a person and have to use force against the person in order to complete the offense. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). A conviction under this section of the Virginia statute requires that the defendant enter the home of protected party while the party is there or remain in the home until the protected party arrives. Therefore, a conviction under this statute is an offense that, by its nature, involves the substantial risk that force will be used against the person or property of another.

Other immigration consequences

Violation of a protective order

A conviction under this section will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(E) (violation of protective order) if the non-citizen is found to have violated the portion of the protective order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued.

Assault and battery upon person protected

A conviction under this section will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(E) (violation of protective order) if the non-citizen is found to have violated the portion of the protective order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued.

A conviction for assault and battery upon a person protected will also render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(E) (crime of domestic violence) if the crime is a "crime of violence" as defined by 18 U.S.C. § 16. *See* analysis of whether this section of the statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony. If the offense is a crime of violence under 18 U.S.C. § 16, then it will be a crime of domestic violence under 8 U.S.C. § 1227(a)(2)(E). The crime would be a crime of domestic violence because the immigration definition of "domestic" includes a spouse or cohabitant and any individual similarly situated to a spouse under the domestic or family violence laws of the jurisdiction where the offense occurs. *See* 8 U.S.C. § 1227(a)(2)(E).

Waiting in the home for protected person to arrive

A conviction under this section will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(E) (violation of protective order) if the non-citizen is found to have violated the portion of the protective order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued.

A conviction under this statute for waiting in the home for the protected person to arrive will also render a non-citizen deportable for a conviction under this offense under 8 U.S.C. § 1227(a)(2)(E) (crime of domestic violence) because the offense is a crime of violence under 18 U.S.C. § 16(b) committed against a person protected under the domestic violence laws of Virginia. *See* 8 U.S.C. § 1227(a)(2)(E).

18.2-61 Rape

Elements

(A) sexual intercourse with person whether or not his spouse or causes witness to have sex with any other person and act is accomplished
- against the will of the complaining witness by force, threat, or intimidation, or
- through the use of the complaining witness's mental incapacity or physical helplessness, or
- with a child under the age of 13

Crime involving moral turpitude

A conviction under any section of this statute is a crime involving moral turpitude. *See Matter of Dingena*, 11 I&N Dec. 723 (BIA 1966) (statutory rape is a crime involving moral turpitude); *Matter of S*, 5 I&N Dec. 686 (BIA 1954) (sex offense against a woman without her consent is a crime involving moral turpitude); *Matter of M*, 2 I&N Dec. 17 (BIA 1944) (having sex with a woman of feeble mind where defendant knows she is feeble-minded is a crime involving moral turpitude).

The offense of aiding and abetting to commit a crime involving moral turpitude is a crime involving moral turpitude. *See, e.g., Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977). Therefore, a conviction for aiding and abetting a rape under this statute is a crime involving moral turpitude.

Aggravated felony

Rape

A conviction under this statute is an aggravated felony under 8 U.S.C. §1101(a)(43)(A) (rape).

Crime of violence

A conviction under this statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. §1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is a crime of violence because several sections require that the defendant use force, threats, or intimidation. Therefore, it is an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another as required by 18 U.S.C. § 16(a). The rape of a child or a mentally of physically incapable person under this statute are also crimes of violence under 18 U.S.C. § 16(b). *See e.g., Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005) (conviction for aggravated criminal sexual abuse, which requires a showing that the accused knew that the victim was unable to understand the nature of the act or unable to give consent is a crime of violence inherently involves a substantial risk that physical force may be used in committing the offense); *Chery v. Ashcroft*, 347 F.3d 404 (2d Cir. 2003) (conviction for sexual assault, which criminalizes sexual intercourse with a victim who is unable to give consent, is a crime of violence); *see also U.S. v. Hernandez*, 9 F.3d 1544 (Table), No. 92-5659 (4th Cir. 1993) (unpublished) (statutory rape is a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony).

Aiding and abetting

The offense of aiding and abetting to commit an aggravated felony is an aggravated felony. *See Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007). Therefore, a conviction for aiding and abetting a rape under this statute is an aggravated felony.

Other immigration consequences

A conviction for spousal rape under Va Code Ann. § 18.2-61 will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(E) (crime of violence against family or household member) because the offense is a crime of violence under 18 U.S.C. § 16(a) committed against a person protected under the domestic violence laws of Virginia. *See* 8 U.S.C. § 1227(a)(2)(E).

18.2-63 Carnal knowledge of a child between the ages of 13 and 15 years of age

Elements

- carnal knowledge (= sexual intercourse, cunnulingus, fellatio, anallingus, anal intercourse, and animate and inanimate object sexual penetration)
- of a child between the ages of 13 and 15 years of age
- without the use of force
- reduced penalty if child consents and the accused is a minor also but such consenting child is three or more years the accused's junior

Crime involving moral turpitude

A conviction for carnal knowledge under Va Code Ann. § 18.2-63 is a crime involving moral turpitude. *See Castle v. INS*, 541 F.2d 1064 (4th Cir. 1976) (holding that a statute punishing the carnal knowledge of any female not his wife, between the ages of fourteen and sixteen, was a crime involving moral turpitude because such offense was a *malum in se* crime which was so basically offensive to American ethics and accepted moral standards as to constitute moral turpitude per se); *Matter of R*, 3 I&N Dec. 562 (BIA 1949) (carnal knowledge is a crime involving moral turpitude).

Aggravated felony

Sexual abuse of a minor

A conviction under this statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(A) (sexual abuse of a minor). *See United States v. Martinez-Carillo*, 250 F.3d 1101 (7th Cir. 2001), *cert. denied*, 534 U.S. 927 (2001) (conviction for digital penetration of 13-year old is an aggravated felony under the sexual abuse of a minor category).

Rape

A conviction under this statute is an aggravated felony under 8 U.S.C. §1101(a)(43)(A) (rape) if the offense involves sexual intercourse.

Crime of violence

A conviction under this statute an aggravated felony under 8 U.S.C. §1101(a)(43)(F), crime of violence, if the sentence imposed is at least one year. *See e.g., Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005) (conviction for aggravated criminal sexual abuse, which requires a showing that the accused knew that the victim was unable to

understand the nature of the act or unable to give consent is a crime of violence because the offense inherently involves a substantial risk that physical force may be used in committing the offense); *Chery v. Ashcroft*, 347 F.3d 404 (2d Cir. 2003) (conviction for sexual assault, which criminalizes sexual intercourse with a victim who is unable to give consent, is a crime of violence); *see also U.S. v. Hernandez*, 9 F.3d 1544 (Table), No. 92-5659 (4th Cir. 1993) (unpublished) (statutory rape is a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(E) (crime relating to child abuse).

18.2-67.1 Forcible sodomy

Elements

- engages in cunnilingus, fellatio, anilingus, or anal intercourse with a complaining witness whether or not his or her spouse,
- or causes a complaining witness, whether or not his or her spouse, to engage in such acts with any other person,
- and
    (1) complaining witness is younger than 13; OR
    (2) The act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness

Crime involving oral turpitude

A conviction under any section of this statute is a crime involving moral turpitude. *See Kassim v. U.S.I.N.S.*, 96 F.3d 1438 (Table) No. 96-1207 (4th Cir. 1996) (unpublished) (fondling an 11-year old is a crime involving moral turpitude); *Matter of S*, 5 I&N Dec. 686 (BIA 1954) (sexual assault against a woman without her consent is a crime involving moral turpitude); *Matter of M*, 2 I&N Dec. 17 (BIA 1944) (having sex with a woman of feeble mind where defendant knows she is feeble-minded is a crime involving moral turpitude).

The offense of aiding and abetting to commit a crime involving moral turpitude is a crime involving moral turpitude. *See, e.g., Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977). Therefore, a conviction for aiding and abetting a forcible sodomy under this statute is a crime involving moral turpitude.

Aggravated felony

(1) Complaining witness is younger than 13

Sexual abuse of a minor

A conviction under this section of the statute is an aggravated felony under 8 U.S.C. §1101(a)(43)(A) (sexual abuse of a minor).

(2) Act accomplished against the will of the complaining witness, by force, threat, or intimidation, or through the use of the witness' mental incapacity or physical helplessness

Crime of violence

A conviction under this section of the statute is an aggravated felony under 8 U.S.C. §1101(a)(43)(F) (crime of violence) if the sentence imposed is at least one year. It is a crime of violence under 18 U.S.C. § 16(a) because there is an element of the use, attempted use, or threatened use of force against the person of another. *See Adsit v. Commonwealth*, No. 0882-98-2 (Va. Ct. App. 1999) (unpublished) (force required to sustain a conviction is some force other than merely the force required to accomplish the unlawful touching prohibited by statute).

A conviction under the language in subsection (2) involving sexual penetration through the use of the complaining witness's incapacity of physical helplessness is a crime of violence under 18 U.S.C. § 16(b). *See, e.g., Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005) (conviction for aggravated criminal sexual abuse, which requires a showing that the accused knew that the victim was unable to understand the nature of the act or unable to give consent is a crime of violence because the offense inherently involves a substantial risk that physical force may be used in committing the offense); *Chery v. Ashcroft*, 347 F.3d 404 (2d Cir. 2003) (conviction for sexual assault, which criminalizes sexual intercourse with a victim who is unable to give consent, is a crime of violence); *Sutherland v. Reno*, 347 F.3d 171 (2d Cir. 2000) (conviction for sexual assault and battery of a minor is a crime of violence because it involves non-consensual act upon another person); *see also Zaidi v. Ashcroft*, 374 F.3d 357 (5th Cir. 2004) (linking substantial risk of force to lack of consent).

Aiding and abetting

The offense of aiding and abetting to commit an aggravated felony is an aggravated felony. *See Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007). Therefore, a conviction for aiding and abetting forcible sodomy under this statute is an aggravated felony.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(E) (crime relating to child abuse) if the offense is against a minor.

18.2-67.2 Object sexual penetration

Elements

(A)

- penetration of labia majora or anus of complaining witness who is not his or her spouse or causes complaining witness to do so
- with any object
- other than for bona fide medical purpose
- and (i) complaining witness is less than 13 or (ii) act accomplished against the will of the complaining witness by force, threat, or intimidation or through the use of the complaining witness's mental incapacity of physical helplessness

Crime involving moral turpitude

A conviction under any section of this statute is a crime involving moral turpitude. *See Kassim v. U.S.I.N.S.*, 96 F.3d 1438 (Table) No. 96-1207 (4th Cir. 1996) (fondling an 11-year old is a crime involving moral turpitude); *Matter of S*, 5 I&N Dec. 686 (BIA 1954) (sexual assault against a woman without her consent is a crime involving moral turpitude); *Matter of M*, 2 I&N Dec. 17 (BIA 1944) (having sex with a woman of feeble mind where defendant knows she is feeble-minded is a crime involving moral turpitude).

A crime of aiding and abetting to commit a crime involving moral turpitude is a crime involving moral turpitude. *See, e.g., Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977). Therefore, a conviction for aiding and abetting a forcible sodomy under this statute is a crime involving moral turpitude.

Aggravated felony

Rape

A conviction under subsection (ii) is not likely to be an aggravated felony under 8 U.S.C. §1101(a)(43)(A) (rape) because there is no sexual intercourse involved. Both the common law and the Model Penal Code have defined rape as involving sexual intercourse. *See* WHARTON'S COMMON LAW, *Sexual Intercourse*, § 276; MODEL PENAL CODE § 213.1 (rape).

(i) Witness is younger than 13 years old

Sexual abuse of a minor

A conviction under subsection (i) of this statute is an aggravated felony under 8 U.S.C. §1101(a)(43)(A) (sexual abuse of a minor); *Pereira-Salmeron*, 337 F.3d 1148 (9th Cir. 2003) (holding that this Virginia statute is a sexual abuse of a minor conviction and therefore an aggravated felony under 8 U.S.C. §1101(a)(43)(A)).

Crime of violence

A conviction under this section of the statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. Several circuit courts have held that sexual offenses against a victim who does not have the capacity to understand the consequences is a crime of violence under 18 U.S.C. § 16(b). *See, e.g., Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005) (conviction for aggravated criminal sexual abuse, which requires a showing that the accused knew that the victim was unable to understand the nature of the act or unable to give consent is a crime of violence because the offense inherently involves a substantial risk that physical force may be used in committing the offense); *Chery v. Ashcroft*, 347 F.3d 404 (2d Cir. 2003) (conviction for sexual assault, which criminalizes sexual intercourse with a victim who is unable to give consent, is a crime of violence); *Sutherland v. Reno*, 347 F.3d 171 (2d Cir. 2000) (conviction for sexual assault and battery of a minor is a crime of violence because it involves non-consensual act upon another person); *see also Zaidi v. Ashcroft*, 374 F.3d 357 (5th Cir. 2004) (linking substantial risk of force to lack of consent). Therefore, a conviction under this section of the statute is a crime of violence under 18 U.S.C. § 16(b).

(ii) Act accomplished against the will of the complaining witness by force, threat, or intimidation

Crime of violence

A conviction under subsection (ii) of this statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. §1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is a crime of violence under 18 U.S.C. § 16(a) because there is an element of the use, attempted use, or threatened use of physical force against the person of another. *See Adsit v. Comm.*, No. 0882-98-2 (Va. Ct. App. 1999) (unpublished) (force required to sustain a conviction is some force other than merely the force required to accomplish the unlawful touching prohibited by statute).

(ii) Act accomplished against the will of the complaining witness through the use of the complaining witness's incapacity or physical helplessness

Crime of violence

A conviction under subsection (ii) involving sexual penetration through the use of the complaining witness's incapacity or physical helplessness is a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. §1101(a)(43)(F) if the sentence imposed is at least one year. *See, e.g., Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005) (conviction for aggravated criminal sexual abuse, which requires a showing that the accused knew that the victim was unable to understand the nature of the act or unable to give consent is a crime of violence because the offense inherently involves a substantial risk that physical force may be used in committing the offense); *Chery v. Ashcroft*, 347 F.3d 404 (2d Cir. 2003) (conviction for sexual assault, which criminalizes sexual intercourse with a victim who is unable to give consent, is a crime of violence); *Sutherland v. Reno*, 347 F.3d 171 (2d Cir. 2000) (conviction for sexual assault and battery of a minor is a crime of violence because it involves non-consensual act upon another person); *see also Zaidi v. Ashcroft*, 374 F.3d 357 (5th Cir. 2004) (linking substantial risk of force to lack of consent).

Aiding and abetting

The offense of aiding and abetting to commit an aggravated felony is an aggravated felony. *See Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007). Therefore, a conviction for aiding and abetting object sexual penetration under this statute is an aggravated felony.

Other immigration consequences

A conviction under this section will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(E) (crime relating to child abuse) if the offense is against a minor.

18.2-67.3 Aggravated sexual battery

Elements
sexual abuse
- complaining witness is less than 13 years of age; or
- act is accomplished through the use of the complaining witness's mental incapacity or physical helplessness; or
- act is accomplished by a parent, step-parent, grandparent, or step-grandparent and the complaining witness is at least 13 but less than 18 years of age; or
- act is accomplished against the will of the complaining witness by force, threat or intimidation and
  (i) the complaining witness is at least 13 but less than 15 years of age,
  (ii) the accused causes serious bodily or mental injury to the complaining witness, or
  (iii) the accused uses or threatens to use a dangerous weapon

Crime involving moral turpitude

Sexual battery of a witness who is a minor

A conviction under Va. Code Ann. § 18.2-67.3 for sexually battering a witness who is a minor is a crime involving moral turpitude. *See Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966) (conviction for taking indecent liberties with a nine-year old girl "without committing or intending to commit the crime of rape" is a crime involving moral turpitude); *see also Matter of W*, 5 I&N Dec. 239 (BIA 1953) (contributing to the delinquency of a minor offense that penalizes immoral actions involving young children is crime involving moral turpitude); *Matter of R*, 3 I&N Dec. 562 (BIA 1949) (carnal knowledge of a minor is a crime involving moral turpitude).

Sexual battery through the use of the witness's mental or physical incapacity

A conviction under Va. Code Ann. § 18.2-67.3 for sexual battery through the use of the witness's mental incapacity is a crime involving moral turpitude. *See Matter of M*, 2 I&N Dec. 17 (BIA 1944) (holding that the offense of having sex with a feeble-minded woman, knowing that she is feeble-minded, is a crime involving moral turpitude). Under the Virginia statute, a defendant is punished for committing sexual battery through the use of the complaining witness's mental or physical incapacity. Since the defendant must *use* the mental incapacity to commit the sexual battery, this wording requires some *mens rea* as to the knowledge of the mental or physical incapacity. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). Therefore, the offense is a crime involving moral turpitude.

Act accomplished against the will of witness by force, threat, intimidation and defendant causes serious bodily or mental injury

A conviction under this section of the Virginia aggravated sexual assault statute is a crime involving moral turpitude. The making of intentional threats has been held to involve moral turpitude. *See, e.g., Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999); *Matter of F*, 3 I&N Dec. 361 (BIA 1949).

Act accomplished against the will of witness by force, threat, intimidation and defendant uses or threatens to use a dangerous weapon.

A conviction under this section of the Virginia aggravated sexual assault statute is a crime involving moral turpitude. Assault with a deadly or dangerous weapon has generally been held to be a crime involving moral turpitude. *See, e.g., Yousefi v. U.S.I.N.S.*, 260 F.3d 318 (4th Cir. 2001); *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976). Because a requirement of a conviction for aggravated sexual battery under this subsection of the statute is the use or threatened use of a dangerous weapon, the offense is a crime involving moral turpitude. *See id.*; *see also Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999) (statute punishing threats to inflict physical injury upon another individual is a crime involving moral turpitude because intentional transmission of threats is evidence of a vicious or corrupt mind).

Aggravated felony

Sexual battery of a witness who is a minor

Sexual abuse of a minor

A conviction under this section of the statute is an aggravated felony under the sexual abuse of a minor category at 8 U.S.C. § 1101(a)(43)(A).

Crime of violence

A conviction under this section of the statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. Several circuit courts have held that sexual offenses against a victim who does not have the capacity to understand the consequences is a crime of violence under 18 U.S.C. § 16(b). *See, e.g., Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005) (conviction for aggravated criminal sexual abuse, which requires a showing that the accused knew that the victim was unable to understand the nature of the act or unable to give consent is a crime of violence because the offense inherently involves a substantial risk that physical force may be used in committing the offense); *Chery v. Ashcroft*, 347 F.3d 404 (2d Cir. 2003) (conviction for sexual assault, which criminalizes sexual intercourse with a victim who is unable to give consent, is a crime of violence); *Sutherland v. Reno*, 347 F.3d 171 (2d Cir. 2000) (conviction for sexual assault and battery of a minor is a crime of violence because it involves non-consensual act upon another person); *see also Zaidi v. Ashcroft*, 374 F.3d 357 (5th Cir. 2004) (linking substantial risk of force to lack of consent). Therefore, a conviction under this section of the statute is a crime of violence under 18 U.S.C. § 16(b).

Sexual battery through the use of the witness's mental or physical incapacity

Crime of violence

A conviction under this section of the statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. Several circuit courts have held that sexual offenses against a victim who does not have the capacity to understand the consequences is a crime of violence under 18 U.S.C. § 16(b). *See, e.g., Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005) (conviction for aggravated criminal sexual abuse, which requires a showing that the accused knew that the victim was unable to understand the nature of the act or unable to give consent is a crime of violence because the offense inherently

involves a substantial risk that physical force may be used in committing the offense); *Chery v. Ashcroft*, 347 F.3d 404 (2d Cir. 2003) (conviction for sexual assault, which criminalizes sexual intercourse with a victim who is unable to give consent, is a crime of violence); *Sutherland v. Reno*, 347 F.3d 171 (2d Cir. 2000) (conviction for sexual assault and battery of a minor is a crime of violence because it involves non-consensual act upon another person); *see also Zaidi v. Ashcroft*, 374 F.3d 357 (5th Cir. 2004) (linking substantial risk of force to lack of consent). Therefore, a conviction under this section of the statute is a crime of violence under 18 U.S.C. § 16(b).

Act accomplished against the will of witness by force, threat, intimidation and defendant causes serious bodily or mental injury or uses a dangerous weapon.

Crime of violence

A conviction under this section of the aggravated sexual battery statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this section of the statute is a crime of violence under 18 U.S.C. § 16(a) because it has as an element the use, attempted use, or threatened use of physical force against the person of another, since the statute punishes a defendant for accomplishing the battery by force, threat, or intimidation. Therefore, a conviction under this section of the statute is a crime of violence under 18 U.S.C. § 16(b).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(E) (crime relating to child abuse) if the crime is against a minor.

18.2-67.4 Sexual battery

Elements

- sexual abuse
- against the will of the complaining witness
- by force, threat, intimidation or ruse

"Sexual abuse," which is defined in Va. Code Ann. § 18.2-67.10, means an act committed with the intent to sexually molest, arouse, or gratify any person, where:

(a) The accused intentionally touches the complaining witness's intimate parts or material directly covering such intimate parts;

(b) The accused forces the complaining witness to touch the accused's, the witness's own, or another person's intimate parts or material directly covering such intimate parts;

(c) If the complaining witness is under the age of 13, the accused causes or assists the complaining witness to touch the accused's, the witness's own, or another person's intimate parts or material directly covering such intimate parts; or

(d) The accused forces another person to touch the complaining witness's intimate parts or material directly covering such intimate parts.

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. *See Matter of S*, 5 I&N Dec. 686 (BIA 1954) (holding that an indecent assault statute, which punished the indecent assault on any female without her consent, was a crime involving moral turpitude); *see also Matter of Z*, 7 I&N Dec. 253 (BIA 1956) (indecent assault, which is defined as the act of taking indecent liberties with a female or fondling her in a lewd and lascivious manner without her consent and against her will without the intent to commit rape, is a crime involving moral turpitude). The Virginia sexual battery statute requires that the sexual abuse be against the will of the complaining witness, so the lack of consent by the witness is a required element of the statute. Therefore, the Virginia statute for sexual battery is a crime involving moral turpitude.

The statute also punishes a defendant for causing or assisting another to participate in the sexual battery. The offense of aiding and abetting is a crime involving moral turpitude if the underlying offense is a crime involving moral turpitude. *See Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977). Because the underlying offense is a crime involving moral turpitude, the aiding and abetting of such offense is also a crime involving moral turpitude.

Aggravated felony

Crime of violence

The Fourth Circuit in *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000), held that a conviction under Va Code Ann. § 18.2-67.4 is a crime of violence and is therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. However, this holding is not conclusive because the non-citizen in *Wireko* only argued that his conviction under this statute could not be an aggravated felony due to its classification as a misdemeanor. The Fourth Circuit rejected this argument and indicated in a footnote that the respondent did not argue that sexual battery is not a crime of violence.

Several federal courts have decided that sexual battery statutes involving a victim who cannot give consent are crimes of violence under 18 U.S.C. § 16(b) because such a sexual battery involves a substantial risk that physical force may be used in the commission of the offense. *See, e.g., Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005) (sexual battery where the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent was a crime of violence under 18 U.S.C. § 16(b)); *Zaidi v. Ashcroft*, 374 F.3d 357 (5th Cir. 2004) (sexual battery statute punishing the intentional touching, mauling or feeling the body or private parts of a child in a lewd and lascivious manner was a crime of violence under 18 U.S.C. § 16(b). These courts did not address whether sexual battery was a crime of violence under 18 U.S.C. § 16(a) and therefore, the holding in these cases does not affect the analysis of whether a conviction under Va. Code Ann. § 18.2-67.4 is a crime of violence because a conviction under this statute is a misdemeanor only. Therefore, the Virginia statute is not analyzed under 18 U.S.C. § 16(b).

Sexual abuse by ruse

Crime of violence

A conviction under this section of the statute is probably not a crime of violence under 18 U.S.C. § 16(a) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year.

Federal courts have held that certain sexual assault statutes did not have, as an element, the use, attempted use, or threatened use of physical force against the person of another. *See U.S. v. Sarmiento-Funes*, 374 F.3d 336 (5th Cir. 2004) (holding that a sexual assault statute that punished the nonconsensual penetration of another person did not have as an element the use of force because a defendant could be convicted under the statute for mere penetration); *U.S. v. Matute-Galdamez*, 111 Fed Appx. 264 (5th Cir. 2004) (unpublished) (holding that a conviction under a statute punishing sexual touching included offenses where consent was obtained through deception or impaired judgment by intoxication and therefore was not a crime of violence); *U.S. v. Arnold*, 58 F.3d 1117 (6th Cir. 1995) (holding that a sexual battery statute that punished unlawful sexual conduct with another person accompanied by circumstances including coercion or the defendant's knowledge of the victim's mental or physical incapacity did not have as an element the use of force). Following these circuit courts' interpretations of these similar statutes, it is possible that a conviction under this section of Va. Code Ann. § 18.2-67.4 is not a crime of violence under 18 U.S.C. § 16(a) because a conviction under this section of the statute does not require that the defendant use physical force to inflict injury. Rather, the Virginia statute punishes sexual battery through the use of "ruse," a type of deception.

However, the Virginia Court of Appeals has held that in order to be punished under this statute, a defendant must overcome the will of the complaining witness, which requires the use of some force other than the merely the force required to accomplish the unlawful touching. *Johnson v. Comm.*, 365 S.E.2d 237 (Va. Ct. App. 1988). The Virginia Court of Appeals in *Johnson* distinguished a touching under this statute from the touching that is involved with an assault and battery. Therefore, a conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16(a) because the Virginia Court of Appeals has read in the use of force as required element of the statute.

Sexual abuse by force, threat or intimidation

Crime of violence

A conviction for sexually abusing a victim by force, threat or intimidation is a crime of violence under 18 U.S.C. § 16(a). A conviction under this section has as an element the use or threatened use of physical force because the act is accomplished through force, threat or intimidation.

Sexual abuse (= by touching minor) by force, threat, intimidation or ruse

Crime of violence

A conviction under this section of the statute may not be a crime of violence under 18 U.S.C. § 16(a) because a defendant can be convicted under this statute for *de minimus* touching. *Johnson v. Comm.*, 365 S.E.2d 237 (Va. Ct. App. 1988) (holding that a conviction under Va. Code Ann. § 18.2-67.4 requires the use of some force other than the merely the force required to accomplish the unlawful touching, except in the case of a

sexual battery against a minor); *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003) (holding that a battery statute punishing *de minimus* touching is not a crime of violence under 18 U.S.C. § 16(a)).

Sexual abuse of a minor

A conviction under this section of the statute is an aggravated felony under 8 U.S.C. §1101(a)(43)(A), sexual abuse of a minor.

Aiding and abetting

This statute also punishes a defendant for encouraging another or aiding in the commission of a sexual assault. A conviction for aiding and abetting an aggravated felony is an aggravated felony. *See Gonzales v. Deunas-Alvarez*, 127 S. Ct. 815 (2007).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(E) (crime relating to child abuse) if the offense is committed against a minor.

18.2-67.5 Attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because an attempt to do any offense that is a crime involving moral turpitude is a crime involving moral turpitude. *See generally Matter of Katsanis*, 14 I&N Dec. 266 (BIA 1973) (attempt requires specific intent to commit substantive crime, and if doing so is a crime involving moral turpitude, the attempt to do the crime is also a crime involving moral turpitude because it is in the intent that moral turpitude inheres). All of the underlying offense are crimes involving moral turpitude. *See* analysis for Va. Code Ann. §§ 18.2-61 (rape); 18.2-67.1 (forcible sodomy); 18.2-67.2 (object sexual penetration); 18.2-67.3 (aggravated sexual battery); 18.2-67.4 (sexual battery).

Aggravated felony

A conviction for attempt to commit an aggravated felony is an aggravated felony if the underlying offense is an aggravated felony. 8 U.S.C. § 1101(a)(43)(U); *see also* analysis for Va. Code Ann. §§ 18.2-61 (rape); 18.2-67.1 (forcible sodomy); 18.2-67.2 (object sexual penetration); 18.2-67.3 (aggravated sexual battery); 18.2-67.4 (sexual battery).

CRIMES INVOLVING FIREARMS

18.2-53 Shooting, etc., in committing or attempting a felony

Elements
- in commission of or attempt to commit a felony
- unlawfully
- shoot, stab, cut or wound another person

Crime involving moral turpitude

A conviction under this Virginia statute is a crime involve moral turpitude. *See Matter of P*, 7 I&N Dec. 376 (BIA 1956) (maiming or wounding by assault and battery is unquestionably a crime involve moral turpitude); *Matter of Medina*, 16 I&N Dec. 611 (BIA 1976) (assault with a deadly weapon is a crime involve moral turpitude). Also, offenses involving the use of firearms, as opposed to the mere possession of firearms, are generally crimes involving moral turpitude. *See, e.g.*, *Matter of S*, 8 I&N Dec. 344 (BIA 1959).

Aggravated felony

Crime of violence

A conviction under this statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute has as an element the use, attempted use, or threatened use of physical force as required by 18 U.S.C. §16(a). The discharge of a firearm is generally held to involve the use of force. *See, e.g.*, *Quezada-Luna v. Gonzales*, 439 F.3d 403 (7th Cir. 2006); *U.S. v. Alfaro*, 408 F.3d 204 (5th Cir. 2005); *Nguyen v. Ashcroft*, 366 F.3d 386 (5th Cir. 2004). Shooting, stabbing, cutting, or wounding all have an element of the use of force, and are violent in nature as contemplated by the definition of crime of violence at 18 U.S.C. §16. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004).

Firearms

A conviction under this statute is possibly an aggravated felony as a firearms offense under 8 U.S.C. § 1101(a)(43)(E). 8 U.S.C. §1101(a)(43)(E)(i) specifies that any offense described in 18 U.S.C. §844(h) is an aggravated felony. 18 U.S.C. § 844(h) punishes a defendant for (1) using fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or (2) carrying an explosive during the commission of any felony that may be prosecuted in a court of the United States.

The Fourth Circuit in *U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2002), decided that "use of an explosive" as defined under 18 U.S.C. § 844(j) means discharging a firearm. The Court was deciding whether a defendant's discharge of a firearm was a "use" of an "explosive" within the meaning of USSG § 2K1.4. The court referenced the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(E)(i). The Fourth Circuit reasoned that the definition at 18 U.S.C. § 844(j) included gunpowders as an "explosive." Therefore, discharging a firearm involves the use of an explosive because shooting the firearm requires an explosion to expel a projectile from a firearm.

Va. Code Ann. § 18.2-53 criminalizes the shooting, stabbing, or wounding of another person in the commission of a felony and not all convictions require the use of a firearm. If the conviction is for shooting, the offense is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i), as an offense classified under 18 U.S.C. § 844(h)(1) because the offense involves using an explosive (i.e. discharging a weapon) in the commission of a felony, since this offense is a felony. Therefore, whether this offense is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i) depends on whether the defendant shot a firearm in the commission of the offense.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. §1227(a)(2)(C) if the weapon that he was convicted of using is a firearm as described in 18 U.S.C. § 921(a)(3). It is necessary to consult the record of conviction because not all offenses punishable under this statute would lead to deportation under 8 U.S.C. § 1227(a)(2)(C). For example, a non-citizen is not deportable under this section if he is convicted for stabbing or cutting another person, as weapons used for stabbing and cutting are not weapons described in 18 U.S.C. § 921(a)(3).

18.2-53.1 Use or display of firearm in committing felony

Elements

- use or attempt to use
- pistol, shotgun, rifle, or other firearm
- or display such weapon
- in threatening manner
- while committing or attempting to commit murder, rape, forcible sodomy, inanimate or animate sexual penetration, robbery, carjacking, burglary, malicious woundings, abduction

Crime involving moral turpitude

Use or attempted use of weapon while committing offense

A conviction under this section of the statute is a crime involving moral turpitude. One district court has held in dictum that a conviction under Va. Code Ann. § 18.2-53.1 is a crime involving moral turpitude. *See U.S. v. Brown*, 127 F. Supp. 2d 392 (W.D.N.Y. 2000). The court reasoned that because this is a crime involving a "corrupt scienter" and is "accompanied by a vicious motive or a corrupt mind," it is a crime involve moral turpitude.

The BIA has held that carrying a concealed weapon with intent to use it against the person of another is a crime involving moral turpitude. *See Matter of S*, 8 I&N Dec. 344 (BIA 1959). The BIA interpreted a statute punishing the willful, unlawful, wrongful and knowing carrying of a concealed dangerous weapon with intent to use it against a person. The BIA found that the essence of the offense was carrying the dangerous weapon with a base, evil, and vicious intent to injure another. Because of the vicious intent to use the weapon, the BIA found that it was a crime involve moral turpitude.

Because this section of the Virginia statute punishes the use or attempted use of a firearm while committing the other offense, this is a crime involving moral turpitude.

The use of a weapon is a crime involve moral turpitude, whereas the mere possession of a weapon is not a crime involving moral turpitude. Moreover, the attempted use of a weapon is a crime involve moral turpitude because the underlying offense is a crime involve moral turpitude. *See generally Matter of Katsanis*, 14 I&N Dec. 266 (BIA 1973) (attempt requires specific intent to commit substantive crime, and if doing so is a crime involve moral turpitude, the attempt to do the crime is also a crime involve moral turpitude because it is in the intent that moral turpitude inheres).

Display weapon in threatening manner while committing other offense

A conviction under this section of the statute is probably a crime involving moral turpitude. One district court has held in dictum that a conviction under Va. Code Ann. § 18.2-53.1 is a crime involving moral turpitude. *See U.S. v. Brown*, 127 F. Supp. 2d 392 (W.D.N.Y. 2000). The court reasoned that because this is a crime involving a "corrupt scienter" and is "accompanied by a vicious motive or a corrupt mind," it is a crime involving moral turpitude. The court did not distinguish between the various sections of the statute to conclude that this offense was a crime involving moral turpitude.

The BIA has held that brandishing a weapon is not necessarily a crime involving moral turpitude. *See Matter of G-R-*, 2 I&N Dec. 733 (BIA 1947). In *Matter of G-R-*, the BIA interpreted a statute punishing assault with a weapon, which was a crime involving moral turpitude. The BIA discussed the difference between assault with a weapon and the mere brandishing of a weapon. The difference between the offenses was that the assault required the actual use of the weapon against another person or attempt to use the weapon (the intent to do bodily harm coupled with the present ability to do so), whereas the mere brandishing did not require any use of the weapon or present ability to use the weapon against another person. This language suggests that brandishing a weapon is less serious than assault with a weapon and that therefore, a conviction for brandishing a weapon is not a crime involving moral turpitude. However, since the Virginia statute punishes displaying a weapon in a threatening manner, a conviction under this statute is probably a crime involving moral turpitude. *See Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999) (credible threats can be a crime involving moral turpitude).

Aggravated felony

Crime of violence

A conviction under this statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under Va. Code Ann. § 18.2-53.1 consists of two elements: (1) the use of a firearm; (2) while committing or attempting to commit murder, rape, forcible sodomy, inanimate or animate object sexual penetration as defined in Va. Code Ann. § 18.2-67.2, robbery, carjacking, burglary, malicious wounding as defined in Va. Code Ann. § 18.2-51, malicious bodily injury to a law-enforcement officer as defined in Va. Code Ann. § 18.2- 51.1, aggravated malicious wounding as defined in Va. Code Ann. § 18.2-51.2, malicious wounding by mob as defined in Va. Code Ann. § 18.2-41 or abduction. All of these underlying offenses or attempted offenses are crimes of violence under 18 U.S.C. § 16 and therefore aggravated felonies with the possible exception of abduction. *See* analysis for underlying statutes. Therefore, a conviction under Va. Code Ann. § 18.2-53.1 is a crime of violence if the underlying crime is a crime of violence. If

the defendant is punished for attempted use of a firearm while in the commission of one of the above-listed offenses, this conviction is an attempted crime of violence and therefore is an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(F) and (U) if the sentence imposed is at least one year.

Firearms

A conviction under this statute is possibly an aggravated felony as a firearms offense under 8 U.S.C. § 1101(a)(43)(E). 8 U.S.C. §1101(a)(43)(E)(i) specifies that any offense described in 18 U.S.C. §844(h) is an aggravated felony. 18 U.S.C. § 844(h) punishes a defendant for (1) using fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or (2) carrying an explosive during the commission of any felony that may be prosecuted in a court of the United States.

The Fourth Circuit in *U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2002), decided that "use of an explosive" as defined under 18 U.S.C. § 844(j) means discharging a firearm. The Court was deciding whether a defendant's discharge of a firearm was a "use" of an "explosive" within the meaning of USSG § 2K1.4. The court referenced the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(E)(i). The Fourth Circuit reasoned that the definition at 18 U.S.C. § 844(j) included gunpowders as an "explosive." Therefore, discharging a firearm involves the use of an explosive because shooting the firearm requires an explosion to expel a projectile from a firearm.

Va. Code Ann. § 18.2-53.1 criminalizes the use or display of a firearm in the commission of a felony and not all convictions require the use of a firearm. If the conviction is for shooting, the offense is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i), as an offense classified under 18 U.S.C. § 844(h)(1) because the offense involves using an explosive (i.e. discharging a weapon) in the commission of a felony, since this offense is a felony. Therefore, whether this offense is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i) depends on whether the defendant shot a firearm in the commission of the offense.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. §1227(a)(2)(C) if the weapon that he was convicted of using is a firearm as described in 18 U.S.C. § 921(a)(3). All of the weapons listed in the offense are described in 18 U.S.C. § 921(a)(3). Therefore, a conviction under this section will lead to deportability under 8 U.S.C. §1227(a)(2)(C).

18.2-56.1 Reckless handling of firearm

Elements

(A) class 1 misdemeanor
- handle recklessly any firearm
- so as to endanger the life, limb or property of any person

(B) class 1 misdemeanor
- person who lost hunting license has been revoked due to violation of Va. Code Ann. § 18.2-56.1(A) and hunts in possession of a firearm

Crime involving moral turpitude

(A) Recklessly handling firearm

A conviction under this section of the statute is not a crime involving moral turpitude. The BIA held that reckless conduct is only a crime involving moral turpitude if the reckless conduct causes serious bodily injury. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994). A conviction under this statute is not a crime involving moral turpitude because the statute punishes reckless acts that bring about simple bodily injury, which is not a crime involving moral turpitude. The statute also punishes a person for recklessly damaging property; the BIA has held the destruction of property is not a crime involving moral turpitude unless there is malicious destruction of property. *See, e.g., Matter of C*, 2 I&N Dec. 716 (BIA 1947); *Matter of B*, 2 I&N Dec. 867 (BIA 1947).

(D) Possessing firearm after license taken away for previous conviction

A conviction under this section of the statute is not a crime involving moral turpitude. The BIA has held that driving while under the influence is a crime involving moral turpitude when the statute punished DUI on a suspended license due to a prior DUI. *See Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999). In *Lopez-Meza*, the BIA interpreted a statute that punished aggravated DUI, where the offender "knowingly" drove under the influence with a suspended, canceled, revoked, or refused license. By analogy, a conviction under Va. Code Ann. § 18.2-56.1(B) is not a crime involving moral turpitude because the Virginia statute does not punish recklessly handing a firearm on a suspended license, but rather punishes a defendant for mere possession of a firearm after the person's hunting license has been suspended. Therefore, a conviction under this statute is not a crime involving moral turpitude.

Aggravated felony

(A) Recklessly handling firearm

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. The offense is a misdemeanor only, and therefore is analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b). This section of the statute does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another.

In *Darnell v. Comm.*, 370 S.E.2d 717 (Va. 1988), the Virginia Supreme Court held that the "reckless" conduct punishable under Va. Code Ann. § 18.2-56.1 is less culpable than the conduct necessary for involuntary manslaughter, but the conduct must be more than that necessary for ordinary negligence. The court decided that the culpable conduct necessary for reckless conduct falls between the criminal negligence necessary for involuntary manslaughter and ordinary negligence.

Because the *mens rea* of this offense is recklessness, a conviction under this statute is not a crime of violence under the reasoning of the Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). The court decided that an offense must have a *mens rea* of more than accidental or negligent conduct in order to be a crime of violence under 18 U.S.C. § 16. The Fourth Circuit in *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir.

2005) decided that involuntary manslaughter under Va. Code Ann. § 18.2-36 was not an aggravated felony because the *mens rea* was not sufficient to meet the definition of crime of violence in 18 U.S.C. § 16. According to the Virginia Supreme Court in *Darnell*, the *mens rea* for involuntary manslaughter in Virginia is more culpable than the *mens rea* for recklessly handling a firearm under Va. Code Ann. § 18.2-56.1. The *mens rea* for this section of the statute, therefore, has a lower level of culpability than the statute interpreted in *Bejarano*. *See id.*; *see also Matter of Martin*, 23 I&N Dec. 491 (BIA 2002) (holding that a statute must have a *mens rea* of intentional conduct in order for it to be a crime of violence under 18 U.S.C. § 16(a)). For this reason, a conviction under this section of the statute is not a crime of violence.

(D) Possessing firearm after license taken away for previous conviction

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. This section of the Virginia statute has no *mens rea*; therefore, it is not a crime of violence under the Supreme Court's reasoning in *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

Firearms

A conviction under this section of the statute is not an aggravated felony as a firearms offense in 8 U.S.C. § 1101(a)(43)(E)(ii). This section of the Virginia statute does not have the same elements of the possession of a firearm by a convicted felon under 18 U.S.C. § 922(g)(1), which is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii). A conviction for reckless handling of a firearm under Va. Code Ann. § 18.2-56.1(A) which causes a person to lose his hunting license is a misdemeanor, not a felony. Therefore, a person who has been convicted under this statute previously and possesses a firearm illegally is not punished as a felon in possession of a firearm.

Other immigration consequences

A conviction under this statute may lead to deportability under 8 U.S.C. § 1227(a)(2)(C). A defendant is deportable under 8 U.S.C. §1227(a)(2)(C) if the weapon that he was convicted of recklessly handling is a firearm as described in 18 U.S.C. § 921(a)(3).

18.2-56.2 Recklessly leaving unsecured firearm around juveniles

Elements

(A) class 3 misdemeanor

- recklessly leaves a loaded unsecured firearm
- in such a manner as to endanger the life and limb or any child under 14

(B) class 1 misdemeanor

- knowingly
- authorize a child under 12 to use a firearm except when under the supervision of an adult

Crime involving moral turpitude

(A) Recklessly leaving loaded unsecured firearm

A conviction under this section of the statute is not a crime involving moral turpitude. The BIA held that reckless conduct is only a crime involving moral turpitude if the reckless conduct causes serious bodily injury. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994). A conviction under this section of the statute is not a crime involving moral turpitude because the statute punishes reckless acts that bring about simple bodily injury, which the BIA does not consider to be a crime involving moral turpitude.

(B) Knowingly authorizing child to use firearm

A conviction under this section of the statute is probably a crime involving moral turpitude. Offenses involving the use of firearms, as opposed to the mere possession of firearms, are generally crimes involving moral turpitude. *See, e.g., Matter of S*, 8 I&N Dec. 344 (BIA 1959). This statute punishes the aiding and abetting of a child's use of a firearm. Generally, aiding and abetting offenses are part of the substantive offense for the purposes of determining whether a crime involves moral turpitude. *See, e.g., Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977).

Aggravated felony

(A) Recklessly leaving loaded unsecured firearm

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is a misdemeanor only, so it is analyzed under 18 U.S.C. § 16(a) and not 18 U.S.C. § 16(b). Va Code Ann. § 18.2-56.2(A) is not a crime of violence under 18 U.S.C. § 16(a) because it lacks an element of the use, attempted use, or threatened use of physical force. A conviction under this statute is based upon the endangerment of a child from reckless conduct of a gun owner. Acting in a reckless manner that results in a threat of physical injury are the elements of the statute; there is no element of physical force against the person or property of another. The statute has no element of the use of force; the defendant only needs to leave the loaded, unsecured gun out in the presence of children. *See U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (statute punishing causing injury to a child by omission is not a crime of violence under 18 U.S.C. § 16).

In addition, the statute does not have a *mens rea* of intentional conduct and therefore is not a crime of violence. In *Matter of Martin*, the BIA held that in order for an offense to be a crime of violence under 18 U.S.C. § 16(a), the offense must have a *mens rea* of intentional conduct. Because this statute punishes reckless conduct, it is not a crime of violence under 18 U.S.C. § 16(a).

(B) Knowingly authorizing child to use firearm

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is a misdemeanor only, so it is

analyzed under 18 U.S.C. § 16(a) and not 18 U.S.C. § 16(b). Va Code Ann. §18.2-56.2(B) is not a crime of violence under 18 U.S.C. § 16(a) because it does not have as an element the use, attempted use, or threatened use of physical force. A conviction under this statute requires that the defendant have authorized a child under 12 to use a firearm without adult supervision. There is no use of force as an element of the statute. Although the statute punishes knowing conduct, which would be a sufficiently culpable *mens rea* under the BIA's reasoning *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002), the offense does not have as an element of use of force against person or property and therefore is not a crime of violence.

Other immigration consequences

A conviction under this statute will possibly render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(C) because the statute punishes a defendant for the use of a firearm. It is necessary for the firearm to be describe in 18 U.S.C. § 921(a) in order for this offense to render the non-citizen deportable.

18.2-154 Shooting at or throwing missiles, etc., at train, car, vessel

Elements

- maliciously or unlawfully
- shoots at or throws missiles at or against
- any train or car on any railroad or transportation company, vessel, watercraft, motor vehicle, or other vehicle
- when occupied by one or more persons
- whereby the life of an occupant may be put in peril

Crime involving moral turpitude

Malicious shooting or throwing missiles at vehicle, train, etc.

A conviction under this statute is a crime involving moral turpitude. *See Matter of Muceros*, A42-998-610 (BIA Index May 11, 2000); *see also Recio-Prado v. Gonzales*, 456 F.3d 819 (8th Cir. 2006) (holding that a statute punishing the malicious, intentional, and unauthorized discharge of a firearm at a dwelling in which there is a human being is a crime involving moral turpitude). In *Matter of Muceros*, the BIA held that a statute punishing the willful and malicious discharging of a firearm at an inhabited dwelling, occupied building, or occupied motor vehicle was a crime involving moral turpitude. The BIA reasoned that the offense involved moral turpitude for two reasons: (1) the intent element of the offense was willful and malicious, which indicated a guilty mind; and (2) the offense required that the defendant shoot at an occupied vehicle, which means that someone was inside. The potential for injury or death in that situation indicated the depravity of the crime.

Because the Virginia statute also contains the element of willful and malicious shooting at an occupied dwelling, it is likely that a conviction under this statute will involve moral turpitude.

Generally, the use of firearms is a crime involving moral turpitude. *See, e.g., U.S. v. Brown*, 127 F. Supp. 2d 392 (W.D.N.Y. 2000) (reasoning that a conviction under a Virginia statute for using or displaying a firearm while attempting to commit another felony is a crime involving moral turpitude because it demonstrates a vicious or corrupt

mind); *Matter of S*, 8 I&N Dec. 344 (BIA 1959) (carrying a concealed deadly weapon with intent to use it against the person of another involves moral turpitude). The statute interpreted by the BIA in *Matter of S* punished the unlawful, willful, wrongful and knowing carrying of a concealed weapon on the defendant's person with the intent to use it against the person of another. The BIA reasoned that because the use of a weapon against another is motivated by an evil, base, or vicious intent, the offense was a crime involving moral turpitude.

Unlawful shooting or throwing missiles at vehicle, train, etc.

A conviction under this statute for unlawfully shooting or throwing a missile at a vehicle, etc. is probably not a crime involving moral turpitude because the statute does not punish intentional shooting at persons or property. *Cf. Recio-Prado v. Gonzales*, 456 F.3d 819 (8th Cir. 2006) (holding that a statute punishing the malicious, intentional, and unauthorized discharge of a firearm at a dwelling in which there is a human being is a crime involving moral turpitude); *Matter of Muceros*, A42-998-610 (BIA Index May 11, 2000) (holding that maliciously discharging a firearm at an occupied dwelling, etc. was a crime involving moral turpitude). Generally, statutes that have no *mens rea* are not crimes involving moral turpitude. Even if the *mens rea* is recklessness, the BIA has held that a statute must have a *mens rea* of recklessness plus causation of serious bodily injury for it to be a crime involving moral turpitude. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996). This offense requires that the defendant shoot or throw missiles in such a way that life would be put in peril, but does not require that the defendant actually injure anyone. Therefore, a conviction under this statute for unlawfully shooting or throwing a missile is probably not a crime involving moral turpitude.

Aggravated Felony

Malicious shooting at or throwing missiles at or against a vehicle, etc.

Firearms

A conviction under this statute is probably an aggravated felony as a firearms offense under 8 U.S.C. § 1101(a)(43)(E). 8 U.S.C. §1101(a)(43)(E)(i) specifies that any offense described in 18 U.S.C. §844(h) is an aggravated felony. 18 U.S.C. § 844(h) punishes a defendant for (1) using fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or (2) carrying an explosive during the commission of any felony that may be prosecuted in a court of the United States.

The Fourth Circuit in *U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2002), decided that "use of an explosive" as defined under 18 U.S.C. § 844(j) means discharging a firearm. The Court was deciding whether a defendant's discharge of a firearm was a "use" of an "explosive" within the meaning of USSG § 2K1.4. The court referenced the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(E)(i). The Fourth Circuit reasoned that the definition at 18 U.S.C. § 844(j) included gunpowders as an "explosive." Therefore, discharging a firearm involves the use of an explosive because shooting the firearm requires an explosion to expel a projectile from a firearm.

If the conviction is for malicious shooting, the offense is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i), as an offense described in 18 U.S.C. § 844(i), which

punishes a defendant for maliciously attempting to damage or destroy, by fire or explosive, any building, vehicle, or other property. If the defendant discharges a firearm against a building maliciously as punishable under Va. Code Ann. § 18.2-154, this offense can be classified as maliciously attempting to destroy or damage property by means of fire or explosive. This offense can also be classified under 18 U.S.C. § 844(h)(1) because the offense involves using an explosive (i.e. discharging a weapon) in the commission of a felony, since this offense is a felony.

If the defendant is convicted under Va. Code Ann. § 18.2-154 for maliciously throwing a missile at or against any vehicle, this offense is possibly an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i) because the offense has the same elements as 18 U.S.C. § 844(i), attempted malicious destruction of property by means of fire or explosive. The term "missile" is not defined by this Virginia statute or its annotations, but a conviction for throwing a missile against property under Va. Code Ann. § 18.2-154 can be a firearms offense if the "missile" fits the definition of one of the "explosives" described in 18 U.S.C. § 844(j).

The definition of "missile" under 18 U.S.C. § 844(j) is: "gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion." Therefore, whether this offense is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i) depends on the missile as described in the record of conviction.

Crime of violence

A conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this section of the statute requires that the defendant maliciously discharge the firearm or shoot the missile at an occupied vehicle. Such actions involve as an element the use, attempted use or threatened use of physical force against the person or property of another.

The discharge of a firearm is generally held to involve the use of force. *See, e.g., Quezada-Luna v. Gonzales*, 439 F.3d 403 (7th Cir. 2006); *U.S. v. Alfaro*, 408 F.3d 204 (5th Cir. 2005); *Nguyen v. Ashcroft*, 366 F.3d 386 (5th Cir. 2004). The malicious throwing of a missile against the vehicle of another is probably a crime of violence under 18 U.S.C. § 16(a) because the offense likely has as an element the use, attempted use, or threatened use of physical force against the person or property of another.

Unlawful shooting at or throwing missiles at or against vehicle, etc.

Aggravated felony

Firearms

A conviction under this statute is probably an aggravated felony as a firearms offense under 8 U.S.C. § 1101(a)(43)(E). 8 U.S.C. §1101(a)(43)(E)(i) specifies that any offense described in 18 U.S.C. § 844(i) is an aggravated felony. 18 U.S.C. § 844(h) punishes a person for (1) using fire or an explosive to commit any felony that may be

prosecuted in a court of the United States, or (2) carrying an explosive during the commission of any felony that may be prosecuted in a court of the United States.

The Fourth Circuit in *U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2002), decided that "use of an explosive" as defined under 18 U.S.C. § 844(j) means discharging a firearm. The Court was deciding whether a defendant's discharge of a firearm was a "use" of an "explosive" within the meaning of USSG § 2K1.4. The court referenced the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(E)(i). The Fourth Circuit reasoned that the definition at 18 U.S.C. § 844(j) included gunpowders as an "explosive." Therefore, discharging a firearm involves the use of an explosive because shooting the firearm requires an explosion to expel a projectile from a firearm.

If the conviction is for "unlawful" shooting, the offense is not described in 18 U.S.C. § 844(i) because it is not a malicious destruction of property by means of fire or explosive or an attempt to do the same. However, the unlawful discharge of a firearm against property can meet the definition of 18 U.S.C. § 844(h)(1) because the defendant must use explosives to commit any felony. This offense is a felony and therefore is probably an offense described in 18 U.S.C. § 844(h)(1).

If the conviction is for unlawful throwing of missiles at or against a vehicle, it is probably an aggravated felony if the missile is an "explosive" described in the definition at 18 U.S.C. § 844(j) because the offense would be punishable under 18 U.S.C. § 844(h)(1) as the use of explosives to commit any felony.

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this section of the statute is probably not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute for unlawful conduct is probably not a crime of violence under 18 U.S.C. § 16(a) because the offense has no *mens rea*. The Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held that in order for an offense to be a crime of violence under 18 U.S.C. § 16(a), the statute must have a *mens rea* more culpable than negligence. *Id.*; *see also Matter of Martin*, 23 I&N Dec. 491 (BIA 2002) (convictions that require proof of the intentional infliction of physical injury have as an element the use of physical force).

Crime of violence - 18 U.S.C. § 16(b)

A conviction for unlawful throwing of a missile or shooting against a vehicle is probably not a crime of violence under 18 U.S.C. § 16(b) as an offense where there is a substantial risk that force may be used against the person or property of another. The offense of unlawful shooting or throwing a missile at or against a vehicle, etc., does not have any *mens rea*, which the Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held to be necessary for an offense to be a crime of violence under 18 U.S.C. § 16(b). *See id.*; *see also Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005) (holding that for an offense to be a crime of violence under 18 U.S.C. § 16(b), there must be a *mens rea* of intentional conduct). There is no risk that the defendant will *intentionally* use force against person or property if the defendant *unintentionally* shoots at or throws a missile at or against a vehicle or train. There is risk that injury to property or person will result. The Supreme Court in *Leocal* specifically held that 18 U.S.C. § 16(b) does not apply to offenses where there is a risk of resulting physical injury only, rather the statute

applies to offenses where there is the risk of use of force against the person or property of another. *See id.*; *see also U.S. v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001) (holding that for an offense to be a crime of violence under 18 U.S.C. § 16(b), the offense must be of the nature that there is a risk that the defendant will intentionally use force against the person or property of another).

Other immigration consequences

A conviction under this section will render a non-citizen deportable under 8 U.S.C. §1227(a)(2)(C) if the weapon that he was convicted of using is a firearm as described in 18 U.S.C. § 921(a)(3). It is necessary to consult the record of conviction because not all offenses punishable under this statute would lead to deportation under 8 U.S.C. § 1227(a)(2)(C).

18.2-279 Discharging firearms or missiles within or at building or dwelling house

Elements

Malicious shooting

- maliciously
- discharges firearm
- within any building when occupied by one or more persons
- in such a manner as to endanger the life or lives of such person or persons
- or maliciously shoots at or maliciously throws any missile at or against any dwelling house or other building when occupied by one or more persons, whereby the life or lives of any such person may be put in peril
- if the person dies, guilty of murder

unlawful shooting

- unlawfully, not maliciously
- if death, guilty of involuntary manslaughter

school shooting

- willfully
- discharges firearm or shoots
- at any school building whether occupied or not

Crime involving moral turpitude

Malicious shooting at building or dwelling house

A conviction under this section of the statute is probably a crime involving moral turpitude. *See Matter of Muceros*, A42-998-610 (BIA Index May 11, 2000); *see also Recio-Prado v. Gonzales*, 456 F.3d 819 (8th Cir. 2006) (holding that a statute punishing the malicious, intentional, and unauthorized discharge of a firearm at a dwelling in which there is a human being is a crime involving moral turpitude). In *Matter of Muceros*, the BIA held that a statute punishing the willful and malicious discharging of a firearm at an inhabited dwelling, occupied building, or occupied motor vehicle was a crime involving moral turpitude. The BIA reasoned that the offense involved moral turpitude for two reasons: (1) the intent element of the offense was willful and malicious, which indicated a guilty mind; and (2) the offense required that the defendant shoot at an occupied vehicle, which means that someone was inside. The potential for injury or death in that situation indicated the depravity of the crime.

Because the Virginia statute also has the element of willful and malicious shooting at an occupied dwelling, a conviction under this statute is probably a crime involving moral turpitude.

Generally, the use of firearms is a crime involving moral turpitude. *See, e.g., U.S. v. Brown*, 127 F. Supp. 2d 392 (W.D.N.Y. 2000) (reasoning that a conviction under a Virginia statute for using or displaying a firearm while attempting to commit another felony is a crime involving moral turpitude because it demonstrates a vicious or corrupt mind); *Matter of S*, 8 I&N Dec. 344 (BIA 1959) (carrying a concealed deadly weapon with intent to use it against the person of another involves moral turpitude). The statute interpreted by the BIA in *Matter of S* punished the unlawful, willful, wrongful and knowing carrying of a concealed weapon on the defendant's person with the intent to use it against the person of another. The BIA reasoned that because the use of a weapon against another is motivated by an evil, base, or vicious intent, the offense was a crime involving moral turpitude.

Willfully shooting at school

A conviction under this section of the statute is probably a crime involving moral turpitude. *See Matter of Muceros*, A42-998-610 (BIA Index May 11, 2000); *see also Recio-Prado v. Gonzales*, 456 F.3d 819 (8th Cir. 2006) (holding that a statute punishing the malicious, intentional, and unauthorized discharge of a firearm at a dwelling in which there is a human being is a crime involving moral turpitude). In *Matter of Muceros*, the BIA held that a statute punishing the willful and malicious discharging of a firearm at an inhabited dwelling, occupied building, or occupied motor vehicle was a crime involving moral turpitude. The BIA reasoned that the offense involved moral turpitude for two reasons: (1) the intent element of the offense was willful and malicious, which indicated a guilty mind; and (2) the offense required that the defendant shoot at an occupied vehicle, which means that someone was inside. The potential for injury or death in that situation indicated the depravity of the crime.

This section of the statute has the element of willful shooting; however, it is not necessary that the school be occupied to be punished under this section. Nonetheless, offenses punishing the use of firearms are generally crimes involving moral turpitude. *See, e.g., U.S. v. Brown*, 127 F. Supp. 2d 392 (W.D.N.Y. 2000) (reasoning that a conviction under a Virginia statute for using or displaying a firearm whle attempting to commit another felony is a crime involving moral turpitude because it demonstrates a vicious or corrupt mind); *Matter of S*, 8 I&N Dec. 344 (BIA 1959) (carrying a concealed deadly weapon with intent to use it against the person of another involves moral turpitude). The statute interpreted by the BIA in *Matter of S* punished the unlawful, willful, wrongful and knowing carrying of a concealed weapon on the defendant's person with the intent to use it against the person of another. The BIA reasoned that because the use of a weapon against another is motivated by an evil, base, or vicious intent, the offense was a crime involving moral turpitude. By this reasoning, a conviction under this section of the statute is probably a crime involving moral turpitude.

Unlawful shooting

A conviction under this section of the statute for unlawfully shooting at a building or a dwelling house is probably not a crime involving moral turpitude because the statute does not punish intentional shooting at persons or property. *See Recio-Prado v. Gonzales*, 456 F.3d 819 (8th Cir. 2006) (holding that a statute punishing the malicious, intentional, and unauthorized discharge of a firearm at a dwelling in which there is a human being is a crime involving moral turpitude); *Matter of Muceros*, A42-998-610 (BIA Index May 11, 2000). It is sufficient that the defendant know that the property is in the line of fire. *See Fleming v. Commonwealth*, 412 S.E.2d 180 (Va. Ct. App. 1991). Therefore, the *mens rea* is unintentional or at least reckless, since the defendant must know of the risk of hitting the house and shoot anyway. Since the statute does not punish behavior that has a recklessness *mens rea* plus causation of serious bodily injury, it is probably not a crime involving moral turpitude. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996).

Aggravated Felony

Malicious shooting or throwing a missile

Firearms

A conviction under this statute is probably an aggravated felony as a firearms offense under 8 U.S.C. § 1101(a)(43)(E). 8 U.S.C. §1101(a)(43)(E)(i) specifies that any offense described in 18 U.S.C. §844(h)(1) is an aggravated felony. 18 U.S.C. § 844(h)(1) punishes the uses fire or an explosive to commit any felony that may be prosecuted in a court of the United States. 8 U.S.C. §1101(a)(43)(E)(i) also includes in the aggravated felony definition offenses punishable under 8 U.S.C. § 844(f)(1), malicious or attempted malicious damage or destruction by means of fire or explosive to any building, vehicle, or other property.

The Fourth Circuit in *U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2002), decided that "use of an explosive" as defined under 18 U.S.C. § 844(j) means discharging a firearm. The Court was deciding whether a defendant's discharge of a firearm was a "use" of an "explosive" within the meaning of USSG § 2K1.4. The court referenced the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(E)(i). The Fourth Circuit reasoned that the definition at 18 U.S.C. § 844(j) included gunpowders as an "explosive." Therefore, discharging a firearm involves the use of an explosive because shooting the firearm requires an explosion to expel a projectile from a firearm.

Va. Code Ann. § 18.2-279 criminalizes the discharge of a firearm maliciously as well as unlawfully. If the conviction is for malicious shooting, then the offense is an aggravated felony under 18 U.S.C. §844(i) because the offense punishes the attempted malicious damage to property by discharging a firearm. The offense may also be a firearms aggravated felony because it is punishable under 18 U.S.C. § 844(h)(1), using fire or explosive to commit any felony. Since this offense is a felony, it is probably an offense involving the use of fire or explosive to commit a felony under 18 U.S.C. § 844(h)(1).

If the defendant is convicted under Va. Code Ann. § 18.2-279 for maliciously throwing a missile at a building or dwelling house, this offense is probably an aggravated

felony under 8 U.S.C. § 1101(a)(43)(E)(i) because the offense has the same elements as 18 U.S.C. § 844(i), attempted malicious destruction of property by means of fire or explosive, or 18 U.S.C. § 844(h)(1), use of fire or an explosive to commit any felony.

The term "missile" is not defined by this Virginia statute or case law, but a conviction for throwing a missile against property under Va. Code Ann. § 18.2-279 is a firearms offense if the "missile" fits the definition of one of the "explosives" described in 18 U.S.C. § 844(j). The definition of "missile" under 18 U.S.C. § 844(j) is: "gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion." If the record of conviction reflects that the missile is an explosive as described in 18 U.S.C. § 844(j), the offense is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i).

Crime of violence - 18 U.S.C. §16(a)

A conviction under this section of the statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under Va. Code Ann. § 18.2-279 can result from discharging a firearm in three different locations: (1) at any school building (whether occupied or not), (2) at or against any dwelling house or building when occupied, or (3) within an occupied building. Under 18 U.S.C. § 16(a), it is necessary to determine whether discharging a firearm in any of those locations requires the use, attempted use, or threatened use of force against the person or property given that the projectile must travel at either property or a person within the property.

A conviction under this section of the statute is a crime of violence under 18 U.S.C. § 16(a) because the defendant must shoot at a building or dwelling house. The discharge of a firearm is generally held to involve the use of force. *See Quezada-Lunes v. Gonzales*, 439 F.3d 403 (7th Cir. 2005); *Nguyen v. Ashcroft*, 366 F.3d 386 (5th Cir. 2004). Because the building must be occupied (except the school building) and the shots must be aimed in the general direction of the property, a conviction under Va. Code Ann. § 18.2-279 probably involves the use, attempted use, or threatened to use force against person or property under 18 U.S.C. § 16(a).

The Fifth Circuit has reasoned that a conviction under this statute had as an element the use of force, but that the force was not necessarily against the person of another as required under U.S.S.G. § 2L1.2. *U.S. v. Alfaro*, 408 F.3d 204 (5th Cir. 2005). The Court reasoned that because a person could be convicted for discharging a firearm against property, it was not a "crime of violence" under the guidelines. The Sentencing Guidelines at U.S.S.G. § 2L1.2 define a crime of violence as an offense that has as an element the use, attempted use, or threatened use of physical force against the *person* of another. This is different from the definition of crime of violence at 18 U.S.C. § 16(a), which defines crime of violence as an offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another. Following the Fifth Circuit's reasoning in *Alfaro*, this offense is a crime of violence

under 18 U.S.C. § 16(a) because the offense involves the use of force against the person or property of another. *See id.*; *see also U.S. v. Cortez-Arias*, 403 F.3d 1111 (9th Cir. 2005) (discharging a firearm at a residential structure is a crime of violence because even if the residents are not in the structure at the time, the shooting involves the threatened use of force against the person of another).

Unlawfully discharging firearm or missile at building or dwelling house

Firearms

A conviction under this section is probably an aggravated felony as a firearms offense under 8 U.S.C. §1101(a)(43)(E)(i) because it is an offense punishable under the enumerated statutes.

The Fourth Circuit in *U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2002), decided that "use of an explosive" as defined under 18 U.S.C. § 844(j) means discharging a firearm. The Court was deciding whether a defendant's discharge of a firearm was a "use" of an "explosive" within the meaning of USSG § 2K1.4. The court referenced the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(E)(i). The Fourth Circuit reasoned that the definition at 18 U.S.C. § 844(j) included gunpowders as an "explosive." Therefore, discharging a firearm involves the use of an explosive because shooting the firearm requires an explosion to expel a projectile from a firearm.

Va. Code Ann. § 18.2-279 criminalizes the discharge of a firearm maliciously as well as unlawfully. A conviction for maliciously discharging a firearm or a missile under this statute is a firearms offense because it is analogous to 18 U.S.C. § 844(i). If the conviction is for unlawful shooting, the offense is not an offense described in 18 U.S.C. §844 (i) because it does not punish the attempted malicious discharge of a firearm. However, the offense may also be a firearms aggravated felony because it is punishable under 18 U.S.C. § 844(h)(1), using fire or explosive to commit any felony. Because this offense is a felony, the offense can be classified as using fire or explosive to commit a felony under 18 U.S.C. § 844(h)(1).

If the defendant is convicted under Va. Code Ann. § 18.2-279 for unlawfully throwing a missile at a building or dwelling house, this offense is probably an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i) because the offense has the same elements as 18 U.S.C. § 844(h)(1), using fire or an explosive to commit any felony. If the record of conviction reflects that the missile was an explosive as described in 18 U.S.C. § 844(j), the offense is an aggravated felony under 8 U.S.C. 18 U.S.C. § 844(j).

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction for unlawfully discharging a firearm under Va. Code Ann. §18.2-279 is a crime of violence under 18 U.S.C. § 16(a). Although the offense is a general intent offense and not a specific intent offense, a violation of the statute may be established upon proof that the defendant intended to shoot at or toward an occupied dwelling. *Fleming v. Comm.*, 412 S.E.2d 180 (Va. Ct. App. 1991). Discharging a firearm at an occupied dwelling involves the use of force against persons and property. Discharging a firearm at a dwelling where the residents are temporarily not present

involves the threatened use of force against person or property. *See U.S. v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006); *U.S. v. Hernandez-Rodriguez*, 467 F.3d 492 (5th Cir. 2006). Therefore, any conviction under this statute is a crime of violence under 18 U.S.C. § 16(a).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. §1227(a)(2)(C) if the weapon that he was convicted of using is a firearm as described in 18 U.S.C. § 921(a)(3). It is necessary to consult the record of conviction because not all offenses punishable under this statute would lead to deportation under 8 U.S.C. § 1227(a)(2)(C).

18.2-280 Willfully discharging firearms in public places

Elements

(A)

- willfully
- discharges a firearm or causes to be discharged any firearm
- in any place of public business or place of public gathering, and
- such conduct results in bodily injury to another person
- misdemeanor offense if conduct does not result in bodily injury to another person

(B)

- willfully
- discharges a firearm or causes to be discharged any firearm
- upon the buildings and grounds of any public, private or religious elementary, middle or high school

(C)

- willfully
- discharges a firearm or causes to be discharged any firearm
- upon any public property within 1,000 feet of the property line of any public, private or religious elementary, middle or high school property

Crime involving moral turpitude

A conviction under this Virginia statute is probably a crime involving moral turpitude. *See Matter of Muceros*, A42-998-610 (BIA Index May 11, 2000); *see also Recio-Prado v. Gonzales*, 456 F.3d 819 (8th Cir. 2006) (holding that a statute punishing the malicious, intentional, and unauthorized discharge of a firearm at a dwelling in which there is a human being is a crime involving moral turpitude). In *Matter of Muceros*, the BIA held that a statute punishing the willful and malicious discharging of a firearm at an inhabited dwelling, occupied building, or occupied motor vehicle was a crime involving moral turpitude. The BIA reasoned that the offense involved moral turpitude for two reasons: (1) the intent element of the offense was willful and malicious, which indicated a guilty mind; and (2) the offense required that the defendant shoot at an occupied vehicle, which means that someone was inside. The potential for injury or death in that situation indicated the depravity of the crime.

Like the statute interpreted by the BIA in *Matter of Muceros*, the Virginia statute contains an element of willful conduct and the discharging of a firearm. Because all of the locations at which the firearm is discharged under the Virginia statute are public places, there is great risk that bodily injury would result. Therefore, based on the BIA's reasoning in *Matter of Muceros*, a conviction under this statute is probably a crime involving moral turpitude.

Aggravated felony

Firearms

A conviction under this statute is probably an aggravated felony as a firearms offense under 8 U.S.C. § 1101(a)(43)(E). A conviction under this statute meets the definition of a firearms offense under 18 U.S.C. § 844(h)(1), which is one of the statutes listed in 8 U.S.C. § 1101(a)(43)(E).

The Fourth Circuit in *U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2002), decided that "use of an explosive" as defined under 18 U.S.C. § 844(j) means discharging a firearm. The Court was deciding whether a defendant's discharge of a firearm was a "use" of an "explosive" within the meaning of USSG § 2K1.4. The court referenced the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(E)(i). The Fourth Circuit reasoned that the definition at 18 U.S.C. § 844(j) included gunpowders as an "explosive." Therefore, discharging a firearm involves the use of an explosive because shooting the firearm requires an explosion to expel a projectile from a firearm.

Va. Code Ann. § 18.2-280 criminalizes the discharge of a firearm willfully as a felony. Because the statute punishes using a firearm in the commission of a felony, the offense is a firearms offense under 18 U.S.C. §844(h)(1) because the statute only requires for a conviction the use of an explosive to commit a felony offense. The statute is divisible; if the defendant is convicted of discharging a firearm in the commission of a felony offense under this statute, this conviction is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E). However, if the defendant is convicted of discharging a firearm in the commission of a misdemeanor, this conviction is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(E).

(A) Misdemeanor willfully discharging a firearm in place of public gathering

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is a misdemeanor only, so it is analyzed under 18 U.S.C. § 16(a) and not 18 U.S.C. § 16(b). A conviction under Va. Code Ann. § 18.2-280(A) is a not necessarily a crime of violence under 18 U.S.C. § 16(a). The discharge of a firearm is generally held to involve the use of force. *See Quezada-Lunes v. Gonzales*, 439 F.3d 403 (7th Cir. 2005); *U.S. v. Alfaro*, 408 F.3d 204 (5th Cir. 2005); *Nguyen v. Ashcroft*, 366 F.3d 386 (5th Cir. 2004); *see also U.S. v. Cortez-Arias*, 403 F.3d 1111 (9th Cir. 2005) (discharging a firearm at a residential structure is a crime of violence because even if the residents are not in the structure at the time, the shooting involves the threatened use of force against the person of another).

A conviction under (A) is a misdemeanor offense if no one is injured in the willful discharge of a firearm. Firing a gun in a public place does not necessarily involve as an element the use of physical force against the person or property of another because the gun need not be fired at property or person. For example, the gun may be shot in the air for celebration. However, the firing of a gun may involve the threatened use of force against the person or property of another. *See Cortez-Arias*, 403 F.3d 1111 Therefore, if a defendant is convicted of the misdemeanor offense under section (A) of this statute, it is probably a crime of violence.

(A) Felony willfully discharging a firearm in place of public gathering, causing bodily harm; (B) and (C) willfully discharging a firearm upon certain grounds

Crime of violence

A conviction under any of these sections of the statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. A felony conviction under Va. Code Ann. § 18.2-280(A) or a conviction under sections (B) and (C) of this section are crimes of violence under 18 U.S.C. § 16(a). The discharge of a firearm is generally held to involve the use of force. *See Quezada-Lunes v. Gonzales*, 439 F.3d 403 (7th Cir. 2005); *U.S. v. Alfaro,* 408 F.3d 204 (5th Cir. 2005); *Nguyen v. Ashcroft*, 366 F.3d 386 (5th Cir. 2004). The statute punishes a willful discharge of a fiream, and therefore the *mens rea* is sufficient to amount to a crime of violence under the Supreme Court's reasoning in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Because the firearm must be discharged in a public place, it is likely that the offense will be against the person or property of another. Therefore, the offense involves the use or threatened use of physical force against the person or property of another as required to meet the definition of a crime of violence. *See U.S. v. Cortez-Arias*, 403 F.3d 1111 (9th Cir. 2005) (discharging a firearm at a residential structure is a crime of violence because even if the residents are not in the structure at the time, the shooting involves the threatened use of force against the person of another).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. §1227(a)(2)(C) if the weapon that he was convicted of using is a firearm as described in 18 U.S.C. § 921(a)(3). All of the offenses punishable under this section involve firearms as described in 18 U.S.C. § 921(a)(3), so a conviction under this statute will lead to deportation under this ground.

18.2-282 Pointing, holding or brandishing a firearm, air or gas operated weapon or object similar in appearance

Elements

- point, hold or brandish
- firearm or any air or gas operated weapon or any object similar in appearance
- whether capable of being fired or not
- in such manner as to reasonably induce fear in the mind of another of being shot or injured

Class 6 felony if violation occurs upon any public, private or religious elementary, middle or high school, including buildings and grounds or upon public property within 1,000 feet of such school property

Crime involving moral turpitude

The Virginia statute punishing brandishing of a weapon is probably not a crime involving moral turpitude. *See Matter of G-R-*, 2 I&N Dec. 733 (BIA 1947). In *Matter of G-R-*, the BIA interpreted a statute punishing assault with a weapon, which it found was a crime involving moral turpitude. The BIA discussed the difference between assault with a weapon and the mere brandishing of a weapon. The difference between the offenses was that the assault required the actual use of the weapon against another person or attempt to use the weapon (the intent to do bodily harm coupled with the present ability to do so), whereas the mere brandishing did not require any use of the weapon or present ability to use the weapon against another person. The language indicates that brandishing a weapon is less serious than assault with a weapon and that therefore, a conviction for brandishing a weapon is not a crime involving moral turpitude.

The BIA's reasoning in *Matter of G-R-*, however, is not exactly on point because under the Virginia statute the defendant must brandish the weapon in a way that reasonably induces fear. The Virginia statute therefore is similar to the making of threats, which the BIA has held to be a crime involving moral turpitude if the statute punishes a defendant for a pattern of credible threats against another person. *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999) (reasoning that intentionally making credible threats over a period of time is a crime involving moral turpitude). However, the Virginia statute does not punish the making of repeated credible threats, which the BIA held to be a crime involving moral turpitude when it interpreted such language in a stalking statute in *Matter of Ajami.* In addition, the language of this Virginia statute is similar to a statute punishing threatening behavior, which the Eighth Circuit held was not a crime involving moral turpitude in *Reyes-Morales v. Gonzales*, 435 F.3d 937 (8th Cir. 2006) (holding that intentionally making telephone calls with reason to know that such calls would cause, and did cause, the recipient to feel frightened was not a crime involving moral turpitude).

Moreover, the Virginia brandishing statute punishes the brandishing of a firearm or something that looks like a firearm, whether capable of being fired or not. Therefore, a defendant can be convicted under this statute for pointing a water gun or an unloaded revolver. The Supreme Court of Virginia stated that the purpose of the statute is to punish the inducement of fear in another, not to punish the use of a weapon. *See Kelsoe v. Comm.*, 308 S.E.2d 104 (Va. 1983). Therefore, the offense is unlikely to be a crime involving moral turpitude under the reasoning of cases that hold that statutes punishing the use of a firearm are crimes involving moral turpitude. *See, e.g., U.S. v. Brown*, 127 F. Supp. 2d 392 (W.D.N.Y. 2001); *Matter of R*, 5 I&N Dec. 612 (BIA 1954).

Aggravated felony

Firearms

A conviction under this statute is not an aggravated felony as a firearms offense under 8 U.S.C. § 1101(a)(43)(E). A conviction under this statute does not meet the definition of a firearms offense under 18 U.S.C. § 844(h)(1), which is one of the statutes listed in 8 U.S.C. § 1101(a)(43)(E), because the statute does not punish the discharge of a

firearm in the commission of a felony. A conviction under this statute does not meet the definition of a firearms offense under any of the other statutes listed in 8 U.S.C. § 1101(a)(43)(E), and therefore is not an aggravated felony under this section.

Crime of violence

A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under Va. Code Ann. § 18.2-282 is probably a crime of violence under 18 U.S.C. § 16(a) because the offense has as an element the use or attempted use of physical force against the person or property of another. The offense has as an element the threatened use of physical force. *See Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937 (9th Cir. 2004) (holding that the drawing or exhibiting a deadly weapon in order to resist or prevent an arrest is the equivalent of a person threatening to use the weapon); *U.S. v. Drummond*, 240 F.3d 1333 (11th Cir. 2001) (holding that a statute punishing the intentional placing or or attempts to place another in fear of physical injury, serious injury, or death by displaying a deadly weapon or instrument was a crime of violence under 18 U.S.C. § 16(a)). The statute punishes the defendant for acting in order to induce fear into another person; therefore, this purposeful brandishing of a weapon in order to induce fear would likely amount to an offense that has, as an element, the threatened use of force against the person of another. *See U.S. v. Hernandez-Rodriguez*, 467 F.3d 492 (5th Cir. 2006), *citing U.S. v. White*, 258 F.3d 374 (5th Cir. 2001) (reasoning that the pointing of a firearm at another in jest would not constitute the threatened use of force, the discharge of the weapon in the direction of the person communicates an intent to inflict physical harm).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. §1227(a)(2)(C) if the weapon that he was convicted of using is a firearm as described in 18 U.S.C. § 921(a)(3). It is necessary to consult the record of conviction because not all offenses punishable under this statute would lead to deportation under 8 U.S.C. § 1227(a)(2)(C).

18.2-286 Shooting in or across road or in street

Elements

- discharges a firearm, crossbow, or bow and arrow
- across any road, or within the right-of-way thereof, or in a street of any city or town

Crime involving moral turpitude

A conviction under this statute is probably not a crime involving moral turpitude The statute does not have a *mens rea* and the offense does not require that the road or street be occupied; therefore, there is little risk of injury. *See Matter of Muceros*, A42-998-610 (BIA Index May 11, 2000); *see also Recio-Prado v. Gonzales*, 456 F.3d 819 (8th Cir. 2006) (holding that a statute punishing the malicious, intentional, and unauthorized discharge of a firearm at a dwelling in which there is a human being is a crime involving moral turpitude). In *Matter of Muceros*, the BIA held that a statute punishing the willful and malicious discharging of a firearm at an inhabited dwelling, occupied building, or

occupied motor vehicle was a crime involving moral turpitude. The BIA reasoned that the offense involved moral turpitude for two reasons: (1) the intent element of the offense was willful and malicious, which indicated a guilty mind; and (2) the offense required that the defendant shoot at an occupied vehicle, which means that someone was inside. The potential for injury or death in that situation indicated the depravity of the crime.

The Virginia statute does not have an intent element, unlike other Virginia statutes that punish the willful or malicious discharging of a firearm. *See* Va. Code Ann. §§ 18.2-279, 18.2-280. Therefore, a person can be convicted under this statute for accidentally discharging a firearm across a road. Since moral turpitude usually is determined by the intent element of the statute, this Virginia statute is unlikely to be a crime involving moral turpitude because there is no requirement that a defendant convicted under this statute have a guilty mind. The statute is similar to a regulatory offense, which generally is not a crime involving moral turpitude. *See Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999).

The Virginia statute can be further distinguished from the statute found to be a crime involving moral turpitude in *Matter of Muceros* because the statute does not punish the discharging of a firearm at an inhabited dwelling. It is possible for someone to be convicted under this statute for accidentally firing off a gun in the middle of the night, when the road is deserted. Therefore, the reason that the BIA found the statute in *Matter of Muceros* to be a crime involving moral turpitude, the likelihood that injury would result from shooting at an occupied dwelling, does not necessarily exist with a conviction under this statute. For these reasons, a conviction under this statute is not a crime involving moral turpitude.

Aggravated felony

Firearms

A conviction under this statute is probably not an aggravated felony under 8 U.S.C. § 1101(a)(43)(E). 8 U.S.C. § 1101(a)(43)(E)(i) specifies that any offense described in 18 U.S.C. § 844(h) is an aggravated felony. 18 U.S.C. § 844(h) punishes a person for (1) using fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or (2) carrying an explosive during the commission of any felony that may be prosecuted in a court of the United States.

The Fourth Circuit in *U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2002), decided that "use of an explosive" as defined under 18 U.S.C. § 844(j) means discharging a firearm. The Court was deciding whether a defendant's discharge of a firearm was a "use" of an "explosive" within the meaning of USSG § 2K1.4. The court referenced the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(E)(i). The Fourth Circuit reasoned that the definition at 18 U.S.C. § 844(j) included gunpowders as an "explosive." Therefore, discharging a firearm involves the use of an explosive because shooting the firearm requires an explosion to expel a projectile from a firearm.

Va. Code Ann. § 18.2-286 criminalizes the discharge of a firearm across a road or street. The offense is not an offense described in 18 U.S.C. §844(i), which punishes a person for maliciously attempting to damage or destroy, by fire or explosive, any building, vehicle, or other property. If the person discharges a firearm across the road

under this statute, this offense cannot be classified as maliciously attempting to destroy or damage property by means of fire or explosive. The *mens rea* is not malicious and there is no attempted damage to property, so it does not fit the definition under 18 U.S.C. § 844(i). This offense can not be classified under 18 U.S.C. §844(h)(1) since the offense does involve using an explosive (i.e. discharging a weapon) in the commission of a felony, because this offense is a misdemeanor.

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is a misdemeanor only, so it is analyzed under 18 U.S.C. § 16(a) and not 18 U.S.C. § 16(b). The firing of a gun involves the use of physical force. *See Quezada-Luna v. Gonzales*, 439 F.3d 403 (7th Cir. 2006); *U.S. v. Alfaro,* 408 F.3d 204 (5th Cir. 2005); *Nguyen v. Ashcroft*, 366 F.3d 386 (5th Cir. 2004). However, the firing a gun in or across a street does not involve as an element the use of physical force against the person or property of another. The location of the conduct is "across any road, or within the right-of-way thereof, or in a street of any city or town." Va. Code Ann. § 18.2-279; *see also U.S. v. Alfaro,* 408 F.3d 204 (5th Cir. 2005) (holding that a conviction under Va. Code Ann. § 18.2-279 is not a crime of violence under U.S.S.G. § 2L1.2 because discharging a weapon against property does have as an element the use of force against the person of another).

In addition, a conviction under Va. Code Ann. § 18.2-286 does not require a *mens rea*. The Supreme Court held in *Leocal v. Ashcroft,* 543 U.S. 1 (2004), that a statute must have a *mens rea* of more than negligent or merely accidental conduct to be a crime of violence under 18 U.S.C. § 16. Therefore, a conviction under this statute is not a crime of violence.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. §1227(a)(2)(C) if the weapon that he was convicted of using is a firearm as described in 18 U.S.C. § 921(a)(3). It is necessary to consult the record of conviction because not all offenses punishable under this statute would lead to deportation under 8 U.S.C. § 1227(a)(2)(C). For example, if a defendant is convicted for shooting a bow and arrow, this is not a deportable offense under this ground of deportability because the bow and arrow is not a firearm as described in 18 U.S.C. § 921(a)(3).

18.2-286.1 Shooting from vehicles so as to endanger persons

Elements

- person in a motor vehicle
- intentionally
- discharges a firearm
- so as to create the risk of injury or death to another person or thereby causes another person to have a reasonable apprehension of injury or death

Crime involving moral turpitude

A conviction under this Virginia statute is a crime involving moral turpitude. *See Matter of Muceros,* A42-998-610 (BIA Index May 11, 2000); *see also Recio-Prado v.*

Gonzales, 456 F.3d 819 (8th Cir. 2006) (holding that a statute punishing the malicious, intentional, and unauthorized discharge of a firearm at a dwelling in which there is a human being is a crime involving moral turpitude). In *Matter of Muceros*, the BIA held that a statute punishing the willful and malicious discharging of a firearm at an inhabited dwelling, occupied building, or occupied motor vehicle was a crime involving moral turpitude. The BIA reasoned that the offense involved moral turpitude for two reasons: (1) the intent element of the offense was willful and malicious, which indicated a guilty mind; and (2) the offense required that the defendant shoot at an occupied vehicle, which means that someone was inside. The potential for injury or death in that situation indicated the depravity of the crime.

Like the statute interpreted by the BIA in *Matter of Muceros*, the Virginia statute has an element of intentional conduct and of discharging a firearm. Also, the statute requires as an element that the shooting create the risk of injury or death to another person or causes another person to have reasonable apprehension of injury or death. The result of the shooting under this Virginia statute is the same as the possible result of the statute that the BIA found to be a crime involving moral turpitude in *Matter of Muceros*. Therefore, a conviction under this statute is a crime involving moral turpitude.

Aggravated felony

Firearms

A conviction under this statute is probably an aggravated felony under 8 U.S.C. § 1101(a)(43)(E). 8 U.S.C. §1101(a)(43)(E)(i) specifies that any offense described in 18 U.S.C. §844(h) is an aggravated felony. 18 U.S.C. § 844(h) punishes a person for (1) using fire or an explosive to commit any felony that may be prosecuted in a court of the United States, or (2) carrying an explosive during the commission of any felony that may be prosecuted in a court of the United States.

The Fourth Circuit in *U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2002), decided that "use of an explosive" as defined under 18 U.S.C. § 844(j) means discharging a firearm. The Court was deciding whether a defendant's discharge of a firearm was a "use" of an "explosive" within the meaning of USSG § 2K1.4. The court referenced the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(E)(i). The Fourth Circuit reasoned that the definition at 18 U.S.C. § 844(j) included gunpowders as an "explosive." Therefore, discharging a firearm involves the use of an explosive because shooting the firearm requires an explosion to expel a projectile from a firearm.

Va. Code Ann. § 18.2-286.1 criminalizes the intentional discharge of a firearm from a vehicle. The offense is probably not an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i), as an offense described in 18 U.S.C. § 844(i), which punishes a person for maliciously attempting to damage or destroy, by fire or explosive, any building, vehicle, or other property. If the defendant discharges a firearm from a vehicle under this statute, this offense can not be classified as maliciously attempting to destroy or damage property by means of fire or explosive. The *mens rea* is intentional, but not malicious. However, this offense can be classified under 18 U.S.C. §844(h)(1) because the offense involves using an explosive (i.e. discharging a weapon) in the commission of a felony,

since this offense is a felony. Therefore, a conviction under this statute is probably an aggravated felony because it is punishable under 18 U.S.C. § 844(h)(1).

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under Va. Code Ann. § 18.2-286.1 requires that the defendant intentionally discharge a firearm from a vehicle so as to create a risk of injury. Such actions involve as an element the use, attempted use or threatened use of physical force against person or property if the discharge of a firearm qualifies as physical force.

Intentionally shooting at a person is an offense that has as an element the use of physical force against the person of another. *See Nguyen v. Ashcroft*, 366 F.3d 386 (5th Cir. 2004). Even if the defendant does not shoot directly at a person, he must place the victim in reasonable apprehension of injury or death, so it is likely that the offense is a crime of violence under 18 U.S.C. § 16(a) because it has as an element the threatened use of physical force. *See U.S. v. Hernandez-Rodriguez*, 467 F.3d 492 (5th Cir. 2006) (firing a gun in the direction of a person involves the threatened use of force against the person of another and therefore is a crime of violence); *Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937 (9th Cir. 2004) (holding that brandishing a weapon in order to avoid arrest is a crime of violence because the offense involves as an element the threatened use of force).

The offense punishes the intentional discharge of a firearm, so there is a *mens rea* of intentional conduct. The Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held that in order for a statute to be a crime of violence under 18 U.S.C. § 16(a), the offense must have a *mens rea* higher than negligence. *See id.*; *see also Matter of Martin*, 23 I&N Dec. 491 (BIA 2002). Therefore, a conviction under this statute is a crime of violence.

Other immigration consequences

A conviction under this section will render a non-citizen deportable under 8 U.S.C. §1227(a)(2)(C) if the weapon that he was convicted of using is a firearm as described in 18 U.S.C. § 921(a)(3). All of the offenses punishable under this statute will render a non-citizen subject to deportation under this ground because all of the offense involve the use of a firearm as described in 18 U.S.C. § 921(a)(3).

18.2-287.4 Carrying loaded firearms in public areas

Elements

- carrying a loaded (a) semi-automatic center-fire rifle or pistol that expels single or multiple projectiles by action of an explosion of a combustible material and is equipped at the time of the offense with a magazine that will hold more than 20 rounds of ammunition or designed by the manufacturer to accommodate a silencer or equipped with a folding stock or (b) shotgun with a magazine that will hold more than seven rounds of the longest ammunition for which it is chambered about his person
- on any public street, road, alley, sidewalk, public right-of-way, or in any public park or any other place of whatever nature that is open to the public

Crime involving moral turpitude

A conviction under this statute is probably not a crime involving moral turpitude. The BIA has held that carrying a concealed weapon with intent to use it against the person of another is a crime involving moral turpitude. *See Matter of S*, 8 I&N Dec. 344 (BIA 1959). The BIA interpreted a statute punishing the willful, unlawful, wrongful and knowing carrying of a concealed dangerous weapon with intent to use it against a person. The BIA found that the essence of the offense was carrying the dangerous weapon with a base, evil, and vicious intent to injure another. Because of the vicious intent to use the weapon, the BIA found that it was a crime involving moral turpitude.

The Virginia statute can be distinguished from the BIA's decision in *Matter of S* because the Virginia offense punishes only the carrying of a firearm. Even though the Virginia statute requires that the firearm be loaded for potential use, there is no element under the Virginia statute that the defendant have the intent to use the weapon against the other. Since the BIA found that the intent to use the weapon against the other led to the conclusion that the offense was a crime involving moral turpitude, a conviction under this Virginia statute is probably not a crime involving moral turpitude.

Moreover, the BIA has held in other cases that the simple possession of a weapon is not a crime involving moral turpitude. *See, e.g., Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992) (criminal possession of a weapon in the third degree under New York law is not a crime involving moral turpitude); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979) (conviction of possession of a concealed sawed-off shotgun is not a crime involving moral turpitude).

Aggravated felony

Firearms

A conviction under this statute is not an aggravated felony as a firearms offense under 8 U.S.C. § 1101(a)(43)(E) because the offense is not analogous to any of the firearms offenses listed in 8 U.S.C. § 1101(a)(43)(E).

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is a misdemeanor only, so it is analyzed under 18 U.S.C. § 16(a) and not 18 U.S.C. § 16(b). A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(a). The carrying of a firearm does not have as an element the use, attempted use, or threatened use of physical force. The crime is committed when the types of firearms described above are loaded and carried in public. The need be no use, discharge, or force exerted to find a defendant guilty. *See Quezada-Luna v. Gonzales*, 439 F.3d 403 (7th Cir. 2006). Therefore, it is not a crime of violence under 18 U.S.C. § 16(a). *See U.S. v. Medina-Anicacio*, 325 F.3d 638 (5th Cir. 2003) (holding that a conviction for knowing possession of a concealed weapon is not a crime of violence under 18 U.S.C. § 16(a)).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. §1227(a)(2)(C) if the firearm or destructive device is described in U.S.C. § 921(a)(3)(A). The definition of firearm is expansive and includes those firearms

described in the language of Va. Code Ann. § 18.2-287.4. The language of Va. Code Ann. § 18.2-287.4 renders a person deportable because the statute punishes the carrying of a rifle or pistol that "expels single or multiple projectiles by action of an explosion of a combustible material." This language is nearly identical to the language of 18 U.S.C. § 921(a)(3)(A). Therefore, all offenses punishable under this statute would render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(C).

18.2-300 Possession or use of sawed-off shotgun or rifle

Elements

(A) possession or use of a "sawed-off" shotgun or "sawed-off" rifle (felony)
- in the perpetration or attempted perpetration of a crime of violence
  - "Crime of violence" applies to and includes any of the following crimes or an attempt to commit any of the same, namely, murder, manslaughter, kidnapping, rape, mayhem, assault with intent to maim, disable, disfigure or kill, robbery, burglary, housebreaking, breaking and entering and larceny.

(B) possession or use of a "sawed-off" shotgun or "sawed-off" rifle (felony)
- for any other purpose

Crime involving moral turpitude

(A) Possession of sawed-off shotgun in commission of crime of violence

A conviction under this statute is probably a crime involving moral turpitude. The BIA has held that possession of a sawed-off shotgun was not a crime involving moral turpitude. *See Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979). However, the Virginia statute punishes not just possession of a weapon but possession in the perpetration of a crime of violence. It is likely, therefore, that because of this added element, a conviction under this statute is a crime involving moral turpitude because offenses involving the use of firearms are generally crimes involving moral turpitude. *See generally Matter of S*, 8 I&N Dec. 344 (BIA 1959) (possession of a concealed weapon with intent to use it is a crime involving moral turpitude).

(A) Use of a sawed-off shotgun in commission of crime of violence

A conviction under this section of the statute is a crime involving moral turpitude because the offense involves the use of a firearm. *See generally Matter of S*, 8 I&N Dec. 344 (BIA 1959) (possession of a concealed weapon with intent to use it is a crime involving moral turpitude).

(B) Possession of a sawed-off shotgun

A conviction under this section of the statute is not a crime involving moral turpitude. The BIA has held that possession of a sawed-off shotgun is not a crime involving moral turpitude. *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979). Since this offense punishes possession only without the intent to use the shotgun, it is not a crime involving moral turpitude. *See Matter of S*, 8 I&N Dec. 344 (BIA 1959) (possession of a concealed

weapon with intent to use it is a crime involving moral turpitude because it is the intent to use the weapon that gives the offense the evil mind required for a finding of a crime involving moral turpitude).

(B) Use of a sawed-off shotgun in commission for any purpose

A conviction under this section of the statute is a crime involving moral turpitude because the offense involves the use of a firearm. *See generally Matter of S*, 8 I&N Dec. 344 (BIA 1959) (possession of a concealed weapon with intent to use it is a crime involving moral turpitude).

Aggravated felony

(A) Possession or use of shotgun in commission of crime of violence

Firearms

A conviction under this statute is not an aggravated felony as a firearms offense under 8 U.S.C. § 1101(a)(43)(E) because the offense is not analogous to any of the firearms offenses listed in 8 U.S.C. § 1101(a)(43)(E). The offense does not involve the discharge of a firearm, so the offense is not analogous to 18 U.S.C. § 844(h), which punishes the use of an explosive to commit a felony. *See U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2000) (holding that discharging a firearm is the "use of an explosive" within the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition).

Crime of violence

A conviction under this statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. Because the defendant must be convicted for possession or use of a shotgun in the commission of a crime of violence, and each of the listed offense is a crime of violence, a conviction under this section is probably a crime of violence. *See* analysis for listed statutes.

(B) Possession of sawed-off shotgun

Firearms

A conviction under this statute is not an aggravated felony as a firearms offense under 8 U.S.C. § 1101(a)(43)(E) because the offense is not analogous to any of the firearms offenses listed in 8 U.S.C. § 1101(a)(43)(E). The offense does not involve the discharge of a firearm, so the offense is not analogous to 18 U.S.C. § 844(h), which punishes the use of an explosive to commit a felony. *See U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2000) (holding that discharging a firearm is the "use of an explosive" within the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition). The offense also does not involve the possession of a firearm by a felon or a person illegally in the U.S, which are punishable under 18 U.S.C. § 922(g), which is listed in the aggravated felony definition.

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if

the sentence imposed is at least one year. A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16(a) because it does not include as an element the use, attempted use, or threatened use of physical force. Mere possession does not require the use, attempted use or threatened use of physical force. *See U.S. v. Johnson*, 246 F.3d 330 (4th Cir. 2001) (holding that possession of a sawed-off shotgun did not contain as an element the use, attempted use, or threatened use of physical force against the person of another).

Crime of violence - 18 U.S.C. § 16(b)

A conviction under this section of the statute for possession of a sawed-off shotgun is probably not a crime of violence under 18 U.S.C. § 16(b). The Fourth Circuit decided that a conviction for possession of a sawed-off shotgun was a crime of violence under the Sentencing Guidelines for career offenders in *U.S. v. Johnson*, 246 F.3d 330 (4th Cir. 2001). A "crime of violence" as defined by the Sentencing Guidelines is: any offense that has an element the use, attempted use, or threatened use of physical force against the person of another, or otherwise involves conduct that presents a serious potential risk of physical injury to another. U.S.S.G. § 4B1.2(a). The court held that possession of a sawed-off shotgun was a crime of violence under the sentencing guidelines because the possession of such a weapon, which serves no legal purpose, presents a serious risk of physical injury to another. However, the court was deciding whether the offense was one which presented as risk of physical injury, not whether it was an offense which presented a risk of use of force in the commission of the offense.

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Supreme Court recognized the distinction between the risk of causation of physical injury and the risk of use of force contemplated by 18 U.S.C. § 16(b). The Court held that 18 U.S.C. § 16(b) does not encompass offenses that create a substantial risk that injury will result from a person's conduct. The substantial risk in 18 U.S.C. § 16(b) relates to the use of force, not to the possible effect of a person's conduct. *See id.*; *see also Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005) (a crime that intrinsically involves a substantial risk that the defendant's actions will cause physical harm does not necessarily involve a substantial risk that force will be used); *Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006) (same).

The Ninth Circuit has held that a conviction for possession of an unregistered firearm was a crime of violence under 18 U.S.C. § 16(b). *See U.S. v. Dunn*, 946 F.2d 615 (9th Cir. 1990). The Court reasoned that the possession of an unregistered firearm involves a "blatant disregard for the law" and therefore involves a substantial risk that force will be used against person or property. *See id.*; *see also U.S. v. Rivas-Palacios*, 244 F.3d 396 (5th Cir. 2001) (holding that the unlawful possession of an unregistered firearm was a crime of violence under 18 U.S.C. § 16(b)). However, the Fifth Circuit reasoned in its more recently decided case *U.S. v. Hernandez-Neave*, 291 F.3d 296 (5th Cir. 2001) that a statute punishing the knowing or reckless carrying of a firearm onto certain premises was not a crime of violence under 18 U.S.C. § 16(b). The Court reasoned that the offense is accomplished once the defendant carries the firearm onto the premises and therefore, there was no risk of intentionally using force against the person or property of another. *See id., citing U.S. v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001); *see also U.S. v. Diaz-Diaz*, 327 F.3d 410 (5th Cir. 2003) (holding that an offense punishing the knowing possession of a short-barrel firearm was not a crime of violence under 18 U.S.C. § 16(b)).

(B) Use of sawed-off shotgun for any purpose

Crime of violence

A conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction for use of a sawed-off shotgun under this statute is probably a crime of violence under 18 U.S.C. § 16(b). The offense is one that, by its nature, involves the substantial risk that force will be used against the person or property of another. The discharge of a firearm is generally held to involve the use of force. *See Quezada-Luna v. Gonzales*, 439 F.3d 403 (7th Cir. 2005); *U.S. v. Alfaro*, 408 F.3d 204 (5th Cir. 2005); *Nguyen v. Ashcroft*, 366 F.3d 386 (5th Cir. 2004). The discharge of a firearm in the direction of a person has also been held to involve the threatened use of physical force against the person or property of another. *See U.S. v. Hernandez-Rodriguez*, 467 F.3d 492 (5th Cir. 2006); *see also U.S. v. Cortez-Arias*, 403 F.3d 1111 (9th Cir. 2005) (discharging a firearm at a residential structure is a crime of violence because even if the residents are not in the structure at the time, the shooting involves the threatened use of force against the person of another). Although the Virginia statute does not specifically require that the shotgun be discharged or used to threaten another person, the inherent nature of the statute involves the risk that the defendant will discharge the firearm directly at the person or property of another or threaten another with the shotgun. The Fourth Circuit has reasoned that a sawed-off shotgun serves no legitimate purpose except for violent purposes. *U.S. v. Johnson*, 246 F.3d 330 (4th Cir. 2001). Therefore, the use of a sawed-off shotgun is probably a crime of violence under 18 U.S.C. § 16(b).

Firearms

A conviction under this statute is possibly an aggravated felony under 8 U.S.C. § 1101(a)(43)(E). If the firearm is fired, the offense is probably an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i) because it is analogous to an offense punishable under 18 U.S.C. § 844(h)(1), which is listed in this aggravated felony section.

The Fourth Circuit in *U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2002), decided that "use of an explosive" as defined under 18 U.S.C. § 844(j) means discharging a firearm. The Court was deciding whether a defendant's discharge of a firearm was a "use" of an "explosive" within the meaning of USSG § 2K1.4. The court referenced the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(E)(i). The Fourth Circuit reasoned that the definition at 18 U.S.C. § 844(j) included gunpowders as an "explosive." Therefore, discharging a firearm involves the use of an explosive because shooting the firearm requires an explosion to expel a projectile from a firearm.

A conviction under Va. Code Ann. § 18.2-300 may involve the discharge of a firearm and is a felony. Therefore, it is necessary to consult the record of conviction. If the offense involves the discharge of a firearm, the offense meets the elements of 18 U.S.C. §844(h)(1) and is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i).

Other immigration consequences

A conviction under this statute would render a non-citizen deportable under 8 U.S.C. §1227(a)(2)(C) if the weapon that he was convicted of using is a firearm as described in 18 U.S.C. § 921(a)(3). All of the weapons listed in the offense are described in 18 U.S.C. § 921(a)(3). Therefore, a conviction under this section will lead to deportability under 8 U.S.C. §1227(a)(2)(C).

18.2-308 Carrying concealed weapon

Elements

- carrying weapon
- that is hidden from common observation
- weapons include:

(i) guns and other weapons which propel missile of any kind by action of an explosion of any combustible material
(ii) dirk, knife, machete, etc.
(iii) nun chuck, etc.
(iv) disk such as oriental dart
(v) other weapon like those enumerated

- section does not apply to any person while in his own home or place of business, law enforcement officers, shooting organization members, weapons collecting organization members, hunters and others who are authorized to carry weapons

Crime involving moral turpitude

A conviction under this statute is probably not a crime involving moral turpitude. The BIA has held that carrying a concealed weapon with intent to use it against the person of another is a crime involving moral turpitude. *See Matter of S*, 8 I&N Dec. 344 (BIA 1959). The BIA interpreted a statute punishing the willful, unlawful, wrongful and knowing carrying of a concealed dangerous weapon with intent to use it against a person. The BIA found that the essence of the offense was carrying the dangerous weapon with a base, evil, and vicious intent to injure another. Because of the vicious intent to use the weapon, the BIA found that it was a crime involving moral turpitude.

The Virginia statute can be distinguished from the BIA's decision in *Matter of S* because the Virginia offense punishes only the carrying of a concealed weapon. There is no element under the Virginia statute that the defendant have the intent to use the weapon against the other. Because the BIA found that the intent to use the weapon against the other led to the conclusion that the offense was a crime involving moral turpitude, a conviction under this Virginia statute is not a crime involving moral turpitude.

Moreover, the BIA has held in other cases that the simple possession of a weapon is not a crime involving moral turpitude. *See, e.g., Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992) (criminal possession of a weapon in the third degree is not a crime involving moral turpitude); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979) (conviction of possession of a concealed sawed-off shotgun is not a crime involving moral turpitude).

Aggravated felony

Firearms

A conviction under this statute is not an aggravated felony as a firearms offense under 8 U.S.C. § 1101(a)(43)(E) because the offense is not analogous to any of the firearms offenses listed in 8 U.S.C. § 1101(a)(43)(E). The offense does not involve the discharge of a firearm, so the offense is not analogous to 18 U.S.C. § 844(h), which punishes the use of an explosive to commit a felony. *See U.S. v. Davis*, 202 F.3d 212 (4th Cir. 2000) (holding that discharging a firearm is the "use of an explosive" within the definition of "explosive" in 18 U.S.C. § 844(j), which is the definition of "explosive" that applies to 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i), all of which are listed in the aggravated felony definition). The offense also does not involve the possession of a firearm by a felon or a person illegally in the U.S, which is punishable under 18 U.S.C. § 922(g), an offense listed in the aggravated felony definition.

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(a). Several circuit courts have held that possession of a concealed weapon is not an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another. *See, e.g., U.S. v. Medina-Anicacio,* 325 F.3d 638 (5th Cir. 2003) (holding that possession of a concealed weapon is not a crime of violence under 18 U.S.C. § 16(a) and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F)); *U.S. v. Gilbert*, 138 F.3d 1371 (11th Cir. 1998) (holding that possession of a concealed weapon is not a crime of violence under U.S.S.G. § 4B1.2 because it does not have as an element the use, attempted use, or threatened use of physical force against the person of another); *U.S. v. Whitfield*, 907 F.2d 798 (8th Cir. 1990) (same).

Crime of violence - 18 U.S.C. § 16(b)

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(b). Carrying a concealed weapon is not an offense that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. The offense is completed by the carrying of the weapon. There is no risk that any physical force will be used in performance of the act of carrying a concealed weapon.

The Ninth Circuit held that a conviction for possession of an unregistered firearm was a crime of violence under 18 U.S.C. § 16(b). *See U.S. v. Dunn*, 946 F.2d 615 (9th Cir. 1990). The Court reasoned that the possession of an unregistered firearm involves a "blatant disregard for the law" and therefore involves a substantial risk that force will be used against person or property. *See id.*; *see also U.S. v. Rivas-Palacios*, 244 F.3d 396 (5th Cir. 2001) (holding that the unlawful possession of an unregistered firearm was a crime of violence under 18 U.S.C. § 16(b)). However, the Fifth Circuit reasoned in its more recently decided case *U.S. v. Hernandez-Neave*, 291 F.3d 296 (5th Cir. 2001) that a statute punishing the knowing or reckless carrying of a firearm onto certain premises was not a crime of violence under 18 U.S.C. § 16(b). The Court reasoned that the offense is accomplished once the defendant carries the firearm onto the premises and therefore, there was no risk of intentionally using force against the person or property of another.

See id., citing U.S. v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001); *see also U.S. v. Diaz-Diaz*, 327 F.3d 410 (5th Cir. 2003) (holding that an offense punishing the knowing possession of a short-barrel firearm was not a crime of violence under 18 U.S.C. § 16(b)).

In *United States v. Hall*, 77 F.3d 398, 401 (11th Cir.1996), the Eleventh Circuit held that carrying a concealed weapon presented a risk of physical injury and therefore met the definition of violent felony under the Sentencing Guidelines for career offenders *See id.*; *see also U.S. v. Gilbert*, 138 F.3d 1371 (11th Cir. 1998) (holding that possession of a concealed firearm is a crime of violence under the U.S.S.G. § 4B1.2(1) because it presents a serious potential risk of physical injury); *but see U.S. v. Whitfield*, 907 F.2d 798 (8th Cir. 1990) (reasoning that the risk to others from carrying concealed weapon is not so immediate as to present serious risk of physical injury). These cases can be distinguished because they were decided under the Sentencing guidelines, which uses the phrase "risk of physical injury," and not "risk of use of force." *See* U.S.S.G. §4B1.2; *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (reasoning that the risk of resulting physical injury from an offense is not the same as the risk of use of force contemplated by 18 U.S.C. § 16(b)); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005) (same). Therefore, a conviction under this statute is not a crime of violence under 18 U.S.C. § 16(b).

Other immigration consequences

A conviction under this statute would render a non-citizen deportable under 8 U.S.C. §1227(a)(2)(C) if the weapon that he was convicted of concealing is a firearm as described in 18 U.S.C. § 921(a)(3). It is necessary to consult the record of conviction because not all offenses punishable under this statute would lead to deportation under 8 U.S.C. § 1227(a)(2)(C). For example, a non-citizen is not deportable under this section if he is convicted for carrying concealed dirks, knives, machetes, nun chucks, oriental darts, and other weapons that are not described in 18 U.S.C. § 921(a)(3).

18.2-308.2:01 Possession or transportation of certain firearms by certain persons

Elements

- any non-citizen, who is NOT a lawful permanent resident
- knowingly and intentionally
- possess, transport any firearm or,
- carry about his person, hidden from view a firearm

Crime involving moral turpitude

A conviction under this statute is probably not a crime involving moral turpitude. The statute is more like a regulatory statute that defines who can and cannot possess firearms. There is a criminal intent as an element of the statute because the defendant must knowingly and intentionally possess the firearm. However, in order for an offense to be a crime involving moral turpitude, there must be an evil mind plus the offense must be morally turpitudinous. *See Matter of B*, 2 I&N Dec. 867 (BIA 1947). Since possession of a firearm alone is not a crime involving moral turpitude, this offense is probably not a crime involving moral turpitude. *See, e.g, Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992) (criminal possession of a weapon in the third degree is not a crime involving moral turpitude); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979)

(possession of a concealed sawed-off shotgun is not a crime involving moral turpitude); *Matter of S*, 8 I&N Dec. 344 (BIA 1959) (possession of a concealed weapon with intent to use it is a crime involving moral turpitude).

Aggravated felony

Possession of a concealed firearm

Firearms

A conviction under this statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E). 8 U.S.C. § 1101(a)(43)(E)(ii) lists certain federal statutes in the aggravated felony definition. One of the listed statutes, 18 U.S.C. § 922(g)(5), makes it unlawful for any person who is an alien, who is either illegally or unlawfully in the U.S., or has been admitted under nonimmigrant visa, to possess, transport, or receive any firearm or ammunition. A conviction under Va. Code Ann. §18.2-308.2:01 requires that the defendant be a non-citizen or a non-lawful permanent resident who has concealed on his person, possessed, or transported a firearm. The elements of the two crimes are similar and therefore, a conviction under Va. Code Ann. § 18.2-308.2:01 is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii).

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. *See* analysis for Va. Code Ann. § 18.2-308 (possession of a concealed weapon).

Possession of a firearm

Firearms

A conviction under this statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E). 8 U.S.C. § 1101(a)(43)(E)(ii) lists certain federal statutes in the aggravated felony definition. One of the listed statutes, 18 U.S.C. § 922(g)(5), makes it unlawful for any person who is an alien, who is either illegally or unlawfully in the U.S., or has been admitted under nonimmigrant visa, to possess, transport, or receive any firearm or ammunition. A conviction under Va. Code Ann. §18.2-308.2:01 requires that the defendant be a non-citizen or a non-lawful permanent resident who has concealed on his person, possessed, or transported a firearm. The elements of the two crimes are similar and therefore, a conviction under Va. Code Ann. § 18.2-308.2:01 is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii).

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. Possession of a firearm by someone who is not legally in the U.S. is not a crime of violence under 18 U.S.C. § 16(a) because the statute contains no use, attempted use, or threatened use of physical force against the person or property of another. *See U.S. v. Johnson*, 953 F.2d 110 (4th Cir. 1991) (holding that a conviction for a felon in possession of a firearm does not have as an element the use, attempted use, or threatened use of physical force against the person of another as required by U.S.S.G. § 4B1.1).

Possession of a firearm by an undocumented non-citizen is not a crime of violence under 18 U.S.C. § 16(b) because it is not an offense that by its nature involves the substantial risk that force will be used against person or property under 18 U.S.C. § 16(b). In *U.S. v. Johnson*, 399 F.3d 1297 (11th Cir. 2005), the Eleventh Circuit held that a conviction for possession of a firearm by a felon is not a crime of violence under 18 U.S.C. 3156(a)(4), which has the same language as 18 U.S.C. § 16(b). *See also U.S. v. Ingle*, 454 F.3d 1082 (10th Cir. 2006); *U.S. v. Bowers*, 432 F.3d 518 (3d Cir. 2005) (same). The Court reasoned that the risk of using the weapon is too attenuated to amount to a risk that force might be used in the commission of the offense. For the same reasons that a conviction for possession of a firearm by a felon is not a crime of violence, possession of a firearm by an undocumented non-citizen is not a crime of violence.

Transportation of a firearm

Firearms

A conviction under this statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E). 8 U.S.C. § 1101(a)(43)(E)(ii) lists certain federal statutes in the aggravated felony definition. One of the listed statutes, 18 U.S.C. § 922(g)(5), makes it unlawful for any person who is an alien, who is either illegally or unlawfully in the U.S., or has been admitted under nonimmigrant visa to possess, transport, or receive any firearm or ammunition. A conviction under Va. Code Ann. §18.2-308.2:01 requires that the defendant be a non-citizen or a non-lawful permanent resident who has concealed on his person, possessed, or transported a firearm. The elements of the two crimes are similar and therefore, a conviction under Va. Code Ann. § 18.2-308.2:01 is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii).

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. This offense is not a crime of violence under 18 U.S.C. § 16(a) because there is no use, attempted use, or threatened use of physical force required for someone to transport a firearm. *U.S. v. Johnson*, 953 F.2d 110 (4th Cir. 1991) (holding that a conviction for a felon in possession of a firearm does not have as an element the use, attempted use, or threatened use of physical force against the person of another as required by U.S.S.G. § 4B1.1).

Transportation of a firearm by an undocumented non-citizen is not a crime of violence under 18 U.S.C. § 16(b) because it is not an offense that by its nature involves the substantial risk that force will be used against person or property under 18 U.S.C. § 16(b). In *U.S. v. Johnson*, 399 F.3d 1297 (11th Cir. 2005), the Eleventh Circuit held a conviction for possession of a firearm by a felon is not a crime of violence under 18 U.S.C. 3156(a)(4), which has the same language as 18 U.S.C. § 16(b). *See also U.S. v. Ingle*, 454 F.3d 1082 (10th Cir. 2006); *U.S. v. Bowers*, 432 F.3d 518 (3d Cir. 2005) (same). The Court reasoned that the risk of using the weapon is too attenuated to amount to a risk that force might be used in the commission of the offense. The reasoning is applicable to a conviction under Va. Code Ann. § 18.2-308.2:01 because a defendant can transport a weapon without risking having to use the weapon. Therefore, for the same reasons that a conviction for possession of a firearm by a felon is not a crime of violence, transportation of a firearm by an undocumented non-citizen is not a crime of violence.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(C) if the weapon that he was convicted of using is a firearm as described in 18 U.S.C. § 921(a)(3). All of the weapons listed in the offense are described in 18 U.S.C. § 921(a)(3). Therefore, a conviction under this section will lead to deportability under 8 U.S.C. § 1227(a)(2)(C).

18.2-308.2:1 Prohibiting the sale, etc. of firearms to certain persons

Elements

- attempts or succeeds in
- selling, bartering, giving, or furnishing any firearm to a person he knows is prohibiting from possessing or transporting a firearm pursuant to §§ 18.2-308.1:1 (acquitted in case by reason of insanity); 18.2-308.2 (convicted felon); 18.2-308.7 (under the age of 18)

Crime involving moral turpitude

A conviction under this statute is not a crime involving moral turpitude. There is no evil mindset required for a conviction under this statute. The defendant must merely know that he is breaking the law, which is not enough for a statute to involve moral turpitude. *See Matter of B*, 6 I&N Dec. 98 (BIA 1954). The BIA has held that a statute that punishes the illegal sale of liquor to certain persons is not a crime involving moral turpitude. *See Matter of J*, 2 I&N Dec. 99 (BIA 1944). For this reason, the sale of firearm to someone whom the law restricts from having such a firearm is not a crime involving moral turpitude.

Aggravated felony

Firearms

A conviction under this statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(E). 8 U.S.C. § 1101(a)(43)(E)(ii) lists certain federal statutes in the aggravated felony definition. One of the listed statutes, 18 U.S.C. § 922(g), makes it unlawful for any person who is an alien, who is either illegally or unlawfully in the U.S., or has been admitted under nonimmigrant visa to possess, transport, or receive any firearm or ammunition. Although the offense of being a felon in possession of a firearm under 18 U.S.C. § 922(g) is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii), the offense of sale of a firearm to a convicted felon is not listed in the aggravated felony statute. The federal offense for knowing sale of a firearm to a convicted felon is listed at 18 U.S.C. § 922(d)(1). Congress did not choose to list this statute in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(E)(ii) and therefore, a conviction for sale of a firearm to a convicted felon under Va. Code Ann. § 18.2-308.2:1 is not an aggravated felony.

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction for being a felon in possession of a firearm is

not a crime of violence under 18 U.S.C. § 16(a) or (b). *See U.S. v. Johnson*, 953 F.2d 110 (4th Cir. 1991) (holding that a conviction for a felon in possession of a firearm does not have as an element the use, attempted use, or threatened use of physical force against the person of another as required by U.S.S.G. § 4B1.1). The sale of a firearm to a convicted felon is also not an offense which has as an element of use, attempted use, or threatened use of force against person or property.

In *U.S. v. Johnson*, 399 F.3d 1297 (11th Cir. 2005), the Eleventh Circuit reasoned that a conviction for being a felon in possession of a firearm was not a crime of violence under 18 U.S.C. 3156(a)(4), which has the same language as 18 U.S.C. § 16(b), because the risk of using the weapon is too attenuated to amount to a risk that force might be used in the commission of the offense as required by 18 U.S.C. §16(b). *See also U.S. v. Ingle*, 454 F.3d 1082 (10th Cir. 2006); *U.S. v. Bowers*, 432 F.3d 518 (3d Cir. 2005) (same). The reason is applicable to a conviction under Va. Code Ann. § 18.2-308.2:1 because the risk of use of force in selling a firearm to a convicted felon is even more attenuated than being a felon in possession of a firearm. Therefore, for the same reasons that a conviction for possession of a firearm by a felon is not a crime of violence, sale of a firearm to a convicted felon or another person proscribed from possessing a firearm is not a crime of violence.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(C) if the weapon that he was convicted of selling is a firearm as described in 18 U.S.C. § 921(a)(3).

CRIMES AGAINST PROPERTY

18.2-77 Arson/burning or destroying dwelling house

Elements

- maliciously
  - burns, or
  - by use of explosive device/substance destroys in whole or part or,
  - causes to be burned
- aids, counsels or procures the burning/destruction of any dwelling house
- place in which persons usually dwell or lodge or,
- occupied building

(B) – any burning of unoccupied building is Class 4 felony
(C) – church is defined in Va. Code Ann. § 18.2-127

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because the BIA has held that similar arson statutes involve moral turpitude. *See Matter of S*, 3 I&N Dec. 617 (BIA 1949); *Matter of M*, 2 I&N Dec. 871 (BIA 1947). Arson is a crime involving moral turpitude because a conviction requires evil intent. Under the Virginia statute, "malice" is defined as doing of a wrongful act intentionally, or without just cause or excuse, or as a result of ill will. *Long v. Commonwealth*, 379 S.E.2d 473 (Va. Ct. App. 1989). In *Matter of S*, the BIA held that a statute punishing arson was a crime involving moral turpitude because it required that the arson be committed willfully, which meant that the act must be committed with evil intent. Because the *mens rea* under the Virginia arson statute is similar to that of the statute interpreted by the BIA in *Matter of S*, a conviction under this Virginia statute is a crime involving moral turpitude.

Aggravated felony

Crime of violence

A conviction under this statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The BIA has decided that an arson conviction under an Alaska statute was an aggravated felony. *Matter of Palacios-Pinera*, 22 I&N Dec. 434 (BIA 1998). The statute interpreted by the BIA in *Matter of Palacios-Pinera* punished a person for arson if he intentionally damaged any property by starting a fire or causing an explosion and by that act recklessly placed another person in danger of serious physical injury. The BIA determined that the offense constituted a crime of violence under 18 U.S.C. § 16 because either the elements of the offense must be such that physical force is an element of the crime, or that the nature of the crime must be such that its commission ordinarily would present a risk that physical force would be used against the person or property of another, regardless of whether the risk develops or harm actually occurred.

The BIA found the act of arson in the first degree, by its very nature, involves a substantial risk of physical force against another person or property. *Matter of Palacios-Pinera*, 22 I&N Dec. 434; *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994). Va. Code

Ann. §18.2-77 requires "malicious" intent, which is similar to the intent level of the Alaska statute interpreted by the BIA in *Matter of Palacios-Pinera*.

The Third Circuit has held that an arson statute was not a crime of violence where the *mens rea* of the statute was recklessness. *See Tran v. Gonzales*, 414 F.3d 464 (3d Cir. 2005). The Court held that while intentionally starting a fire may be a crime of violence, the reckless burning would not be a crime of violence under either 18 U.S.C. § 16(a) or (b). The Virginia statute has a higher level of intent, however, punishing the malicious causation of fire. Therefore, a conviction under the Virginia statute is probably a crime of violence.

Aiding and abetting

A conviction under this statute for aiding and abetting an arson is an aggravated felony because if the underlying offense is an aggravated felony, aiding and abetting such offense is an aggravated felony. *See Gonzalez v. Duenas-Alvarez*, 127 S. Ct. 815 (2007).

Solicitation

A conviction under this statute for solicitation to commit arson is probably an aggravated felony. Congress did not include solicitation in the helping offenses to the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(U). Rather, section (U) of the aggravated felony definition includes attempts or conspiracies to commit a substantive offense. The offense of solicitation has been analyzed by some courts in the context of the ground of deportability of a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The Ninth Circuit has held that a solicitation to commit a controlled substance offense is not a conviction for the substantive offense. *See Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999); *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997). However, the BIA has held that solicitation to possess drugs is a crime relating to a controlled substance. *See Matter of Beltran*, 20 I&N Dec. 521 (BIA 1992). The BIA reasoned that solicitation was similar to the offense of attempt or conspiracy, but the main difference with attempt or conspiracy is that the offeree doesn't accept the offer when the crime is solicitation. The BIA reasoned that this offense is basically the same as attempt or conspiracy and therefore is the substantive offense.

It is more likely that solicitation was not listed in 8 U.S.C. § 1101(a)(43)(U) because Congress presumed that this offense was part of the substantive offense, since in other areas of immigration law the substantive offense encompasses aiding and abetting. *See, e.g., Matter of Short*, 20 I&N Dec 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977). Therefore, a conviction for solicitation to commit arson is probably an aggravated felony.

18.2-89 Burglary

Elements

- break and enter
- the dwelling house of another
- in the nighttime
- with intent to commit a felony or any larceny therein
- increased penalty if armed with a deadly weapon at the time of such entry

Crime involving moral turpitude

A conviction under this statute is not necessarily a crime involving moral turpitude. *See Matter of L*, 6 I&N Dec. 666 (BIA 1955); *Matter of M*, 2 I&N Dec. 721 (BIA 1946) (holding that breaking and entering with intent to commit a crime involving moral turpitude is a crime involving moral turpitude). The statute punishes acting with intent to commit any larceny *or* a felony. Breaking and entering with intent to commit larceny is a crime involving moral turpitude, but breaking and entering with intent to commit a felony does not necessarily involve moral turpitude. Therefore, it will be necessary to look at the record of conviction to determine whether this offense is a crime involving moral turpitude.

Aggravated felony

Burglary offense

A conviction under this statute is not necessarily an aggravated felony as a burglary offense under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. The definition of burglary in Va. Code Ann. § 18.2-89 does not fit the general definition of a "burglary offense" within the federal definition, which is the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime therein. *See Taylor v. U.S.*, 495 U.S. 575 (1990). This general definition is the definition that immigration courts use to determine whether an offense constitutes a "burglary offense" under 8 U.S.C. §1101(a)(43)(G). *See Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000). The Virginia statute does not punish the unlawful entry into a structure, just that the defendant make an entry. However, if the record of conviction reflects that the entry was unlawful, the offense will probably come within the definition of a burglary offense at 8 U.S.C. § 1101(a)(43)(G).

Crime of violence

A conviction under this Virginia statute is a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence is at least one year. The Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held that burglary is a classic crime of violence under 18 U.S.C. § 16(b) because the burglar must risk using force against an occupant of the home. Therefore, a conviction under this statute is a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony if the sentence imposed is at least one year.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under U.S.C. § 1227(a)(2)(C) if the defendant is armed with a deadly weapon that is a firearm under 18 U.S.C. § 921(a). It is necessary to look to the record of conviction to determine what the deadly weapon is. The weapon must be one described in 18 U.S.C. § 921(a) in order to render a non-citizen deportable under this ground.

18.2-90 Entering dwelling house, etc. with intent to commit murder, rape, robbery or arson

Elements

- enters in the nighttime without breaking OR
  - breaks + enters in the daytime OR
  - enters and conceals himself
- in dwelling house or an adjoining, occupied outhouse

OR

- in the nighttime enters without breaking OR
  - at any time breaks and enters OR
  - enters and conceals himself
- in any building permanently affixed to realty, or any ship, vessel, or river craft or any railroad car, or any car, truck or trailer
- if such car, truck or trailer is used as a dwelling or place of human habitation

+ with the intent to commit murder, rape, robbery or arson
*If armed with a deadly weapon at the time of the break in, increased punishment

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. Breaking and entering is a crime involving moral turpitude if it is done with the intent to commit a crime involving moral turpitude. *See Matter of M*, 2 I&N Dec. 721 (BIA 1946); *Matter of L*, 6 I&N Dec. 666 (BIA 1955). A defendant can be convicted under Va Code Ann. § 18.2-90 if he breaks and enters with the intent to commit murder, rape, robbery or arson. Using the Virginia code general definitions of murder, rape, robbery and arson, each of these offenses is a crime involving moral turpitude. *See* analysis for Va. Code Ann. §§ 18.2-77 (arson); 18.2-32 (murder); 18.2-61 (rape). Therefore, every conviction under this statute is a crime involving moral turpitude.

Aggravated felony

Burglary offense

This offense is not necessarily a burglary offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. The offense punished by the statute does not match the federal definition of burglary because there is no statutory requirement for an "unlawful" entry. However, if the record of conviction reflects an unlawful entry, that is probably a burglary offense. *See* analysis for Va. Code Ann. § 18.2-89.

Crime of violence

A conviction under this statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held that burglary is the classic crime of violence under 18 U.S.C. § 16(b) because the burglar will have to risk using force against an occupant of the home. This Virginia statute punishes the unlawful entry into a dwelling or other inhabited places, where there is a substantial risk that the perpetrator might happen upon an occupant and need to resort to

violence to accomplish the offense. Therefore, a conviction under this statute is a crime of violence under 18 U.S.C. § 16(b).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under U.S.C. § 1227(a)(2)(C) if the defendant is armed with a deadly weapon that is a firearm under 18 U.S.C. § 921(a). It is necessary to look to the record of conviction to determine what the deadly weapon is. The weapon must be one described in 18 U.S.C. § 921(a) in order to render a non-citizen deportable under this ground.

18.2-91 Statutory burglary

Elements

- commits any acts mentioned in Va. Code Ann. § 18.2-90 (breaking and entering a dwelling house)
- with intent to commit larceny, or any felony other than murder, rape, robbery or arson

OR

- commits any acts mentioned in Va. Code Ann. § 18.2-89 (burglary) or § 18.90 (breaking and entering dwelling house)
- with intent to commit assault and battery

*additional punishment for either offense if the defendant is armed with a deadly weapon at the time of such entry

Crime involving moral turpitude

A conviction under this statute is not necessarily a crime involving moral turpitude. *See* analysis for Va. Code Ann. § 18.2-89. Va. Code Ann. § 18.2-89 punishes general breaking and entering with the intent to commit any felony or larceny therein, and Va. Code Ann. § 18.91 adds that the breaking and entering be done with intent to commit an assault and battery. The offense is not a crime involving moral turpitude because the breaking and entering must be done with intent to commit a crime involving moral turpitude in order for the offense to be a crime involving moral turpitude. Because simple assault and battery is not a crime involving moral turpitude, breaking and entering with intent to commit an assault and battery is not a crime involving moral turpitude. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989). However, if the defendant is convicted for breaking and entering with intent to commit larceny, this conviction is a crime involving moral turpitude because larceny is a crime involving moral turpitude. *See* analysis for Va. Code Ann. §§ 18.2-95 and 96 (petty larceny and grand larceny). Therefore, it is necessary to consult the record of conviction to determine whether this offense is a crime involving moral turpitude.

Aggravated felony

Burglary offense

This offense is not necessarily a burglary offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. The offense punished by the statute does not match the federal definition of burglary because there is no statutory requirement for an "unlawful" entry. However, if the record of

conviction reflects an unlawful entry, this is probably a burglary offense. *See* analysis for Va. Code Ann. § 18.2-89.

Crime of violence

A conviction under this statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. *See* analysis for Va. Code Ann. §§ 18.2-89 and 18.2-90.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under U.S.C. § 1227(a)(2)(C) if the defendant is armed with a deadly weapon that is a firearm under 18 U.S.C. § 921(a). It is necessary to look to the record of conviction to determine what the deadly weapon is. The weapon must be one described in 18 U.S.C. § 921(a) in order to render a non-citizen deportable under this ground.

18.2-92 Breaking and entering dwelling house with intent to commit other misdemeanor

Elements

- breaks and enters a dwelling house while said dwelling is occupied
- either in the day or nighttime
- with the intent to commit any misdemeanor except assault and battery or trespass

*heightened punishment if defendant armed with deadly weapon at the time of entry

Crime involving moral turpitude

A conviction under this statute is not necessarily a crime involving moral turpitude. Breaking and entering is a crime involving moral turpitude if it is done with the intent to commit a crime involving moral turpitude. *See Matter of M*, 2 I&N Dec. 721 (BIA 1946); *Matter of L*, 6 I&N Dec. 666 (BIA 1955). The statute punishes breaking and entering with the intent to commit any misdemeanor. Breaking and entering with intent to commit a non-turpitudinous misdemeanor does not involve moral turpitude. Therefore, it is necessary to look to the record of conviction to determine whether the offense is a crime involving moral turpitude.

Aggravated felony

Burglary offense

This offense is not necessarily a burglary offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. The offense punished by the statute does not match the federal definition of burglary because there is no statutory requirement for an "unlawful" entry. However, if the record of conviction reflects an unlawful entry, this is probably a burglary offense. *See* analysis for Va. Code Ann. § 18.2-89.

Crime of violence

A conviction under this statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held

that burglary is the classic crime of violence under 18 U.S.C. § 16(b) because the burglar will have to risk using force against an occupant of the home. This Virginia statute punishes the unlawful entry into a dwelling house when the dwelling is occupied, where there is a substantial risk that the perpetrator might happen upon an occupant and need to resort to violence to accomplish the offense. Therefore, a conviction under this statute is a crime of violence under 18 U.S.C. § 16(b).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable under U.S.C. § 1227(a)(2)(C) if the defendant is armed with a deadly weapon that is a firearm under 18 U.S.C. § 921(a). It is necessary to look to the record of conviction to determine what the deadly weapon is. The weapon must be one described in 18 U.S.C. § 921(a) in order to render a non-citizen deportable under this ground.

18.2-94 Possession of burglary tools

Elements

- have in possession tools, implements or outfit
- with intent to commit burglary, robbery, or larceny
- intent evidenced by possession of such tools by person who is not licensed to have them

Crime involving moral turpitude

A conviction under this statute is not necessarily a crime involving moral turpitude. The offense is a crime involving moral turpitude only if the record of conviction reflects that such tools were possessed with the intent to commit a crime that is inherently immoral. *See Matter of S*, 6 I&N Dec. 769 (BIA 1955). The Virginia statute requires that the defendant possess the tools with intent to commit robbery, burglary, or larceny. The statute does not specify which definition of burglary it follows. Therefore, using the general burglary statute under Virginia law, this offense is not necessarily a crime involving moral turpitude because not all burglaries under Va. Code Ann. § 18.2-89 are crimes involving moral turpitude. *See* analysis for Va. Code Ann. § 18.2-89. By this same reasoning, a conviction for possession of burglary tools is not necessarily a crime involving moral turpitude because the record does not necessarily reflect that the tools were possessed with the intent to commit a larceny or to break and enter to commit a crime involving moral turpitude. *See also generally Matter of Serna*, 20 I&N Dec. 579 (BIA 1992) (holding that a conviction is only a crime involving moral turpitude if the person has intent to commit a crime involving moral turpitude).

Aggravated felony

Burglary offense

A conviction under this statute is not a burglary offense under 8 U.S.C. § 1101(a)(43)(G) and therefore is not an aggravated felony if the sentence imposed is at least one year. The Virginia offense does not match the generic definition of burglary in *Taylor v. U.S.*, 495 U.S. 575 (1990), which is the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime therein. This general

definition is the definition that immigration courts use to determine whether an offense constitutes a "burglary offense" under 8 U.S.C. § 1101(a)(43)(G). *See Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000). The Virginia statute does not punish the unlawful entry into a structure, just that the defendant have intent to commit a burglary or another listed offense. Therefore, a conviction under this statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(G).

Attempted burglary offense

A conviction under this statute may be considered an attempt to commit burglary and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(G) and (U) if the sentence imposed is at least one year. An attempt under the definition at § 1101(a)(43)(U) requires the completion of a substantial step towards the commission of the offense together with the requisite intent to commit the offense. *See Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999). The mere possession of the tools with intent to commit burglary may be sufficient to prove attempt, since possession of tools may be a "substantial step" towards the commission of the offense. *See Sui v. INS*, 250 F.3d 105 (2d Cir. 2001) (holding that knowingly and unlawfully possessing counterfeit securities with the intent to deceive was not necessarily an attempted fraud offense under 8 U.S.C. §§ 1101(a)(43)(M) and (U)); Model Penal Code § 5.01(2)(f) (possession of materials to be employed in the commission of the crime, which are specifically designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances shall not be held insufficient as a matter of law to constitute a substantial step). The question of whether the possession of the tools with intent to commit the crime alone can be a substantial step towards the offense sufficient to constitute an attempt is not fully resolved. Therefore, it is possible that this offense will be an attempted burglary offense.

It is also possible that the offense is not an attempted burglary because none of the burglary statutes in Virginia match the Supreme Court's definition of burglary in *Taylor v. U.S.*, 495 U.S. 575 (1990). *See* analysis for Va. Code Ann. §§ 18.2-89, 90, 91, 92. The Supreme Court's definition of burglary in *Taylor* is the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime therein. This general definition is the definition that immigration courts use to determine whether an offense constitutes a "burglary offense" under 8 U.S.C. § 1101(a)(43)(G). *See Matter of Perez*, 22 I&N Dec. 1325. The Virginia statutes do not punish the unlawful entry into a structure, just that the defendant make some entry. However, if the record reflects that the defendant possessed burglary tools to make an unlawful entry, the offense will probably come within the definition of an attempted burglary offense at 8 U.S.C. §§ 1101(a)(43)(G) and (U).

Attempted theft offense

A conviction under this statute may be considered an attempted theft offense aggravated felony under 8 U.S.C. § 1101(a)(43)(G) and (U) if the sentence imposed is at least one year. The Virginia statute punishes the possession of the tools with intent to commit a burglary, robbery, or larceny. If the defendant is charged with possessing the tools to commit robbery or larceny, this offense is probably an attempted theft offense. However, if the defendant is charged with possessing the tools to commit burglary, it is necessary to look to the definition of "burglary" to determine if it is a theft offense. The language of statutory burglary in Virginia is at Va. Code Ann. § 18.2-89, which punishes breaking and entering with intent to commit a felony or any larceny therein. Not all

felonies are theft offenses and therefore, a defendant could be convicted for possessing burglary tools with intent to break and enter to commit a trespass or a non-theft offense. Therefore, a conviction under this statute is an attempted theft aggravated felony offense under 8 U.S.C. § 1101(a)(43)(G) and (U) if the record of conviction reflects that the defendant possessed the burglary tools with intent to commit larceny or robbery and not with intent to commit general burglary.

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). It is not a crime of violence under 18 U.S.C. § 16(a) because there is no element of use, attempted use, or threatened use of physical force against the person or property of another. Nor is the offense one that, by its nature, involves a substantial risk that force will be used against the person or property of another under 18 U.S.C. § 16(b). Possession of burglary tools alone with the intent to commit robbery, burglary, or larceny does not carry a substantial risk that force will be used against the person or property of another. Rather, the offense is more like the possession of a firearm by a felon, which courts have reasoned is not a crime of violence under 18 U.S.C. 3156(a)(4), which has the same language 18 U.S.C. § 16(b). *See, e.g., U.S. v. Ingle*, 454 F.3d 1082 (10th Cir. 2006); *U.S. v. Bowers*, 432 F.3d 518 (3d Cir. 2005); *U.S. v. Johnson*, 399 F.3d 1297 (11th Cir. 2005).

Moreover, the statutory elements of the offense are met when the defendant possesses such tools with the intent to use them. The statute does not punish the actual use of those tools to commit a burglary. The mere possession of tools with intent to use them to do a crime of violence is not by itself a crime of violence. There is no risk that force will be used against person or property of another in order for a defendant to possess burglary tools as required by 18 U.S.C. § 16(b). Rather, the offense is committed once the tools are possessed and the intent is proven. Therefore, there is no risk that the defendant will use force against the person or property of another in order to effectuate the commission of possessing burglary tools with intent to use them. For this reason, a conviction under this statute is not a crime of violence.

18.2-95 Grand larceny

Elements

- wrongful taking of goods of another
- without the owner's consent
- with intent to permanently deprive the owner of the possession of goods

larceny definition includes larceny from the person or not from the person

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because the statute has as an element intent to permanently deprive the owner of the property. *See Matter of M*, 2 I&N Dec. 686 (BIA 1946); *Matter of D-*, 1 I&N Dec. 143 (BIA 1941).

Aggravated felony

Theft offense

A conviction under this statute is a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if sentence imposed is at least one year. The elements of larceny are the same elements of a theft offense described by the BIA because larceny requires that the defendant exercise control over another person's property with the intent to deprive the person of such property. *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000); *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000).

Crime of violence

A conviction under this statute for larceny from the person is probably a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The Fourth Circuit has held that a conviction under this statute is an offense that, by its nature, presents a serious risk that physical injury against a person will result. *See U.S. v. Smith*, 359 F.3d 662 (4th Cir. 2004) (reasoning that taking property from the immediate control of a victim could likely result in the escalation of the offense to a violent one). Although the Fourth Circuit's decision in *Smith* concerned whether an offense was a crime of violence under U.S.S.G. § 4B1.2(a), which defines crime of violence by risk of injury and not risk of use of force, the reasoning of the Fourth Circuit in *Smith* can still apply to an analysis under 18 U.S.C. § 16(b). Because of the confrontational nature of larceny from the person, it is a crime where there is a substantial likelihood that force will be used against the person or property of another. Therefore, a conviction for larceny from the person is probably a crime of violence under 18 U.S.C. § 16(b).

18.2-96 Petty larceny

Elements

- wrongful taking of goods of another
- without the owner's consent
- with intent to permanently deprive the owner of the possession of goods

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. Petty larceny has generally been held to be a crime involving moral turpitude, regardless of the gravity of the offense. *See, e.g., Pino v. Landon*, 349 U.S. 1 (1955). The case law interpreting Va. Code Ann. § 18.2-96 states that larceny is the wrongful taking of the goods of another without the owner's consent and with the intention to permanently deprive the owner of possession of the goods. *See Bright v. Comm.*, 356 S.E.2d 443 (Va. Ct. App. 1987). Because an element of the Virginia offense is permanent deprivation, a conviction under this statute is a crime involving moral turpitude. *See Matter of M*, 2 I&N Dec. 686 (BIA 1946); *Matter of D-*, 1 I&N Dec. 143 (BIA 1941).

Aggravated felony

Theft offense

A conviction under this statute is a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if sentence imposed is at least one year. The

elements of larceny are the same elements of a theft offense described by the BIA because larceny requires that the defendant exercise control over another person's property with the intent to deprive the person of such property. *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000); *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000).

Crime of violence

Petty larceny is not a crime of violence under 18 U.S.C. § 16(a) and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) because it is not an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another. *See U.S. v. Smith*, 359 F.3d 662 (4th Cir. 2004). The offense is a misdemeanor only, so it is not analyzed under 18 U.S.C. § 16(b).

18.2-96.1 Identification of certain personalty

Elements

(C)

- remove, alter, deface, destroy, conceal, or otherwise obscure manufacturer's serial number or marks
- without the consent of the owner
- with intent to render it or other property unidentifiable

(D)

- possess such personal property or any part thereof
- without the consent of the owner
- knowing that the manufacturer's serial number or any distinguishing feature has been removed, altered, defaced, destroyed, concealed, or otherwise obscured with intent to violate the provisions of this section

The offense is a misdemeanor if the value of the personalty is less than $200, and a felony if the value is over $200.

Crime involving moral turpitude

(C) Removing or defacing seal without the consent of the owner

A conviction under this section of the statue is possibly a crime involving moral turpitude. The BIA has held that statutes punishing destruction of property are crimes involving moral turpitude where the *mens rea* is willful behavior; the Virginia statute does not require that the defendant act willfully. *See Matter of C*, 2 I&N Dec. 716 (BIA 1946). There statute also does not have as an element the intentional deprivation of the rights and benefits of ownership from the true owner. However, the defendant must act with intent to render the property unidentifiable, which is an evil intent that might amount to intending to permanently deprive the owner of the rights and benefits of ownership and therefore be a crime involving moral turpitude. *See Matter of P*, 4 I&N Dec. 252 (BIA 1951) (statute punishing the taking of the property of another without his consent with intent to convert it to the use of the taker was a crime involving moral turpitude because the conversion of use from true owner to taker is the intent to permanently deprive the owner and will sustain a finding of crime involving moral turpitude). Therefore, it is possible that a conviction under this statute is a crime involving moral turpitude.

(D) Possession of property knowing that the seal is removed

A conviction under this section of the statute is probably not a crime involving moral turpitude. The offense is similar to the possession of stolen goods knowing that such goods have been stolen, since knowledge is an element of the offense and the Virginia conviction requires that the defendant possess another's property without the owner's consent. Therefore, under the same analysis as possession of stolen goods, it is possible that this offense is a crime involving moral turpitude. *See Matter of Z*, 7 I&N Dec. 253 (BIA 1956); *Matter of R*, 6 I&N Dec 772 (BIA 1955). However, the Virginia statute punishes only possession of the goods knowing that the seal is removed, not with knowledge that they are stolen. Therefore, this is offense is probably not a crime involving moral turpitude.

Aggravated felony

(C) Removing or defacing seal without the consent of the owner

Attempted theft

A conviction under this section of the statute is possibly an attempted theft offense and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(G) and (U) if the sentence imposed is at least one year. The Virginia statue does not have as an element the criminal intent to deprive the owner of the rights and benefits of ownership and therefore does not have all of the elements of a theft offense as described by the BIA. *See Matter of V-Z-S*, 22 I&N Dec. 1338 (BIA 2000). However, the Virginia statute punishes the acts done with intent to render the property unidentifiable, which may be considered a substantial step toward the deprivation from the owner of the rights and benefits of ownership since it increases the likelihood that the owner of the vehicle will not find it. *See Sui v. INS*, 250 F.3d 105 (2d Cir. 2001); *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999). Therefore, it is possible that a conviction under this statute is an attempted theft offense.

Crime of violence

A conviction under section (C) of the statute is probably not a crime of violence and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. Even though some force must be used to cover the manufacturer's mark to commit an offense under this section of the statute, it is *de minimus* force, which is not the force contemplated by 18 U.S.C. § 16(a). *See Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003); *U.S. v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006); *U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001). Therefore, the statute does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another.

Nor is there a substantial risk that use of force will be used against the person or property of another as required by 18 U.S.C. § 16(b). It is unlikely that the defendant will have to use violent or destructive force in order to remove, destroy or conceal the manufacturer's seal. *See Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001). It is not similar to the risk of force in gaining access to another person's vehicle, which the BIA held to be a substantial risk of use of force under 18 U.S.C. § 16(b). *See Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). Because a defendant need not actually break into the car to remove or destroy the seal, it is not likely that the BIA's decision in *Matter of*

Brieva will control. Therefore, a conviction under this statute is not a crime of violence under 18 U.S.C. § 16.

(D) Possession of property knowing that the seal is removed

Theft offense

A conviction under this section of the statute is probably not a theft offense under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. The offense is similar to the offense of concealing stolen goods, since the defendant must exercise unlawful control over another person's property. The defendant must also know that the seal that has been altered on the car, so it is very similar to knowing that the car was stolen or unlawfully converted. The BIA recognized that certain federal statutes fit within the definition of theft offense as contemplated by Congress in 8 U.S.C. § 1101(a)(43)(G). *See Matter of Bahta,* 22 I&N Dec. 1381 (BIA 2000). One of these statutes is 8 U.S.C. § 2313, which punishes the receipt, possession, or concealing of a vehicle or aircraft knowing that such vehicle was stolen, unlawfully converted, or taken. However, because the Virginia statute does not require that the defendant know that the property is stolen, it does not have the same elements as the theft offenses described by the BIA in *Matter of Bahta.* Therefore, this offense is probably not a a theft offense.

Trafficking in vehicles on which ID numbers have been altered

A conviction under either section of this statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(R) as an offense relating to trafficking in vehicles the identification numbers of which have been altered. The Virginia statute only punishes the lifting of the identification seal or the possession of such a vehicle. There is no element of the Virginia statute that punishes the trafficking in such vehicles since the defendant need not sell or trade for commercial benefit the vehicles. *See generally Matter of Davis*, 20 I&N Dec. 536 (BIA 1992) (defining illicit trafficking in a controlled substance as trading or dealing where there is a business or merchant nature).

18.2-98 Larceny of bank notes, checks, etc., or any book of accounts

Elements

- steal any bank note, check, or other writing or paper of value or,
- whether it represents money or otherwise, or any book of accounts, for or concerning money or goods due or to be delivered,
- shall be deemed guilty of larceny thereof, and receive the same punishment, (according to the value of the thing stolen) as larceny of goods and chattels

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. The BIA has repeatedly held that larceny is a crime involving moral turpitude where there is an intent to permanently deprive the owner of the rights and benefits of ownership. *See Matter of Esfandiary*, 16 I & N. Dec. 659 (BIA 1979); *Matter of D,* 7 I & N. Dec. 476 (BIA 1957).

The Virginia statute does not contain an explicit intent requirement, but the word "steal" appears in the VA statute. *See Matter of Westman*, 17 I&N Dec. 50 (BIA 1979) (holding that a statute punishing stealing or unlawfully obtaining property by check was a

crime involving moral turpitude). A charge under this statute shall be sufficient to sustain a charge for larceny, so it is likely that the definition of "steal" under this Code section will take on the elements of Virginia larceny, Va. Code Ann. § 18.2-95, which punishes a defendant for intending to deprive the owner permanently of the rights and benefits of ownership. *See Bright v. Comm.*, 356 S.E.3d 443 (Va. 1987) (defining common law larceny). Because the statute punishes a defendant for permanently depriving the owner of the rights and benefits of ownership, it is a crime involving moral turpitude.

Aggravated felony

Theft offense

A conviction under this statute is a theft offense and therefore an aggravated felony under 8 U.S.C. §1101(a)(43)(G) if the sentence imposed is at least one year. The Virginia statute punishes stealing, which meets the definition of a theft offense. A theft offense requires that there be criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent. *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000).

18.2-102 Unauthorized use of animal, aircraft, vehicle or boat

Elements

- take, drive, or use any animal, aircraft, vehicle, boat, or vessel not his own
- without the consent of the owner
- in the absence of the owner
- with intent temporarily to deprive the owner of possession

Crime involving moral turpitude

A conviction under this statute is not a crime involving moral turpitude because the statute punishes a taking with the intent to temporarily deprive the owner of the vehicle, not the intent to permanently deprive the owner of the rights and benefits of ownership. *See Matter of M*, 2 I&N Dec. 686 (BIA 1946); *Matter of D-*, 1 I&N Dec. 143 (BIA 1941).

Aggravated felony

Theft offense

A conviction under this statute is a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. The elements of this statute meet the definition of a theft offense, which requires that there be criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent. *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000).

Crime of violence

A conviction for a felony under this statute (for any vehicle, etc. valued at over $200) is probably a crime of violence and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The offense is a crime of violence under 18 U.S.C. §16(b) as an offense that, by its nature, involves the substantial

risk that force will be used against the property of another to effectuate the offense. *See Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005) (unauthorized use of a vehicle is a crime of violence under 18 U.S.C. section 16(b) because there is a substantial risk that force will be used against property in order to enter the vehicle).

18.2-103 Concealing or taking possession of merchandise; altering price tags; transferring goods from one container to another; counseling, etc., another in performance of such acts

Elements

- without authority and without having paid full amount for goods
- with intent to convert to own or another's use or with intent to defraud owner of the value of the goods
- does one of these acts:
  willfully conceals or takes possession of merchandise; or
  alters price tags or transfers containers; or
  counsel, assists, aids or abets another to do so

Crime involving moral turpitude

Concealing or taking possession of merchandise

A conviction for concealing or taking possession of merchandise with intent to defraud or convert to one's own use under this statute is a crime involving moral turpitude. *See Matter of W- and B-*, 5 I&N Dec. 87 (BIA 1953) (statute punishing the knowing concealment of goods with intent to defraud is a crime involving moral turpitude). Statutes that punish the intent to defraud are generally crimes involving moral turpitude. *Jordan v. DeGeorge*, 341 U.S. 223 (1951). Also, statutes that punish the intent to permanently deprive the owner of the rights and benefits of ownership are crimes involving moral turpitude. *Matter of M*, 2 I&N Dec. 686 (BIA 1946). The intent to convert property to one's own use is substantially similar to the intent to permanently deprive the owner of the rights and benefits of ownership. *See Matter of* P, 4 I&N Dec. 252 (BIA 1951); *Matter of G-T-*, 4 I&N Dec. 446 (BIA 1951). Therefore, a conviction under this section of the statute is a crime involving moral turpitude.

Altering the price tag or other price marking on such goods or merchandise, or transferring the goods from one container to another

A conviction for altering a price tag or container with intent to defraud or convert to one's own use under this statute is a crime involving moral turpitude because of the intent requirement of the statute. *See Matter of A*, 4 I&N Dec. 378 (BIA 1951) (conviction for altering official records is not a crime involving moral turpitude because there was no intent requirement). Statutes that punish the intent to defraud are generally crimes involving moral turpitude. *Jordan v. DeGeorge*, 341 U.S. 223 (1951). Also, statutes that punish the intent to permanently deprive the owner of the rights and benefits of ownership are crimes involving moral turpitude. *Matter of M*, 2 I&N Dec. 686 (BIA 1946). The intent to convert property to one's own use is substantially similar to the intent to permanently deprive the owner of the rights and benefits of ownership. *Matter of* P, 4 I&N Dec. 252 (BIA 1951); *Matter of G-T-*, 4 I&N Dec. 446 (BIA 1951).

Therefore, a conviction under this section of the statute is a crime involving moral turpitude.

Counseling, assisting, aiding or abetting another in the performance of any of the above acts

A conviction for aiding and abetting under this statute is a crime involving moral turpitude. The BIA has held that aiding and abetting statutes do not define a separate offense but rather concern the underlying offense of the principal. *Matter of Beltran*, 20 I&N Dec 521 (BIA 1992); *Matter of Short*, 20 I&N Dec 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977). Therefore, a conviction for aiding and abetting a crime involving moral turpitude is a crime involving moral turpitude. Because a conviction under any section of this statute is a crime involving moral turpitude, a conviction under the aiding and abetting section of the statute is a crime involving moral turpitude.

Aggravated felony

Concealing or taking possession of merchandise

Theft offense

A conviction under this section of the statute is probably a theft offense and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(G) and (U) if the sentence imposed is at least one year. The Virginia statute punishes concealing or changing the tags on merchandise with intent to convert the goods to one's own or to defraud the owner of the value of the goods. These elements fit the definition of a theft offense, which requires that there be criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent. *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000). The BIA recognized that certain federal statutes fit within the definition of theft offense as contemplated by Congress in 8 U.S.C. section 1101(a)(43)(G). *See Matter of V-Z-S-*, 22 I&N Dec. 1338; *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000). One of these statutes is 8 U.S.C. § 2313, which punishes the receipt, possession, or concealing of a vehicle or aircraft. Therefore, concealing goods or altering price tags with intent to convert the goods to one's own use is probably a theft offense under 8 U.S.C. §1101(a)(43)(G).

Fraud offense

A conviction under this section of the statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

Altering price tags or switching containers

Theft offense

A conviction under this section of the statute is probably not a theft offense. The section punishes the act of altering price tags or switching containers or assisting another in doing so with the intent to defraud the store owner of the price of the goods. This does not necessarily fit within the definition of a theft offense because there is no criminal intent to deprive the owner of the rights and benefits of ownership. *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000). Nor is there any actual requirement that the goods be appropriated from one person to the other. Moreover, if the defendant succeeds in

purchasing the merchandise at the modified price, this offense will not be a theft offense because the defendant would not take the merchandise without consent. Rather, the defendant would have the consent of the owner of the goods to take the property, but that consent would be fraudulently obtained. The Fourth Circuit distinguished between theft and fraud offenses in the aggravated felony definition and found that fraud offenses involve unlawfully obtained consent of the owner, whereas theft offenses involve takings without the consent of the owner. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

Fraud offense

A conviction under this section of the statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. §1101(a)(43)(M)(i) if the loss to the victim is more than $10,000.

Aiding and abetting

A conviction under this statute for aiding and abetting any of the above acts is an aggravated felony if if the underlying offense is an aggravated felony. *See Gonzalez v. Duenas-Alvarez*, 127 S. Ct. 815 (2007).

18.2-105.2 Manufacture or sale of devices to shield against electronic detection of shoplifting

Elements

- manufacture, sell, offer for sale, distribute or possess
- specially coated or laminated bag or other device primarily designed and intended to shield shoplifted merchandise from detection by anti-theft electronic alarm sensor
- with the intent that it be used to aid in the shoplifting of merchandise

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude because the statute does not punish mere possession of such an instrument, but possession with intent to use it to shoplift. Although "shoplifting" is not defined by statute, shoplifting generally involves the intent to permanently deprive the owner of the rights and benefits of ownership. *See Matter of M*, 2 I&N Dec. 686 (BIA 1946); *Matter of D-*, 1 I&N Dec. 143 (BIA 1941). Therefore, a conviction under this statute is probably a crime involving moral turpitude because the statute punishes possession of a device for shoplifting with the intent to commit a crime involving moral turpitude. *See generally Matter of Serna*, 20 I&N Dec. 579 (BIA 1992) (possession of fraudulent identification is a crime involving moral turpitude if the identification document is possessed with an intent to use it); *Matter of S*, 6 I&N Dec. 769 (BIA 1955) (possession of burglary tools is a crime involving moral turpitude if the tools are possessed with the intent to commit a crime involving moral turpitude).

Aggravated felony

Theft offense

A conviction under this statute is not a theft offense and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. A conviction under this statute does not involve the criminal intent to deprive the

owner of the rights and benefits of ownership, which is required for an offense to be a theft offense. *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000). Nor does the statute require that the defendant acquire any property of another or that the defendant actually take anything. Rather, the offense is committed once the defendant makes, sells, distributes or possesses such device with the intent that it be used to aid in the shoplifting of merchandise.

Attempted theft offense

A conviction under this statute is possibly an attempted theft offense under 8 U.S.C. §§1101(a)(43)(G) and (U). An attempt under the definition at § 1101(a)(43)(U) requires the completion of a substantial step towards the commission of the offense and the requisite intent to commit the offense. *See Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999). The mere possession of the device to be used for shoplifting with intent that such tools be used in a shoplifting may be sufficient to prove attempt, since possession of the device may be a "substantial step" towards the commission of the offense. *See Sui v. INS*, 250 F.3d 105 (2d Cir. 2001) (holding that knowingly and unlawfully possessing counterfeit securities with the intent to deceive was not necessarily an attempted fraud offense under 8 U.S.C. §§ 1101(a)(43)(M) and (U)); Model Penal Code § 5.01(2)(f) (possession of materials to be employed in the commission of the crime, which are specifically designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances shall not be held insufficient as a matter of law to constitute a substantial step). The question of whether the possession of the device with intent to commit the crime alone can be a substantial step towards the offense sufficient to constitute an attempt is not fully resolved. Therefore, it is possible that this offense is an attempted theft offense.

It is likely that the manufacturing, selling, offering for sale, or distribution, each with the intent that the device be used to aid in shoplifting, is an attempted theft offense. The defendant must make a substantial step towards the commission of the theft. The making, selling, offering for sale, or distribution, with the requisite intent is probably a substantial step. Like the submission of the fraudulent insurance claim that was found to be a substantial step in *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999), a defendant convicted under this statute initiates the acts which will complete the theft of the merchandise.

18.2-107 Theft or destruction of public records by others than officers

Elements

- steal OR
- fraudulently secrete or destroy a public record or part thereof

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. The offense involves either stealing, where the intent is generally to deprive the owner permanently of the rights and benefits of ownership; or acting fraudulently, which always involves moral turpitude. Both larceny and fraud offenses are generally crimes involving moral turpitude. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951); *Matter of M*, 2 I&N Dec. 686 (BIA 1946); *Matter of D-*, 1 I&N Dec. 143 (BIA 1941).

Aggravated felony

Stealing public record

Theft offense

A conviction under this section of the statute is theft offense under 8 U.S.C. § 1101(a)(43)(G) if the sentence is at least one year. A defendant can be convicted under this statute for stealing, which involves the criminal intent to deprive the owner of the rights and benefits of ownership. *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000).

Fraudulently secrete or destroy a public record

Theft offense

A conviction under this section of the statute is probably not a theft offense under 8 U.S.C. § 1101(a)(43)(G) if the sentence is at least one year. The BIA in *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000), discussed several federal statutes that it reasoned were included in the general definition of theft offense under 8 U.S.C. § 1101(a)(43)(G). One of these was 18 U.S.C. § 2313, which punishes the disposal of property knowing the same to have been stolen. Like 18 U.S.C. § 2313, the Virginia statute requires that the defendant secrete or destroy property. However, there is no requirement under the Virginia statute that the defendant know it was stolen and therefore it is not necessarily a theft offense under this analysis. Another statute that the BIA mentioned in *Matter of Bahta* was 18 U.S.C. § 641, which punishes the concealing of stolen property. Fraudulently secreting property under this Virginia statute is similar to concealing stolen property. However, there is no requirement under the Virginia statute that the defendant know that it was stolen and therefore it is not necessarily a theft offense under this analysis.

Fraud offense

A conviction under this section of the statute is a fraud offense under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

18.2-108 Receiving stolen goods

Elements

- buy, receive, or aid in concealing
- stolen goods
- knowing the same to have been stolen

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. The statute punishes receiving stolen goods with knowledge that such goods have been stolen; the BIA has held that similar statutes are crimes involving moral turpitude. *Matter of Patel*, 15 I&N Dec. 212 (BIA 1975); *Matter of Z*, 7 I&N Dec. 253 (BIA 1956), and *Matter of R*, 6 I&N Dec. 772 (BIA 1955). If the defendant is convicted for aiding in the concealment of stolen goods, this is also a crime involving moral turpitude. The BIA has held that aiding and abetting statutes do not define a separate offense but rather concern the underlying offense of the principal. *Matter of Beltran*, 20 I&N Dec 521(BIA 1992); *Matter of Short*, 20 I&N Dec 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336

(BIA 1977). A conviction for aiding and abetting a crime involving moral turpitude is therefore a crime involving moral turpitude.

Aggravated felony

Theft offense

A conviction under this statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. In *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000), the BIA concluded that the predominant modern view of the phrase "receipt of stolen property" in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(G) includes the knowing receipt, possession, or retention of another's property without consent. The BIA found that the common element among these offenses was that the offender exercise unauthorized control over another's property, which means that proof that the defendant was involved in the actual taking is not necessary. The BIA thus found that receipt of stolen property was an aggravated felony.

Aiding and abetting

A conviction under this statute for aiding and abetting receipt of stolen property is an aggravated felony because if the underlying offense is an aggravated felony, aiding and abetting such offense is an aggravated felony. *See Gonzalez v. Duenas-Alvarez*, 127 S. Ct. 815 (2007).

18.2-108.1 Receipt of stolen firearm

Elements

- buys or receives a firearm or,
- aids in its concealment
- knowing the firearm was stolen

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. *See* analysis for Va. Code Ann. § 18.2-108 (receipt of stolen goods).

Aggravated felony

Theft offense

A conviction under this statute is a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. *See* analysis for Va. Code Ann. § 18.2-108 (receipt of stolen goods).

Firearms

A conviction under this statute is a firearms aggravated felony under 8 U.S.C. § 1101(a)(43)(E). The offense is punishable under 18 U.S.C. § 922(j), which is one of the statutes listed in 8 U.S.C. § 1101(a)(43)(E). 18 U.S.C. § 922(j) punishes the receipt, possession, concealment, storage, barter, sale or disposal of any stolen firearm.

Other immigration consequences

A conviction under this statute would render a non-citizen deportable under U.S.C. § 1227(a)(2)(C) if the non-citizen is convicted of receiving a stolen firearm as defined by 18 U.S.C. § 921(a).

18.2-108.01 Larceny with intent to sell or distribute

Elements

(A)

- commits larceny
- value over $200
- with intent to sell or distribute

(B)

- sells, attempts to sell, or possesses with intent to sell
- value of $200 or more
- knew or should have known that the property was stolen

Crime involving moral turpitude

(A) Larceny with intent to sell

A conviction under this section of the statute is a crime involving moral turpitude because the statute has as an element the intent to permanently deprive the owner of the property. *See Matter of M*, 2 I&N Dec. 686 (BIA 1946); *Matter of D-*, 1 I&N Dec. 143 (BIA 1941).

(B) Sell, attempt to sell, or possess with intent to sell when knew or should have known that property was stolen

A conviction under this section of the statute is not necessarily a crime involving moral turpitude. If a defendant is convicted under this section of the statute for selling or possessing with intent to sell goods known to have been stolen, this is a crime involving moral turpitude. S*ee Matter of Patel*, 15 I&N Dec. 212 (BIA 1975); *Matter of Z*, 7 I&N Dec. 253 (BIA 1956), *Matter of R*, 6 I&N Dec. 772 (BIA 1955).

However, if the defendant is convicted for selling or possessing with intent to sell goods that he should have known were stolen, it is possible that this is not a crime involving moral turpitude. In *Matter of K*, 2 I&N Dec. 90 (BIA 1944), the BIA examined a similar statute under a German law that punished a defendant for receiving goods that "he knows or must assume on the basis of the given conditions that they have been acquired by means of any criminal act." The BIA reasoned that a conviction under this statute did not inherently involve moral turpitude because a person could be convicted without the requisite intent to deprive. Therefore, it is possible that a conviction under this Virginia statute is not a crime involving moral turpitude if the defendant was convicted under the "should have known" element of the statute.

Aggravated felony

Theft offense

A conviction under this statute is a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if sentence imposed is at least one year. The elements of larceny are the same elements of a theft offense described by the BIA because larceny requires that the defendant exercise control over another person's property with the intent to deprive the person of such property. *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000); *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000).

18.2-109 Receipt or transfer of possession of stolen vehicle, aircraft, or boat

Elements

- with intent to procure or pass title to a vehicle, aircraft, boat or vessel
- which he knows or has reasons to believe has been stolen
- receives or transfers possession or has in possession such vehicle, aircraft, boat or vessel

Crime involving moral turpitude

A conviction under this statute is not necessarily a crime involving moral turpitude. If a defendant is convicted under this section of the statute for possessing or passing title or possession of a vehicle, aircraft, boat or vessel known to have been stolen, this is a crime involving moral turpitude. S*ee Matter of Patel*, 15 I&N Dec. 212 (BIA 1975); *Matter of Z*, 7 I&N Dec. 253 (BIA 1956), and *Matter of R*, 6 I&N Dec. 772 (BIA 1955).

However, if the defendant is convicted for possessing or passing title or possessing a vehicle, aircraft, boat or vessel that he should have known was stolen, it is possible that this is not a crime involving moral turpitude. In *Matter of K*, 2 I&N Dec. 90 (BIA 1944), the BIA examined a similar conviction under a German statute that punished a defendant for receiving goods that "he knows or must assume on the basis of the given conditions that they have been acquired by means of any criminal act." The BIA reasoned that a conviction under this statute did not inherently involve moral turpitude because a person could be convicted without the requisite intent to deprive. Therefore, it is possible that a conviction under this statute is not a crime involving moral turpitude if the defendant was convicted under the "should have known" element of the statute.

Aggravated felony

Theft offense

A conviction under this statute is a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. The Virginia statute punishes the possession or transfer of a vehicle, boat, aircraft or vessel with knowledge that it has been stolen. This statute meets the definition of a theft offense, which requires that there be criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent. *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000). The BIA recognized that certain federal statutes fit within the definition of the ft offense as contemplated by Congress in 8 U.S.C. § 1101(a)(43)(G). *See Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000). One of these statutes is 18 U.S.C. § 2313, which punishes the receipt, possession, or concealing of a vehicle or aircraft, knowing that it has been stolen.

18.2-111 Embezzlement

Elements
wrongfully or fraudulently
- uses, disposes of, conceals, or embezzles
- money, bill, note, etc.
- received from another or for his employer or,
- that was entrusted to him

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. The BIA has held that embezzling or purloining involves moral turpitude. *See e.g., Matter of Battan,* 11 I&N Dec. 271 (BIA 1965); *Matter of Ademo*, 10 I&N Dec. 593 (BIA 1964). Embezzlement is a crime involving moral turpitude because it involves the intent to defraud. Generally, any statute that has fraud as an essential element is a crime involving moral turpitude. *See Jordan v. DeGeorge,* 341 U.S. 223 (1951); *Matter of McNaughton,* 16 I&N Dec. 569 (BIA 1978).

Aggravated felony

Theft offense

A conviction under this statute is a theft offense under 8 U.S.C. § 1101(a)(43)(G) and therefore an aggravated felony if the sentence imposed is at least one year. The offense punishes the criminal intent to deprive the owner of the rights and benefits of ownership and the unlawful exercise of control over another person's property. *See Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000); *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000). The BIA in *Matter of Bahta* discussed certain federal statutes that are included in the definition of theft offense under 8 U.S.C. § 1101(a)(43)(G). One of these offense is 18 U.S.C. § 641, which punishes the embezzlement of government property or the concealment of such property. The elements of the federal embezzlement statute are similar to the Virginia statute, so the Virginia statute is a theft offense.

Fraud offense

A conviction under this statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

18.2-119 Trespass after having been forbidden to do so

Elements
- goes or remains upon
- the lands, buildings or premises of another, and any other portion or area thereof
- after having been forbidden to do so, either orally or in writing the owner, lessee, custodian or other person lawfully in charge thereof (or by sign or court order)

Crime involving moral turpitude

A conviction under this statute is not necessarily a crime involving moral turpitude. Since the statute does not require a specific intent to commit a crime involving moral turpitude such as larceny, it is not necessarily a crime involving moral turpitude.

Matter of Esfandiary, 16 I&N Dec. 659 (BIA 1979). In *Matter of Esfandiary*, the statute in question had a specific intent requirement. The statute had an element of malicious and mischievous intent. Furthermore, the respondent in *Matter of Esfandiary* was convicted of trespass with intent to commit larceny, which is a crime involving moral turpitude.

The Virginia statute has an intent element, since there must be a willful trespass. Therefore, one who enters and stays upon another's land under a bona fide claim of right cannot be convicted of trespass. *See O'Banion v. Comm.*, 531 S.E.2d 599 (Va. Ct. App. 2000); *Reed v. Comm.*, 366 S.E.2d 274 (Va. Ct. App. 1988). It is possible to distinguish the lesser intent required for a conviction under the Virginia statute from the intent requirement under the statute interpreted by the BIA in *Matter of Esfandiary*, since willful is a less culpable mental state than malicious and mischievous.

It is more likely that a conviction for trespass under this statute will be a crime involving moral turpitude if the record of conviction indicates that the trespass was done with intent to commit a crime involving moral turpitude.

Aggravated felony

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The offense will only be analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because a conviction under the statute is a misdemeanor. Therefore, the offense must have as an element the use, attempted use, or threatened use of physical force against the person or property of another.

Va. Code Ann. §18.2-119 does not include as an element the use, the attempted use, or threatened use of physical force. Rather, the elements of the offense are going upon or remaining upon the lands building, or premises of another after having been forbidden to do so. Therefore, a conviction under this statute is not a crime of violence.

18.2-121 Entering property of another for purpose of damaging it

Elements

- enter the land, dwelling, or outhouse or any other building of another
- for the purpose of damaging such property or any of the contents thereof or in any manner interfere with the rights of the owner, user or the occupant thereof
- class 1 misdemeanor, class 6 felony if defendant intentionally selects the occupant because of his race, religious conviction, color, or national origin

Crime involving moral turpitude

Misdemeanor offense

A conviction under this statute is not necessarily a crime involving moral turpitude. An unlawful entry is a crime involving moral turpitude if the record of conviction shows that the entry was made with the intent to commit a crime involving moral turpitude. *See Matter of E*, 2 I&N Dec. 134 (BIA 1944). Since the statute punishes unlawful entry to damage property and property damage is not necessarily a crime involving moral turpitude, this offense is not a crime involving moral turpitude.

See Matter of C, 2 I&N Dec. 716 (BIA 1946) (reasoning that willful destruction of property is not a crime involving moral turpitude because willful is defined so broadly so as to include gross or wanton negligence and therefore the statute does not have sufficient evil intent to be a crime involving moral turpitude).

A defendant may also be convicted for entering someone's property with intent to interfere with the rights of the owner. Interfering with the rights of the owner is not the equivalent of permanently depriving the owner of the rights and benefits of ownership and therefore such interference would not be a crime involving moral turpitude. *See Matter of M*, 2 I&N Dec. 686 (BIA 1946); *Matter of D*, 1 I&N Dec. 143 (BIA 1941).

Felony offense

A conviction under this statute for felony unlawful entry is possibly a crime involving moral turpitude because this section of the statute requires that the defendant intentionally select the property because of the owner's race, religious conviction, color or national origin. Moral turpitude often inheres in the intent of the statute, and this statute requires that the defendant act intentionally. *See Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999). However, it is possible that a conviction under this section of the statute is not a crime involving moral turpitude because the offense does not punish the breaking and entering with intent to commit a crime involving moral turpitude. *See Matter of E*, 2 I&N Dec. 134 (BIA 1944).

Aggravated felony

Misdemeanor offense

Burglary offense

A conviction under this statute is not necessarily an aggravated felony as a burglary offense under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. The definition of burglary in Va. Code Ann. § 18.2-89 does not fit the general definition of a "burglary offense" within the federal definition, which is the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime therein. *See Taylor v. U.S.*, 495 U.S. 575 (1990). This general definition is the definition that immigration courts use to determine whether an offense constitutes a "burglary offense" under 8 U.S.C. §1101(a)(43)(G). *See Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000). The Virginia statute does not punish the unlawful entry into a structure, just that the defendant make an entry.

In addition, the Virginia statute does not punish only entries into a structure, as the generic burglary definition in *Taylor* requires. Rather, the defendant can be convicted for entering the lands of another. *See Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000) (holding that vehicle burglary is not a burglary offense under 8 U.S.C. § 1101(a)(43)(G) because the defendant does not enter a structure as required by the *Taylor* definition). Thus, whether a conviction under this statute is a burglary offense depends on the record of conviction. If the defendant is convicted for unlawfully entering a building or dwelling house, the offense is a burglary offense.

Crime of violence

A conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. Because this offense is a misdemeanor only, it will

only be examined under 18 U.S.C. § 16(a) and not under 18 U.S.C. § 16(b). The Virginia statute does not necessarily have as an element the use, attempted use, or threatened use of physical force against the person or property of another. It is not necessary that a defendant use physical force against the person or property to gain access to the land, dwelling or building of another.

The entering upon the lands or into the dwelling of another with intent to damage of property does not necessarily have as an element the attempted or threatened use of physical force against property. In *U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001), the Fifth Circuit held that force, as used in the statutory definition of a crime of violence, is "synonymous with destructive or violent force." *See id., quoting U.S. v. Rodriguez-Guzman*, 56 F.3d 18 (5th Cir.1995) (explaining that, in the context of a burglary offense, force means"more than the mere asportation of some property of the victim"); see also *U.S. v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006). The destruction of property by spray painting, marking, or illegal fishing, which is punishable under this statute, is not enough force to amount to a crime of violence under 18 U.S.C. § 16(a).

Attempted theft offense

A conviction under this statute is not an attempted theft offense and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(G) and (U) if the sentence imposed is at least one year. The defendant need not have an intent to deprive the owner of property as required for a theft offense. *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000). Rather, the defendant need only have the intent to damage property or interfere with the rights of the owner. A defendant can damage property or interfere with the rights of the owner without intending to deprive the owner of anything.

Felony offense

Burglary offense

A conviction under this statute is not necessarily a burglary offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. *See* analysis for misdemeanor unlawful entry under Va Code Ann. § 18.2-121. If the defendant is convicted for unlawfully entering a building or dwelling house, the offense is a burglary offense.

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(a). *See* analysis for misdemeanor unlawful entry under Va Code Ann. § 18.2-121.

Crime of violence - 18 U.S.C. § 16(b) – risk of use of force against property

A felony conviction under this statute is possibly a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute, by its nature, possibly involves a substantial risk that force will be used against the property of another. The offense is completed when the entry upon the lands occurs with the *intent* to damage. There is no need for any damage to property to have occurred. Under 18 U.S.C. § 16(b), the offense must by its nature, involve a substantial risk that physical force against the person or property of another may be *used in the course of committing* the offense. A conviction under this stutute does not pose any such risk of physical force because the conviction is for having the purpose of damaging such property. Had actual destruction occurred it is

likely the defendant would have been charged under Va. Code Ann. § 18.2-137 (destruction of property).

Even if the Virginia statute is considered a crime of violence due to the risk of use of force against property, the destruction of property contemplated in the statute need not include violent or destructive force. *See U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001) (a statute that punished intentionally or knowingly making markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of another is not a crime of violence under 18 U.S.C. § 16(b) because it does not involve the kind of risk of destructive force); *but see Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005) (holding that a statute punishing unauthorized use of a vehicle is a crime of violence under 18 U.S.C. § 16(b) because there is a substantial risk of use of force against a vehicle in gaining access to use it without consent, despite the fact that many defendants could get into the vehicle through an unlocked door or a slim jim).

In many cases punishable under this Virginia statute, damaging of property can involve physical force. For example, breaking windows to gain entry to or wrecking a barn door with a crowbar will require the use of physical force. It is possible that many acts punishable under this statute do not require the use of physical force. However, because the language in 18 U.S.C. § 16(b) requires that a statute be analyzed according to its intrinsic nature, it is possible that the offense of unlawful entry for purposes of damaging property is a crime of violence under 18 U.S.C. § 16(b) because of the substantial risk of use of force against the property of another.

Crime of violence - 18 U.S.C. § 16(b), risk of use of force against person

A felony conviction under this statute is not necessarily a crime of violence under 18 U.S.C. § 16(b) because there is not necessarily the risk of using force against the person of another in the commission of the offense. The Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held that burglary offenses were crimes of violence under 18 U.S.C. § 16(b) because of the substantial risk that the defendant would run into an inhabitant and have to use force against that person to accomplish the burglary. However, Va. Code Ann. § 18.2-121 punishes the unlawful entry or remaining on the premise of a building or lands of another with the intent to commit a felony. The Virginia statute does not only punish the entry into the dwelling of another with intent to commit a felony and therefore can be distinguished from the reasoning in *Leocal*. *See U.S. v. Guadardo*, 40 F.3d 102 (5th Cir. 1994) (reasoning that breaking into a non-dwelling was not a crime of violence because there was no risk that the defendant would encounter an occupant); *see also Sareang Ye v. INS*, 214 F.3d 1128 (9th Cir.2000) (holding that burglary of a vehicle is not a crime of violence, unlike residential burglary, because a defendant would be able to see inside the windows of a car before burglarizing the car, therefore reducing the risk of confrontation with a person).

Whether this conviction is a crime of violence under 18 U.S.C. § 16(b) because of the likelihood of the use of force against the person of another will depend on the record of conviction. If the record of conviction indicates that the defendant entered a dwelling house, this is a crime of violence under 18 U.S.C. § 16(b).

18.2-134 Trespass on posted property

Elements

- any person goes on the lands, waters, ponds, boats or blinds of another
- that has posted no entry signs according to Va. Code Ann. § 18.2-134.1
- to hunt, fish or trap
- without permission

18.2-134.1 Proper Posting

May post property by:

- placing signs prohibiting hunting, fishing or trapping where they may reasonably be seen; or
- placing identifying paint marks on trees or posts at each road entrance and adjacent to public roadways and public waterways adjoining the property.
- such marks shall be readily visible to any person approaching the property.

Crime involving moral turpitude

A conviction under this statute is probably not a crime involving moral turpitude. The statute does not require that the defendant trespass with the specific intent to commit a crime involving moral turpitude such as larceny. *See Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979) (holding that a trespass statute was a crime involving moral turpitude because it had an element of malicious and mischievous intent and the defendant was convicted of trespass with intent to commit larceny).

A conviction for trespass under this statute is probably a crime involving moral turpitude if the record of conviction indicates that the trespass was done with intent to commit a crime involving moral turpitude.

Aggravated felony

Crime of violence

A conviction under this statute is not a crime of violence and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. This offense is only analyzed under 18 U.S.C. § 16(a) and not 18 U.S.C. § 16(b) because a conviction under the statute is a misdemeanor only. Va. Code Ann. § 18.2-134 does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another. Rather, the elements of the offense are (1) going (specifically) upon lands, waters, ponds, boats or blinds (2) which have been posted in accordance with statutory provisions (3) to hunt, fish, or trap (4) without consent.

18.2-137 Destruction of property

Elements
(A) class 3 misdemeanor
- unlawfully defaces, damages, or removes property of another or any monument
- without intent to steal

(B) class 1 misdemeanor if value is less than $1,000; class 6 felony if value is more
- intentionally defaces, damages, or removes property of another or any monument
- without intent to steal

Crime involving moral turpitude

(A) Unlawful destruction of property

A conviction under this section of the statute is not a crime involving moral turpitude. The BIA has held that destruction of private property is not a crime involving moral turpitude if the *mens rea* is so broad as to include gross negligence. *See Matter of C*, 2 I&N Dec. 716 (BIA 1946); *see also Matter of M*, 2 I&N Dec. 686 (BIA 1946) (holding that a destruction of property statute without a *mens rea* was not a crime involving moral turpitude). Section (A) of the Virginia statute has a *mens rea* of unlawfully, which is less than intentional and more like negligent. The Virginia courts have reasoned that the intent element under Va. Code Ann. § 18.2-137(A) is criminal negligence, which requires a showing that the act is so reckless, wanton, or flagrant as to indicate a callous disregard for human life and of the probable consequences of the act. *Crowder v. Comm.*, 436 S.E.2d 192 (Va. Ct. App. 1993). Following the BIA's reasoning in *Matter of C*, a conviction under this Virginia statute, which punishes gross negligence, is not a crime involving moral turpitude.

Even if the intent element of the Virginia statute is more like recklessness, a conviction under the statute is not a crime involving moral turpitude because the statute does not have a *mens rea* of recklessness coupled with an element causation of serious bodily injury. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996).

(B) Intentional destruction of property

A conviction under section (B) of the statute is a probably a crime involving moral turpitude. Unlike section (A) of the statute, section (B) of the Virginia destruction of property statute requires that the defendant commit the offense intentionally. Therefore, the BIA's holding in *Matter of C*, 2 I&N Dec. 716 (BIA 1946), does not apply because the destruction of property statute at issue in *Matter of C* had a *mens rea* of gross or wanton negligence, which is less culpable than intentional conduct. *See id.*; *see also Matter of N*, 8 I&N Dec. 466 (BIA 1959) (a statute punishing the unlawful, malicious and mischievous destruction of property was a crime involving moral turpitude where the record of conviction indicated that the offense was committed maliciously and wantonly, not by negligence or carelessness); *Matter of P-Y-M-*, 4 I&N Dec. 461 (BIA 1951) (holding that intentionally wrecking a train is a crime involving moral turipitude because the *mens rea* is intentional conduct).

Aggravated felony

(A) Unlawful destruction of property

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this section of the statute is a misdemeanor only, and therefore is analyzed only under 18 U.S.C. § 16(a) and not 18 U.S.C. § 16(b). In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Supreme Court interpreted 18 U.S.C. § 16 to require a higher degree of intent than negligent or merely accidental conduct. The Virginia courts have interpreted the *mens rea* of unlawful in this statute to be criminal negligence, which requires a showing that the act is so reckless, wanton, or flagrant as to indicate a callous disregard for human life and of the probable consequences of the act. *Crowder v. Comm.*, 436 S.E.2d 192 (Va. Ct. App. 1993). This *mens rea* is similar to recklessness *mens rea*; the Supreme Court in *Leocal* did not decide whether a statute containing such a *mens rea* would be a crime of violence. However, the BIA has held that for the purposes of interpreting 18 U.S.C. § 16(a), only intentional conduct will amount to a crime of violence. *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002).

(B)(i) Misdemeanor intentional destruction of property

Crime of violence

A conviction under this section of the statute is probably not a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. Va. Code Ann. § 18.2-137(B)(i) is a misdemeanor and must be examined only under 18 U.S.C. § 16(a) and not 18 U.S.C. § 16(b). The *mens rea* of this section of the statute is sufficient to find that the offense is a crime of violence under 18 U.S.C. § 16(a). *See Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002) (a statute punishing the intentional causation of bodily injury is a crime of violence under 18 U.S.C. § 16(a)).

However, Va. Code Ann. § 18.2-137(B)(i) does not necessarily involve physical force as an element. *See U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001) (holding that a statute punishing the making of marks on the property of another is not a crime of violence because the term force is "synonymous with destructive or violent force"); *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003) (holding that the word "force" as used in 18 U.S.C. § 16(a) means violent force and that mere physical contact with a victim does not have as an element the use of "force" as contemplated by 18 U.S.C. § 16).

Under Va. Code Ann. § 18.2-137(B)(i), the act of merely moving a monument to face the wrong direction involves force, but it is not necessarily violent force. Vandalism such as spray painting, or carving names into park benches are punishable under this statute and none involve the use of "force" as defined in *Flores* and *Landeros-Gonzales*. Therefore, a conviction under this section of the statute is probably not a crime of violence.

(B)(ii) Felony intentional destruction or property

Crime of violence – 18 U.S.C. § 16(a)

A conviction under this section of the statute is probably not a crime of violence under 18 U.S.C. § 16(a) and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. *See* analysis for Va. Code Ann. § 18.2-137(B)(i).

Crime of violence – 18 U.S.C. § 16(b)

A conviction under Va. Code Ann. § 18.2-137(B)(ii) is probably a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The inquiry under 18 U.S.C. § 16(b) is whether by its nature, the offense involves a substantial risk that physical force will be used against person or property.

It is possible to argue that the type of force used in this statute is not destructive or violent force. *See U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001) (a statute that punishes intentionally or knowingly making markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of another is not a crime of violence under 18 U.S.C. § 16(b) because it does not involve the risk of destructive force). However, the BIA has held that the unauthorized use of a vehicle is a crime of violence under 18 U.S.C. § 16(b) because there is a substantial risk of use of force against the property of another when a defendant is attempting to gain access to a vehicle. *See Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). The statute that the BIA was interpreting punished the intentional and knowing operation of another person's vehicle without the effective consent of the owner. The BIA reasoned that there was a substantial risk of use of force against the property of another because a defendant would have to use physical force to gain access to the vehicle.

Although the Virginia destruction of property statute does not have the same elements as the statute interpreted by the BIA in *Matter of Brieva*, the reasoning could have impact on decisions about the Virginia statute because the BIA found that there was a substantial risk of use of force against a vehicle in gaining access to use it without consent, despite the fact that many defendants could get into the vehicle through an unlocked door or a slim jim. These would not necessary be the violent or destructive force contemplated under *Landeros-Gonzales*; however, the BIA reasoned that this would amount to a substantial risk of use of force. Because the BIA has expanded what amounts to the "substantial risk that force will be used against the property of another" to include all of the possible conduct to gain access to another person's vehicle, it is likely that the *de minimus* force arguments in *Landeros-Gonzales* will not be followed in analyzing this statute. Therefore, a conviction under Va. Code Ann. § 18.2-137(B)(ii) is probably a crime of violence under 18 U.S.C. § 16(b).

18.2-138 Damaging public buildings

Elements

- willfully and maliciously
- does one of the following:
  - (i) breaks any window or door of the Capitol, any courthouse, house of public worship, college, school house, etc. OR
  - (ii) damages or defaces the Capitol or any other public building on the Capitol Square, or in any other public buildings or public grounds; OR
  - (iii) destroys any property in any of such buildings

  OR
- willfully and unlawfully
- damages or defaces any book, newspaper, magazine, map, etc. in any library, reading room, museum, or other educational institution

Class 1 misdemeanor if property is less than $1000; class 6 felony if property is more than $1000

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because the statute punishes the willful and malicious destruction of property, which the BIA has reasoned is a crime involving moral turpitude. *See, e.g., Matter of N*, 8 I&N Dec. 466 (BIA 1959); *Matter of C*; 2 I&N Dec. 716 (BIA 1946); *Matter of M*, 2 I&N Dec. 686 (BIA 1946).

Aggravated felony

Willfully and unlawfully breaking window, destroying property, or damaging or defacing building – misdemeanor

Crime of violence

A conviction under this section of the statute is not necessarily a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this section of the statute is a misdemeanor and must be examined only under 18 U.S.C. § 16(a) and not 18 U.S.C. § 16(b). The *mens rea* of this section of the statute is sufficient to find that the offense is a crime of violence under 18 U.S.C. § 16(a). *See Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002) (a statute punishing the intentional causation of bodily injury is a crime of violence under 18 U.S.C. § 16(a)).

However, a conviction under this section of the statute does not necessarily involve physical force as an element. *See U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001) (holding that a statute punishing the making of marks on the property of another is not a crime of violence because the term force is "synonymous with destructive or violent force"); *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003) (holding that the word "force" as used in 18 U.S.C. § 16(a) means violent force and that mere physical contact with a victim does not have as an element the use of "force" as contemplated by 18 U.S.C. § 16).

Under this section, the act of breaking a window, damaging or defacing a public building, or destroying property within, can be accomplished without the use of "force" as defined in *Flores* and *Landeros-Gonzales*. Therefore, a conviction under this section of the statute is probably not a crime of violence.

Willfully and unlawfully breaking window, destroying property, or damaging or defacing building – felony

Crime of violence – 18 U.S.C. § 16(a)

A conviction under this section of the statute is probably not a crime of violence under 18 U.S.C. § 16(a) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. *See* analysis for Va. Code Ann. § 18.2-138 (misdemeanor breaking window, destroying property, or damaging or defacing a building).

Crime of violence – 18 U.S.C. § 16(b)

A conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The inquiry under 18 U.S.C. § 16(b) is whether by its nature, the offense involves a substantial risk that physical force will be used against person or property.

It is possible to argue that the type of force used in this section of the statute is not destructive or violent force. *See U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001) (a statute that punishes intentionally or knowingly making markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of another is not a crime of violence under 18 U.S.C. § 16(b) because it does not involve the risk of destructive force). However, the BIA has held that the unauthorized use of a vehicle is a crime of violence under 18 U.S.C. § 16(b) because there is a substantial risk of use of force against the property of another when a defendant is attempting to gain access to a vehicle. *See Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). The statute that the BIA was interpreting punished the intentional and knowing operation of another person's vehicle without the effective consent of the owner. The BIA reasoned that there was a substantial risk of use of force against the property of another because a defendant would have to use physical force to gain access to the vehicle.

Although a conviction under this section of the statute does not have the same elements as the statute interpreted by the BIA in *Matter of Brieva*, the reasoning could have impact on decisions about the Virginia statute because the BIA found that there was a substantial risk of use of force against a vehicle in gaining access to use it without consent, despite the fact that many defendants could get into the vehicle through an unlocked door or a slim jim. These would not necessary be the violent or destructive force contemplated under *Landeros-Gonzales*; however, the BIA reasoned that this would amount to a substantial risk of use of force. Because the BIA has expanded what amounts to the "substantial risk that force will be used against the property of another" to include all of the possible conduct to gain access to another person's vehicle, it is likely that the *de minimus* force arguments in *Landeros-Gonzales* will not be followed in analyzing this offense. Therefore, a conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16(b).

Willfully and unlawfully damaging or defacing any book, etc.

Crime of violence - 18 U.S.C. § 16(a)

A conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16(a) and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. This offense is a misdemeanor if the property is valued at less than $1,000. Therefore, it is a crime of violence under 18 U.S.C. § 16(a) only if the offense has as an element the use, attempted use, or threatened use of physical force against the person or property of another. As with the destruction or defacing of public buildings, the use of force punished under this section of the statute is not violent force and therefore not the type of force contemplated by 18 U.S.C. § 16(a). *See, e.g., U.S. v. Villegas-Hernandez,* 468 F.3d 874 (5th Cir. 2006); *U.S. v. Landeros-Gonzalez,* 262 F.3d 424 (5th Cir. 2001); *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003). The offense of destroying or defacing a book or pamphlet probably does not involve violent force because a book or pamphlet is small and requires very minimal force to destroy or deface. Therefore, a conviction under this section of the statute is probably not a crime of violence under 18 U.S.C. § 16(a).

Crime of violence - 18 U.S.C. § 16(b)

A conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16(b) and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. If the value of the property destroyed or defaced under this statute is more than $1,000, the offense is a felony and therefore can be analyzed under 18 U.S.C. § 16(b). There is not a substantial risk that force will be used in destroying or defacing a book or pamphlet because the possible force used is not violent, since it does not require that a person use active force against the book when he destroys it. *See U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001).

The destruction or defacing of a book or pamphlet is probably not a crime of violence under the BIA's reasoning in *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). In *Matter of Brieva*, the BIA reasoned that there was a substantial risk of use of force against the property of another when a person used a vehicle without authorization. The destruction of a book or pamphlet is not an offense similar enough to the unauthorized use of a vehicle because a defendant need not create as much damage to complete the crime. In *Matter of Brieva*, the BIA reasoned that a defendant would likely have to smash car windows to gain entry into the vehicle. However, the damage of a book usually does not require any such force to accomplish the act. Therefore, a conviction under this section of the statute is probably not a crime of violence under 18 U.S.C. § 16(b).

18.2-146 Tampering with vehicle

Elements

- individually or in association with others
- willfully
- against the will or without the consent of the owner
    - break, injure, tamper with or remove any part of vehicle, aircraft, boat or vessel for the purpose of
        - injuring, defacing or destroying vehicle, etc.; OR

- temporarily or permanently prevent its useful operation; OR
- for any purpose

OR

- in any other manner maliciously interfere with or prevent the running or operation of such vehicle, etc.

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude. The BIA has held that destruction of private property is not a crime involving moral turpitude if the *mens rea* is so broad as to include gross negligence. *See Matter of C*, 2 I&N Dec. 716 (BIA 1946). The Virginia tampering statute, however, requires that the defendant commit the offense intentionally. Therefore, the BIA's holding in *Matter of C* does not apply since the destruction of property statute at issue in *Matter of C* had a *mens rea* of gross or wanton negligence, which is less culpable than intentional conduct. *See id.*; *see also Matter of N*, 8 I&N Dec. 466 (BIA 1959) (a statute punishing the unlawful, malicious and mischievous destruction of property was a crime involving moral turpitude where the record of conviction indicated that the offense was committed maliciously and wantonly, not by negligence or carelessness); *Matter of P-Y-M-*, 4 I&N Dec. 461 (BIA 1951) (holding that intentionally wrecking a train is a crime involving moral turipitude because the *mens rea* is intentional conduct); *Matter of G*, 4 I&N Dec. 409 (BIA 1951) (tampering with a vessel is a crime involving moral turpitude).

Aggravated felony

Theft offense

A conviction under this statute is not a theft offense under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. The statute does not require as an element the criminal intent to deprive the owner of the rights and benefits of ownership, so it does not meet the definition of a theft offense. *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000).

Crime of violence

A conviction under this section of the statute is probably not a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this section of the statute is a misdemeanor and must be examined only under 18 U.S.C. § 16(a) and not 18 U.S.C. § 16(b). The *mens rea* of this section of the statute is sufficient to find that the offense is a crime of violence under 18 U.S.C. § 16(a). *See Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002) (a statute punishing the intentional causation of bodily injury is a crime of violence under 18 U.S.C. § 16(a)).

However, a conviction under this section of the statute does not necessarily involve physical force as an element. *See U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001) (holding that a statute punishing the making of marks on the property of another is not a crime of violence because the term force is "synonymous with destructive or violent force"); *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003) (holding that the word "force" as used in 18 U.S.C. § 16(a) means violent force and that mere physical contact with a victim does not have as an element the use of "force" as contemplated by 18 U.S.C. § 16).

Under this section, the act of breaking or tampering with property can be accomplished without the use of "force" as defined in *Flores* and *Landeros-Gonzales*. Therefore, a conviction under this section of the statute is probably not a crime of violence.

18.2-147 Entering or setting a vehicle in motion

Elements

- without the consent of the owner or person in charge of the vehicle, aircraft, boat, vessel, locomotive or other rolling stock of a railroad
    - climbs into or upon such vehicle
    - with intent to commit any crime, malicious mischief, or injury thereto

  OR
    - while the vehicle is at rest attempts to manipulate the levers and starting crank or other device, breaks or mechanism thereof

  OR
    - sets in motion any vehicle
    - with intent to commit any crime, malicious mischief, or injury thereto

Crime involving moral turpitude

A conviction under this statute is not necessarily a crime involving moral turpitude. The analysis for this offense is similar to breaking and entering, which is only a crime involving moral turpitude if the record reflects that there was an intent to commit a crime involving moral turpitude. *See Matter of M*, 2 I&N Dec. 721 (BIA 1946). The statute punishes the entering of a vehicle with the intent to commit any crime, which is not necessarily an intent to commit a crime involving moral turpitude. The statute also punishes entering a vehicle with intent to commit malicious mischief, which could be a crime involving moral turpitude. The BIA has held that destruction of private property is not a crime involving moral turpitude if the *mens rea* is so broad as to include gross negligence. *See Matter of C*, 2 I&N Dec. 716 (BIA 1946). Therefore, whether this offense is a crime involving moral turpitude depends on the record of conviction.

Aggravated felony

Theft offense

A conviction under this statute is not a theft offense under 8 U.S.C. § 1101(a)(43)(G) and therefore is not an aggravated felony if the sentence imposed is at least one year. The statute does not require as an element the criminal intent to deprive the owner of the rights and benefits of ownership and therefore is not a theft offense. *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000). The BIA reasoned in *Matter of V-Z-S-* that a "glorified borrowing" offense under California law was not a theft offense under section 1101(a)(43)(G). The BIA examined a statute that punished the taking of a vehicle for the purpose of temporarily using or operating the same. Because the statute required no intent to deprive the owner permanently or temporarily of his property, it was not a theft offense under 8 U.S.C. § 1101(a)(43)(G).

Va. Code Ann. § 18.2-147 punishes the putting in motion of a vehicle or the manipulation of the brakes or levers of a vehicle without the consent of the owner. There

is no element under the Virginia statute that the defendant intend to deprive the owner of the rights and benefits of ownership. Therefore, the offense is not a theft offense as defined by the BIA in *Matter of V-Z-S-*.

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The offense is a misdemeanor and therefore must be analyzed under 18 U.S.C. § 16(a), which requires that the offense have as an element the use, attempted use, or threatened use of physical force against the person or property of another. Although a defendant convicted under this Virginia statute must put a car in motion, which would lead to destruction of the car or other property, there is no element of the use of force. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004) (reasoning that the causation of injury does not equal the use of force). Even if the setting of a vehicle in motion can be construed as the use of force, the statute requires only *de minimus* force for a conviction. *See Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003); *U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001) (holding that malicious mischief to a vehicle does not have as an element the use of force against a vehicle when the defendant need only make marks against the property).

18.2-147.1 Breaking and entering railroad cars, motortrucks, aircraft, pipeline system

Elements

- breaks the seal or lock
- of any railroad car, vessel, aircraft, motortruck, wagon, or other vehicle or pipeline system containing shipments of freight or express or other property
- or breaks and enters such vehicle or pipeline system with the intent to commit a larceny or felony therein
- class 3 felony if armed with firearm when breaks and enters

Crime involving moral turpitude

Simple breaking

A conviction under this section of the statute is not a crime involving moral turpitude. A breaking and entering offense is not a crime involving moral turpitude unless the person breaks and enters with the intent to commit a crime involving moral turpitude. *See Matter of L*, 6 I&N Dec. 666 (BIA 1955). A conviction under this statute does not involve breaking and entering, it only punishes simple breaking, and therefore is not a crime involving moral turpitude.

This section of the statute has no *mens rea* and therefore the offense can not be equated with the crime involving moral turpitude destruction of property cases because the BIA has held that destruction of property is only a crime involving moral turpitude if the destruction of property is committed intentionally. *See Matter of C*, 2 I&N Dec. 716 (BIA 1946).

Breaking and entering with intent to commit felony or larceny

A conviction under this section of the statute is not necessarily a crime involving moral turpitude. A conviction for breaking and entering with intent to commit a felony is a crime involving moral turpitude if the record of conviction reflects that the defendant broke into the vehicle with intent to commit a larceny or some other crime involving moral turpitude therein. *See Matter of L*, 6 I&N Dec. 666 (BIA 1955).

Aggravated felony

Simple breaking

Burglary offense

A conviction for simple breaking is not a burglary offense and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. The elements of the statute do not match the Supreme Court's definition of a burglary offense as defined in *Taylor v. U.S.*, 495 U.S. 575 (1990). The statute does not include any entry. Also, the statute does not punish the breaking and entering into a structure, but the breaking into a vehicle. *See Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000) (breaking and entering into a vehicle is not a burglary offense because the generic definition of burglary in *Taylor* only includes breaking into vehicles). In addition, this section of the statute does not include as an element the intent to commit a crime therein, which is another part of the generic definition of burglary offenses under *Taylor*. Therefore, a conviction under this statute is not a burglary offense under 8 U.S.C. § 1101(a)(43)(G).

Crime of violence – 18 U.S.C. § 16(a)

A conviction for breaking into a railroad car, etc., is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16(a) because there is no use, attempted use, or threatened use of physical force against the person or property of another. Although some level of force must be used to break the seal or lock on the car, this force is not in all cases violent force to pick the lock. *See Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003) (a battery statute does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another because it punishes *de minimus* force); *U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001) (holding that a statute punishing making marks on property is not a crime of violence because the force necessary under the statute is not destructive or violent force).

Crime of violence – 18 U.S.C. § 16(b)

A conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this section involves a substantial risk of the use of force against the property of another. The BIA has held that the unauthorized use of a vehicle is a crime of violence under 18 U.S.C. § 16(b) because there is a substantial risk that an unauthorized vehicle user could use force against the vehicle to gain access. *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). Since the breaking into a railroad car involves the breaking of a seal or a lock to accomplish the offense, it is likely to be a crime of violence under the BIA's reasoning in *Matter of Brieva.*

Breaking and entering with intent to commit felony or larceny

Burglary offense

A conviction under this section of the statute is not a burglary offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. A conviction for breaking and entering with intent to commit a felony or larceny under this statute does not match the Supreme Court's definition of a burglary offense as defined in *Taylor v. U.S.*, 495 U.S. 575 (1990). The statute does not include an unlawful entry. Also, the Virginia statute punishes not the breaking and entering into a structure, but the breaking and entering into a vehicle. *See Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000) (breaking and entering into a vehicle is not a burglary offense because the generic definition of burglary in *Taylor* only includes breaking into vehicles). Therefore, a conviction under this statute is not a burglary offense under 8 U.S.C. § 1101(a)(43)(G).

Crime of violence – 18 U.S.C. § 16(a)

A conviction for breaking into a railroad car, etc., with intent to commit a larceny or felony therein is not a crime of violence under 18 U.S.C. § 16(a) and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16(a) because there is no use, attempted use, or threatened use of physical force against the person or property of another. Although some level of force must be used to break the seal or lock on the car, this force is not in all cases violent force to pick the lock. *See Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003) (a battery statute does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another because it punishes *de minimus* force); *U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001) (holding that a statute punishing making marks on property is not a crime of violence because the force necessary under the statute is not destructive or violent force).

Crime of violence – 18 U.S.C. § 16(b)

A conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute for breaking and entering into a railroad car, etc., with intent to commit a larceny or a felony therein is an offense that by its nature has a substantial risk of the use of force against the property of another. The BIA has held that the unauthorized use of a vehicle is a crime of violence under 18 U.S.C. § 16(b) because there is a substantial risk that an unauthorized vehicle user could use force against the vehicle to gain access. *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). Since the breaking into a railroad car involves the breaking of a seal or a lock to accomplish the offense, a conviction under this section of the statute is probably a crime of violence under the BIA's reasoning in *Matter of Brieva.*

Attempted theft offense

A conviction under this statute for breaking and entering with intent to commit a larceny or other theft offense therein is not necessarily an attempted theft offense and therefore an aggravated felony under 18 U.S.C. §§ 1101(a)(43)(G) and (U) if the sentence imposed is at least one year. *See U.S. v. Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001). In *Martinez-Garcia*, the non-citizen was found to have committed an attempted theft

offense under 8 U.S.C. § 1101(a)(43)(G) due to his conviction for auto theft. The Court looked at the record of conviction, which included his charge for unlawfully entering a motor vehicle without the owner's consent with the intent to commit a theft. Based on this information, the Court concluded that the non-citizen had made a substantial step toward the commission of the theft and that he possessed the requisite intent to commit the theft offense. Because the language of Va. Code Ann. § 18.2-147.1 is similar to the language of the statute under which the non-citizen in *Martinez-Garcia* was convicted, a conviction under this Virginia statute is probably an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(G) and (U). A conviction under this section of the statute is therefore an aggravated felony as an attempted theft offense if the record of conviction indicates that the defendant had an intent to commit or larceny in the vehicle.

Other immigration consequences

A conviction under this statute would render a non-citizen deportable under U.S.C. § 1227(a)(2)(C) if the defendant is armed with a deadly weapon that is a firearm under 18 U.S.C. § 921(a). It is necessary to look to the record of conviction to determine what the deadly weapon is. The weapon must be one described in 18 U.S.C. § 921(a) in order to render a non-citizen deportable under this ground.

18.2-152 Stealing from or tampering with parking meter, vending machine, pay phone

Elements

- enters, forces or attempts to force an entrance into or tampers with or inserts any part of an instrument into
- any parking meter, vending machine, money changing machine, or any other device designed to receive money
- with intent to steal or purloin therefrom

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. The offense of breaking and entering is only a crime involving moral turpitude if the defendant enters with the intent to commit a crime involving moral turpitude. *See Matter of M*, 2 I&N Dec. 721 (BIA 1946). This Virginia statute requires that the defendant have the intent to steal or purloin in order to be convicted. Since stealing usually requires an intent to permanently deprive, a conviction under this statute is a crime involving moral turpitude. *See Matter of M*, 2 I&N Dec. 686 (BIA 1946).

Aggravated felony

Misdemeanor offense

Crime of violence

A conviction under the misdemeanor version of this statute is not necessarily a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. As a misdemeanor, the offense is analyzed only under 18 U.S.C. § 16(a), any offense that has as an element

the use, attempted use, or threatened use of physical force against the person or property of another.

However, a conviction under this section of the statute does not necessarily involve physical force as an element. Although the defendant must use force against the property, it need not be violent force because a defendant can be convicted for inserting an instrument into the parking meter, phone or vending machine. *See U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001) (holding that a statute punishing the making of marks on the property of another is not a crime of violence because the term force is "synonymous with destructive or violent force"); *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003) (holding that the word "force" as used in 18 U.S.C. § 16(a) means violent force and that mere physical contact with a victim does not have as an element the use of "force" as contemplated by 18 U.S.C. § 16).

Under this section, the act of breaking or tampering with property can be accomplished without the use of "force" as defined in *Flores* and *Landeros-Gonzales*. Therefore, a conviction under this section of the statute is probably not a crime of violence.

Felony

Crime of violence – 18 U.S.C. § 16(a)

A conviction under this section of the statute is not necessarily a crime of violence under 18 U.S.C. § 16(a) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. *See* analysis for Va. Code Ann. § 18.2-152 (misdemeanor offense).

Crime of violence – 18 U.S.C. § 16(b)

A conviction under this section of the statute is probably an aggravated felony under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16(b) because there is a substantial risk that the defendant will use force against the property of another in order to effectuate the offense. Although the defendant need not use violent force every time to enter the machine, parking meter, or phone, it is probably an offense that, by its nature, involves a substantial risk that force will be used because in most cases a defendant will have to use force to get into the machine.

The BIA has held that the unauthorized use of a vehicle is a crime of violence under 18 U.S.C. § 16(b) because there is a substantial risk that an unauthorized vehicle user could use force against the vehicle to gain access. *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). The BIA held that the statute was a crime of violence despite the fact that a defendant could gain access to the vehicle through the use of a slim jim or by means of an unlocked door. Therefore, a conviction under this section of the statute is a crime of violence under 18 U.S.C. § 16(b) because there are very few non-violent ways to gain access to a phone, parking meter, or vending machine. Although there may be some non-violent ways to gain access, such as inserting an instrument into the machine, the intrinsic nature of the offense is such that there is a substantial risk that force will be used against the property of another in the commission of the offense.

Attempted theft offense

A conviction under this statute is probably an attempted theft offense and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(G) and (U) if the sentence imposed is at least one year. *See U.S. v. Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001). In *Martinez-Garcia*, the non-citizen was found to have committed an attempted theft offense under 8 U.S.C. § 1101(a)(43)(G) due to his conviction for auto theft. The Court looked at the record of conviction, which included his charge for unlawfully entering a motor vehicle without the owner's consent with the intent to commit a theft. Based on this information, the Court concluded that the non-citizen had made a substantial step toward the commission of the theft and that he possessed the requisite intent to commit the theft offense. Following the reasoning in *Martinez-Garcia*, a conviction under Va Code Ann. § 18.2-152 is probably an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(G) and (U). The entry into a parking meter, phone or vending machine is probably a substantial step toward the commission of a theft offense. The defendant must also have the intent to steal or purloin from the machine when he enters the machine. Therefore, a conviction under this statute is probably an attempted theft offense. *See Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999).

18.2-152.3 Computer Fraud

Elements

- uses a computer network without authority and
  1) obtains property or services by false pretenses; or
  2) embezzles or commits larceny; or
  3) converts the property of another

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because all of the underlying offense are crimes involving moral turpitude due to the fact that each offense has fraud as an essential element. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951) Although this statute does not specify which definition it uses for each underlying offense, one can look to the analysis of these sections in the Virginia Code to conclude that each offense is a crime involving moral turpitude. *See* analysis for Va. Code Ann. §§ 18.2-178 (obtaining money by false pretenses); 18.2-111 (embezzlement); 18.2-103 (concealing property with the intent to convert).

Each of the underlying offenses punished under the statute is a crime involving moral turpitude. *See, e.g., Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (conviction of false pretenses is a crime involving moral turpitude because it involves an intent to defraud); *Matter of Battan*, 11 I&N Dec. 271 (BIA 1965) (embezzlement is a crime involving moral turpitude because it involves an intent to defraud); *See Matter of P*, 4 I&N Dec. 252 (BIA 1951) (statute punishing the taking of the property of another without his consent with intent to convert it to the use of the taker is a crime involving moral turpitude because intending to convert the property is the equivalent of intending to permanently deprive the owner of property). Therefore, the use of a computer network to commit any of these offenses is a crime involving moral turpitude. *Cf. Matter of Baker*, 15 I&N Dec. 50 (BIA 1974) (assault with intent to commit a crime involving moral

turpitude is a crime involving moral turpitude); *Matter of Moore*, 13 I&N Dec. 711 (BIA 1971) (breaking and entering with intent to commit a crime involving moral turpitude is a crime involving moral turpitude).

Aggravated felony

Theft offense

A conviction under this statute is a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the term or imprisonment is at least one year. The offense requires that the defendant exercise control over the property of another, which meets the definition of a theft offense. *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000). Each of the offenses requires the intent to deprive the owner of the rights and benefits of ownership because the defendant must act without the authority of the owner of the computer network. Therefore, any conviction under this statute is a theft offense under 8 U.S.C. § 1101(a)(43)(G).

Fraud offense

A conviction under this statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

18.2-152.6 Theft of computer services

Elements

- willfully
- obtains computer services
- without authority

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. Although this offense does not have as an express element the intent to defraud, it is an offense that involves fraud because the defendant must obtain computer services without authority. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (conviction of false pretenses is a crime involving moral turpitude because it involves an intent to defraud).

Aggravated felony

Theft offense

A conviction under this statute is a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. The defendant must exercise unlawful control over the property of another. Also, this unlawful control is exercised with criminal intent to deprive the owner of the rights and benefits of ownership because the defendant must act without authority. *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000); *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000). There is a circuit split on whether theft of services is a theft offense. *See Ambibola v. Ashcroft*, 378 F.3d 173 (2d Cir. 2004) (statute punishing theft of services is a theft offense); *U.S. v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (statute punishing theft of service is not a theft offense). Because it is more likely that the Fourth Circuit would follow the reasoning of the Second Circuit than the Ninth, a conviction under this statute is probably a theft offense.

Fraud offense

A conviction under this statute is probably an offense involving fraud or deceit and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

CRIMES INVOLVING FRAUD

18.2-168 Forging public records

Elements
- false making or material alteration
- with intent to defraud
- of a writing
- which, if genuine, might apparently be of legal efficacy, or the foundation of legal liability, or operate to the prejudice of another man's right

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because intent to defraud is an essential element of the offense. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951); *Matter of Jimenez*, 14 I&N Dec. 442 (BIA 1973) (conviction of a criminal possession of forgery devices with intent to use them for the purpose of forgery is a crime involving moral turpitude), *Matter of A*, 5 I&N Dec. 53 (BIA 1953) (because forgery involves fraud, it is a crime involving moral turpitude).

Aggravated felony

Forgery

A conviction under this statute is an aggravated felony as a crime related to forgery under 8 U.S.C. § 1101(a)(43)(R) if the sentence is at least one year. In the aggravated felony definition, forgery is not defined. Nor is the there a federal definition of forgery to use as a benchmark. Therefore, courts have reasoned that the common law definition of forgery should be used to determine whether a particular offense is an aggravated felony. The three elements of the common law definition of forgery are: (1) the false making or material alteration (2) with intent to defraud (3) of a writing that, if genuine, might be of legal efficacy). *Richards v. Ashcroft*, 400 F.3d 125 (2d Cir. 2005). The common law definition of forgery exactly mirrors the Virginia definition of forgery and therefore, a conviction under this statute is an aggravated felony if the sentence imposed is at least one year.

Fraud offense

A conviction under this statute is an aggravated felony as a fraud offense under 8 U.S.C. § 1101(a)(43)(M) if the loss to the victim is over $10,000.

18.2-171 Making or having anything designed for forging any writing

Elements
- engrave, stamp, cast, make or mend
- plate, block, press, or other thing adapted and designed for the forging and false making of any writing or other thing
- the forging or writing whereof is punishable by this chapter

OR
- have in possession such a plate, block, press or other thing
- with intent to use, or cause or permit it to be used

- in forging or false making of any such writing or other thing

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. The statute does not punish mere possession of a device for forging documents; rather, the statute punishes possession with intent to use to the device or the making of a device. *See generally Matter of Serna*, 20 I&N Dec. 579 (BIA 1992) (possession of a fake identification document is not a crime involving moral turpitude, but possession with intent to use such document is a crime involving moral turpitude). Since forgery is a crime involving moral turpitude, creating a device or possessing a device with intent to use it in a forgery is a crime involving moral turpitude. *See Matter of Jimenez*, 14 I&N Dec. 442 (BIA 1973).

Aggravated felony

Forgery

A conviction under this statute is an aggravated felony as a crime related to forgery under 8 U.S.C. § 1101(a)(43)(R) if the sentence is at least one year. The Second Circuit has held that a statute punishing the possession of forged instruments with the intent to defraud was an offense related to forgery and therefore an aggravated felony. *See Richards v. Ashcroft*, 400 F.3d 125 (2d Cir. 2005). Because of the all-inclusive nature of the term "relating to" in the aggravated felony section, this offense will be an offense relating to forgery.

Attempted fraud

A conviction under this statute is probably aggravated felony as an attempted fraud offense under 8 U.S.C. §§ 1101(a)(43)(M) and (U) if the loss to the victim exceeds $10,000. The statute does not punish the use of the instruments that the defendant creates and therefore, the defendant need not take a substantial step toward the commission of a forgery offense as required to meet the definition of attempt. *See Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999). However, possession of the instruments to commit a forgery, coupled with intent to use these instruments, can be a substantial step toward the commission of the underlying offense. *See Sui v. INS*, 250 F.3d 105 (2d Cir. 2001). A conviction under this statute is probably an aggravated felony as an attempted fraud offense under 8 U.S.C. §§ 1101(a)(43)(M) and (U) if the loss or the potential loss to the victim exceeds $10,000. *See Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) (holding that the victim need not actually suffer the loss if the offense is an attempted fraud aggravated felony).

18.2-172 Forging, uttering, etc., other writings

Elements

- forge any writing
- to the prejudice of another's right
- or utter, or attempt to employ as true such a forged writing
- knowing it to be forged

OR

- obtain by any false pretenses or token the signature of another person

- to any such writing
- with intent to defraud any other person

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. Forgery offenses generally are crimes involving moral turpitude. *See Matter of Jimenez*, 14 I&N Dec. 442 (BIA 1973); *Matter of Jensen*, 10 I&N Dec. 747 (BIA 1964).

Aggravated felony

Forgery

A conviction under this statute is a crime related to forgery and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(R) if the term of imprisonment is at least one year.

Fraud offense

A conviction under this statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

18.2-173 Having in possession forged coin or bank notes

Elements

- have in possession
- forged bank notes or base coin
- knowing the same to be forged or base
- with the intent to utter or employ the same as true, or to see, exchange, or deliver them, so as to enable any other person to utter or employ them as true

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. The statute does not punish mere possession of the forged notes or coin; rather, the statute punishes possession with intent to use to forged notes or coin. *See generally Matter of Serna*, 20 I&N Dec. 579 (BIA 1992) (possession of a fake identification document is not a crime involving moral turpitude, but possession with intent to use such document is a crime involving moral turpitude). Since forgery is a crime involving moral turpitude, possessing a forged document with intent to use it in a forgery is a crime involving moral turpitude. *See Matter of Jimenez*, 14 I&N Dec. 442 (BIA 1973).

Aggravated felony

Forgery

A conviction under this statute is an aggravated felony as a crime related to forgery under 8 U.S.C. § 1101(a)(43)(R) if the sentence imposed is at least one year. The Second Circuit has held that a statute punishing the possession of forged instruments with the intent to defraud was an offense related to forgery and therefore an aggravated felony. *See Richards v. Ashcroft*, 400 F.3d 125 (2d Cir. 2005). Because of the all-inclusive nature of the term "relating to" in the aggravated felony section, a conviction under this statute is probably an offense relating to forgery.

Attempted fraud

A conviction under this statute is probably an aggravated felony as an attempted fraud offense under 8 U.S.C. §§ 1101(a)(43)(M) and (U) if the loss to the victim is over $10,000. The statute does not punish the use of the forged bank notes or coin; therefore, the defendant need not take a substantial step toward the commission of a fraud offense as required to meet the definition of attempt. *See Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999). However, possession of the forged bank notes or coin, coupled with intent to use these instruments, can be a substantial step toward the commission of the underlying offense. *See Sui v. INS*, 250 F.3d 105 (2d Cir. 2001). Therefore, a conviction under this statute is probably an aggravated felony as an attempted fraud if the loss or attempted loss to the victim is over $10,000. *See Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) (holding that the victim need not actually suffer the loss if the offense is an attempted fraud aggravated felony).

18.2-178 Obtaining money or signature, etc., by false pretense

Elements

- obtains, by false pretenses or token
- from any person
- with intent to defraud
- money, a gift certificate or other property that may be the subject of larceny

OR

- obtains, by false pretenses or token
- with intent to defraud
- the signature of any person to a writing, the false making whereof would be a forgery

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because fraud is an essential element of the offense. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951). The BIA has also held that convictions for false pretenses are crimes involving moral turpitude. *Matter of P*, 3 I&N Dec. 56 (1947).

Aggravated felony

Theft offense

A conviction under this statute is not a theft offense aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentenced imposed is at least one year. The offense does not involve the taking of property from the rightful owner without the owner's consent. Rather, the offense involves the owner of the property voluntarily surrendering the property based on the fraud. The Fourth Circuit distinguished between theft and fraud offenses in the aggravated felony definition and found that fraud offenses involve unlawfully obtained consent of the owner, whereas theft offenses involve takings without the consent of the owner. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

Fraud offense

A conviction under this statue is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

Forgery

If the defendant is convicted under the forgery section of this statute statute, the conviction is a forgery offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(R) if the sentence imposed is at least one year. Although the statute does not directly punish the elements of a forgery offense, 8 U.S.C. § 1101(a)(43)(R) includes offenses "relating to" forgery; because of the all-inclusive nature of the term "relating to," a conviction for a forgery-related offense under this statute will probably be an aggravated felony under 8 U.S.C. § 1101(a)(43)(R) if the sentence imposed is at least one year. The statute is divisible, so it will be necessary to consult the record of conviction to determine whether the conviction involves forgery.

18.2-181 Issuing bad checks, etc., larceny

Elements

- with intent to defraud
- make or draw or utter or deliver
- any check, draft, or order for the payment of money upon any bank or like institution
- knowing at the time of making that there are insufficient funds for the payment of such check

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because fraud is an essential element of the offense. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951). The BIA has also held that convictions for issuing bad checks with intent to defraud are crimes involving moral turpitude. *Matter of Logan,* 17 I&N Dec. 367 (BIA 1980); *Matter of B*, 4 I&N Dec. 297 (BIA 1951).

Aggravated felony

Theft offense

A conviction under this statute is not a theft offense aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentenced imposed is at least one year. The offense does not involve the taking of property from the rightful owner without the owner's consent. Rather, the offense involves the owner of the property voluntarily surrendering the property based on the fraud. The Fourth Circuit distinguished between theft and fraud offenses in the aggravated felony definition and found that fraud offenses involve unlawfully obtained consent of the owner, whereas theft offenses involve takings without the consent of the owner. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005). Moreover, a conviction under this statute does not require that the defendant obtain the property of another. *Payne v. Comm.*, 281 S.E.2d 873 (Va. 1981); *Warren v. Comm*, 247 S.E.2d 692 (Va. 1978). Because the "taking" of property is not an element, a conviction under this statute is not a theft offense under the BIA's definition of a theft offense. *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000).

Attempted fraud

A conviction under this statue is an attempted fraud offense and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(M)(i) and (U) if the loss or the potential loss to the victim exceeds $10,000. A conviction under this statute meets the definition

of attempt because a conviction requires that the defendant intend to defraud and make a substantial step toward the commission of the offense, since the defendant must make the check knowing that there are insufficient funds for the payment of such check. *See Sui v. INS*, 250 F.3d 105 (2d Cir. 2001); *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999).

18.2-181.1 Issuance of bad checks

Elements

- Violates Va. Code Ann. § 18.2-181
- $200 or more
    - Drawn upon same bank account
    - Are made payable to same firm, person, or corporation

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because fraud is an essential element of the offense. *See* analysis for VA Code Ann. §18.2-181.

Aggravated felony

Theft offense

A conviction under this statute is not a theft offense aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentenced imposed is at least one year. *See* analysis for Va. Code Ann. § 18.2-181.

Attempted fraud

A conviction under this statue is an attempted fraud offense and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(M)(i) and (U) if the loss or the potential loss to the victim exceeds $10,000. *See* analysis for Va. Code Ann. § 18.2-181.

18.2-186.2 False statements or failure to disclose material facts in order to obtain aid or benefits under any local, state or federal housing assistance program

Elements

(i)

- knowingly
- makes or causes to be made
- either directly or indirectly or through any agent or agency
- any false statement in writing
- with the intent that it should be relied upon
- or fails to disclose any material fact concerning the financial means or ability to pay of himself or of any other person for whom he is acting
- for the purpose of procuring aid and benefits available under any local, state or federally funded housing assistance program

OR

(ii)

- knowingly
- fails to disclose a change in circumstances

- in order to obtain or continue to receive under any such program aid or benefits to which he is not entitled

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because the making of false statements are generally crimes involving moral turpitude. *See, e.g., Matter of Acosta*, 14 I&N Dec. 338 (BIA 1973); *Matter of B*, 1 I&N Dec. 121 (BIA 1941).

Aggravated felony

Theft offense

A conviction under this statute is not a theft offense aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentenced imposed is at least one year. The offense does not involve the taking of property from the rightful owner without the owner's consent. Rather, the offense involves the owner of the property voluntarily surrendering the property based on the fraud. The Fourth Circuit distinguished between theft and fraud offenses in the aggravated felony definition and found that fraud offenses involve unlawfully obtained consent of the owner, whereas theft offenses involve takings without the consent of the owner. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

Attempted fraud

A conviction under this statute is an attempted fraud offense and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(M)(i) and (U) if the loss or the proposed loss to the victim exceeds $10,000. A conviction under this statute meets the definition of attempt because a conviction requires that the defendant intend to defraud, i.e., that the defendant must act with the intent that the statement be relied upon. The defendant must also make a false statement or fail to disclose the change in circumstances, which is a substantial step towards the commission of the fraud. *See Sui v. INS*, 250 F.3d 105 (2d Cir. 2001); *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999). The attempted offense involves fraud or deceit because the defendant must falsely represent a material fact with knowledge of the falsity. The statute also includes as an element intent to defraud the other party, i.e., that the defendant must act with the intent that the statement be relied upon. *See Matter of GG*, 7 I&N Dec. 161 (BIA 1956) (definition of fraud in the common legal sense).

63.2-522 False statements to obtain public assistance

Elements

- obtains or attempts to obtain
- or aids and abets any person in obtaining
- by means of a willful false statement or representation or by impersonation or other fraudulent device
- public assistance, or benefits from other programs to which he is not entitled

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because false statements are generally crimes involving moral turpitude. *See, e.g., Matter of Acosta*, 14 I&N Dec. 338 (BIA 1973); *Matter of B*, 1 I&N Dec. 121 (BIA 1941).

The offense of aiding and abetting has been held by the BIA to relate to the underlying offense and therefore is a crime involving moral turpitude if the underlying offense is a crime involving moral turpitude. *See, e.g., Matter of Beltran*, 20 I&N Dec 521 (BIA 1992); *Matter of Short*, 20 I&N Dec 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977).

Aggravated felony

Theft offense

A conviction under this statute is not a theft offense aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentenced imposed is at least one year. The offense does not involve the taking of property from the rightful owner without the owner's consent. Rather, the offense involves the owner of the property voluntarily surrendering the property based on the fraud. The Fourth Circuit distinguished between theft and fraud offenses in the aggravated felony definition and found that fraud offenses involve unlawfully obtained consent of the owner, whereas theft offenses involve takings without the consent of the owner. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

Fraud offense

A conviction under this statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000 because it involves fraud or deceit.

Aiding and abetting

A conviction for aiding and abetting in the false statements to obtain public assistance is an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000. Aiding and abetting is an aggravated felony if the underlying offense is an aggravated felony. *See Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007).

63.2-523 Unauthorized use of food stamps, benefit transfer cards, etc.

Elements

- knowingly and with intent to defraud
- transfers, acquires, alters, traffics in or uses
- or aids and abets another person in transferring, acquiring, altering, trafficking in, or using, or possessing
- food stamps, electronic benefit transfer cards or other devices subject to the federal reserve system regulations
- or benefits from the programs in any manner not authorized by law

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because fraud is an essential element of the offense. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951). The offense of aiding and abetting has been held by the BIA to relate to the underlying offense and therefore is a crime involving moral turpitude if the underlying offense is a

crime involving moral turpitude. *See, e.g., Matter of Beltran*, 20 I&N Dec 521 (BIA 1992); *Matter of Short*, 20 I&N Dec 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977).

Aggravated felony

Theft offense

A conviction under this statute is not a theft offense aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentenced imposed is at least one year. The offense does not involve the taking of property from the rightful owner without the owner's consent. Rather, the offense involves the owner of the property voluntarily surrendering the property based on the fraud. The Fourth Circuit distinguished between theft and fraud offenses in the aggravated felony definition and found that fraud offenses involve unlawfully obtained consent of the owner, whereas theft offenses involve takings without the consent of the owner. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

Fraud offense

A conviction under this statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000 because it involves fraud or deceit.

Aiding and abetting

A conviction for aiding and abetting in the use, transfer, or trafficking in food stamps is an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000. Aiding and abetting is an aggravated felony if the underlying offense is an aggravated felony. *See Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007).

18.2-186.3 Identity theft

Elements

(A)

- without the authorization or permission of the person or persons who are subjects of the identifying information
- with the intent to defraud
- for his own use or the use of a third person
- do one of the following acts:
    (1) obtain, record or access identifying information that is not available to the general public that would assist in accessing financial records, obtaining identification documents, or obtaining benefits of such other person; OR
    (2) obtain goods or services through the use of identifying information of such other person; OR
    (3) obtain identification documents in such other person's name; OR
    (4) obtain, record or access identifying information while impersonating a law enforcement officer or an official of the Virginia government

(B)

- without the authorization or permission of the person or persons who are subjects of the identifying information
- with intent to sell or distribute the information to another
- do one of the following acts:

(1) obtain goods or services through the use of identifying information of such other person; OR
(2) obtain identification documents in such other person's name; OR
(3) obtain, record or access identifying information while impersonating a law-enforcement officer or an official of the Commonwealth

(B1)

- use identification documents or identifying information of another person or of a false or fictitious person
- whether that person is dead or alive
- to avoid summons, arrest, prosecution or to impede criminal investigation

As used in this section, "identifying information" shall include but not be limited to: (i) name; (ii) date of birth; (iii) social security number; (iv) driver's license number; (v) bank account numbers; (vi) credit or debit card numbers; (vii) personal identification numbers (PIN); (viii) electronic identification codes; (ix) automated or electronic signatures; (x) biometric data; (xi) fingerprints; (xii) passwords; or (xiii) any other numbers or information that can be used to access a person's financial resources, obtain identification, act as identification, or obtain goods or services. Va. Code Ann. § 18.2-186.3(C).

Crime involving moral turpitude

Section (A)

A conviction under section (A) of this statute is a crime involving moral turpitude because fraud is a necessary element of the offense, since the defendant must do all acts with intent to defraud. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951).

Section (B)

A conviction under section (B) under this statute is a crime involving moral turpitude because fraud is implied element. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951). To be conviction under section (B), the defendant must use another person's identity to obtain goods, services, documents or access to identifying information without the authorization of the person whose identity is used. The BIA has held that a statute punishing the use of a credit card without authorization is a crime involving moral turpitude because the lack of authorization implies an intent to defraud. *See Matter of Chouinard*, 11 I&N Dec. 839 (BIA 1966).

Section (B1)

A conviction under section (B1) of the statute is a crime involving moral turpitude because the offense involves fraud or deceit. *See See Knoetze v. U.S.*, 634 F.2d 207 (11th Cir. 1981) (holding that obstruction of justice where fraudulent means are used to impede an investigation, even though there was no language of "intent to defraud" in the statute, was a crime involving moral turpitude); *Matter of B*, 6 I&N Dec. 702 (BIA 1955) (reasoning that a statute punishing impersonation of an officer in order to demand or obtain money was a crime involving moral turpitude, even through the statute did not expressly contain the language "with intent to defraud").

Aggravated felony

Section (A)(1)

Theft offense

A conviction under section (A)(1) of this statute is probably a theft offense under 8 U.S.C. § 1101(a)(43)(G) and therefore an aggravated felony if a one-year sentence is imposed because it requires that the defendant obtain certain benefits that belong to another person through the use of that person's information. *See U.S. v. Mejia-Barba*, 327 F.3d 678 (8th Cir. 2003) (holding that an identity theft conviction is a theft offense under 8 U.S.C. § 1101(a)(43)(G) because it involves misappropriation of property by using it in a manner that is inconsistent with the rights of the true owner). Unlike a conviction under section (A)(2), the offense requires that the defendant use the information to appropriate to himself the benefits from the owner of such information. *See Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

Attempted theft

A conviction under section (A)(1) is an attempted theft offense and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(G) and (U) if the sentence imposed is at least one year. The section punishes obtaining or accessing information that would assist in accessing financial records of such person. Any of this must be obtained without the authorization or permission of the person who are subject of the identifying information and with intent to defraud. The offense therefore has an element of the criminal intent to deprive the owner of the rights and benefits of ownership, because the defendant must act without the authorization or permission of the victim. *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000). The defendant must get some information that would allow him to access the money or goods of another person, which is a substantial step towards the deprivation of the property. *See Sui v. INS*, 250 F.3d 105 (2d Cir. 2001); *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999).

Fraud offense

An conviction under section (A)(1) of this statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

Section (A)(2)

Theft offense

A conviction under section (A)(2) of this statute is probably not a theft offense under 8 U.S.C. § 1101(a)(43)(G) and therefore is not an aggravated felony if a sentence of at least one year is imposed. Unlike a conviction under section (A)(1), the offense requires that the defendant use another person's information to appropriate to himself the property of a third party. Such an act is not a theft offense because the act involves the owner of the property consenting to giving such property. Rather, the offense involves the owner of the property voluntarily surrendering the property based on the fraud. The Fourth Circuit distinguished between theft and fraud offenses in the aggravated felony definition and found that fraud offenses involve unlawfully obtained consent of the owner, whereas theft offenses involve takings without the consent of the owner. *See Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005); *but see U.S. v. Mejia-Barba*, 327 F.3d 678 (8th Cir. 2003) (holding that a statute punishing the use of another person's identity

to obtain credit, property or services without the authorization of that other person is a theft offense under 8 U.S.C. § 1101(a)(43)(G)).

Fraud offense

An conviction under section (A)(2) of this statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

Section (A)(3) and (4)

Theft offense

A conviction under either sections (A)(3) or (4) of this statute is probably not a theft offense under 8 U.S.C. § 1101(a)(43)(G) and therefore is not an aggravated felony if the sentence imposed is at least one year. Although a conviction under either of these sections requires that the defendant obtain certain benefits that belong to another person through the use of that person's information, such a taking is of *de minimus* value. *See U.S. v. Mejia-Barba*, 327 F.3d 678 (8th Cir. 2003) (holding that an identity theft conviction is a theft offense under 8 U.S.C. § 1101(a)(43)(G) because it involves misappropriation of property by using it in a manner which is inconsistent with the rights of the true owner); *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000) (holding that a *de minimus* taking is not a theft offense under 8 U.S.C. § 1101(a)(43)(G)). The taking of one's identity can be considered a *de minimus* taking because the owner loses nothing of major value if all that is taken is the victim's identity. Should the defendant also use that identity to steal something of value that belongs to the victim, then this would most likely entail more than a *de minimus* taking. However, the mere borrowing of an identity document deprives the owner of nothing more than the amount that it costs to replace the document.

Fraud offense

A conviction under either section (A)(3) or (4) of this statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

Section (B)(1)

Theft offense

A conviction under section (B)(1) of this statute is probably a theft offense under 8 U.S.C. § 1101(a)(43)(G) and therefore an aggravated felony if a one-year sentence is imposed because it requires that the defendant sell the right to obtain certain benefits that belong to another person through the use of that person's information. *See U.S. v. Mejia-Barba*, 327 F.3d 678 (8th Cir. 2003) (holding that an identity theft conviction is a theft offense under 8 U.S.C. § 1101(a)(43)(G) because it involves misappropriation of property by using it in a manner that is inconsistent with the rights of the true owner). The criminal intent to deprive the owner of the rights and benefits of ownership is evidenced by the element that the defendant act without the authorization or permission of the person who is the subject of the identifying information. *See Matter of V-Z-S-*, 22 I&N Dec. 1381 (BIA 2000).

Fraud offense

A conviction under section (B)(1) is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

Section (B)(2) and (3)

Theft offense

A conviction under either section (B)(2) and (3) of the statute is probably not a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) and (U) if the sentence imposed is at least one year. The statute punishes obtaining identification documents in another person's name or obtaining access to identifying information about a person while impersonating a law enforcement officer with the intent to sell such information. These offenses are takings, but they could be considered a *de minimus* taking. *See U.S. v. Mejia-Barba*, 327 F.3d 678 (8th Cir. 2003) (holding that an identity theft conviction is a theft offense under 8 U.S.C. § 1101(a)(43)(G) because it involves misappropriation of property by using it in a manner that is inconsistent with the rights of the true owner); *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000) (holding that a *de minimus* taking is not a theft offense under 8 U.S.C. § 1101(a)(43)(G)). The taking of one's identity can be considered a *de minimus* taking because the owner loses nothing of major value if all that is taken is the victim's identity. Should the defendant also use that identity to steal something of value that belongs to the victim, then this would most likely entail more than a *de minimus* taking. However, the mere borrowing of an identity document deprives the owner of nothing more than the amount that it costs to replace the document.

Fraud offense

An offense under either section (B)(2) and (3) is a fraud offense and therefore an aggravated felony if the loss to the victim exceeds $10,000.

Section (B1)

Obstruction of justice

A conviction under this section is probably not an offense relating to obstruction of justice and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year. The offenses punishable under this section of the statute do not qualify as one of the offenses generally thought to come within the obstruction of justice offenses in Title 18 chapter 73 of the U.S. Code. *See Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999). A conviction under this statute involves the obstruction of one's own arrest, not the obstruction of the judicial process. The BIA has reasoned that it is substantially unlikely that an offense of simply obstructing or hindering one's own arrest will be an aggravated felony under 8 U.S.C. § 1101(a)(43)(S). *See Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

18.2-192 Credit card theft

Elements

(1) (a) a person is guilty of credit card or credit card number theft when:
- takes, obtains or withholds a credit card/number from person, possession, custody or
- control without cardholder's consent or,
- with knowledge that is was so taken
- receives the card or number with intent to use, sell, or transfer it to a person other than the issuer or the cardholder

(1)(b) receives credit card/number that he knows to have been:
- lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder and who
- retains possession with intent to use, sell or to transfer the credit card/number to a person other than the issuer or the cardholder

(1)(c) not being the issuer
- sell the card/number or,
- buys a credit card/number from person other than issuer

(1)(d) in one 12 month period receives cards/numbers issued in names of two or more persons
- which he has reason to know were taken or retained under circumstances which constitutes a violation of Va. Code Ann. § 18.2-194 (Unauthorized possession of credit cards) and subdivision (1)(c) of this section.

(2) credit card/number theft is grand larceny and is punishable as provided by Va Code Ann. § 18.2-95

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because the statute punishes the exercise of control over another person's property with the intent to permanently deprive the owner of the rights and benefits of ownership. *See Matter of M*, 2 I&N Dec. 686 (BIA 1946); *Matter of D-*, 1 I&N Dec. 143 (BIA 1941). In addition, some of the offenses punishable under this statute include the receipt of stolen property with knowledge that it has been stolen, which is a crime involving moral turpitude. *See Matter of Patel*, 15 I&N Dec. 212 (BIA 1975); *Matter of Z*, 7 I&N Dec. 253 (BIA 1956), *Matter of R*, 6 I&N Dec. 772 (BIA 1955).

Aggravated felony

Theft offense

A conviction under any section of this statute is a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. The offense requires that the defendant exercise control over another person's property with the criminal intent to deprive the owner of the rights and benefits of ownership. *See Matter of V-Z-S*, 22 I&N Dec. 1338 (BIA 2000). In addition, the Fourth Circuit has held that a conviction under this statute is a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

18.2-193 Credit card forgery

Elements

(1)(a)

- with intent to defraud a purported issuer, a person or organization providing money, goods or services or anything else of value, or any other person
- falsely makes or falsely embosses a purported credit card or utters such a credit card

(1)(b)

- not being the cardholding or the person authorized by him
- with intent to defraud the issuer, or a person or organization providing money, goods or services or anything else of value, or any other person
- signs a credit card

(1)(c)

- not being the cardholder or the person authorized by him
- with intent to defraud the issuer, or a person or organization providing money, goods or services or anything else of value, or any other person
- forges a sales draft or cash advance/withdrawal draft
- or uses a credit card number of a card of which he is not the cardholder,
- or utters, or attempts to employ as true, such forged draft knowing it to be forged

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because any conviction under this statute requires fraud as an essential element. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951).

Aggravated felony

Forgery

A conviction under this statute is a forgery offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(R) if the sentence imposed is at least one year. The Virginia definition of credit card forgery matches the common law definition of forgery, which has been used to define the forgery offense in 8 U.S.C. § 101(a)(43)(R). *See Richards v. Ashcroft*, 400 F.3d 125 (2d Cir. 2005) (three elements of common law forgery are (1) the false making or material alteration (2) with intent to defraud (3) of a writing that, if genuine, might be of legal efficacy).

Fraud offense

A conviction under this statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim is over $10,000.

18.2-195 Credit card fraud

Elements

(1) credit card fraud – with intent to defraud:

(a) uses to obtain something of value or, retains in violation of Va Code Ann. § 18.2-192 (credit card theft) or card which he knows is expired or revoked or;

(b) obtains money, goods, services or anything else of value without consent of cardholder by representing:

(i) without the consent of the cardholder that that he is the specified holder of the card or card number; or

(ii) that he is the holder of a card or credit card number and such card or number has not in fact been issued;

(c) obtains control over credit card/number as security for debt; or

(d) obtains money from an issuer by use of an unmanned device of the issuer or through a person other than the issuer when he knows that such advance will exceed his available credit with the issuer and any available balances held by the issuer.

(2) person authorized by an issuer to furnish goods/services - with intent to defraud:

(a) furnishes money, goods, services or anything else of value upon presentation of a credit card or credit card number obtained or retained in violation of Va Code Ann. § 18.2-192 (credit card theft), or a credit card or credit card number which he knows is expired or revoked;furnishes something of value or,

(b) fails to furnish goods/services he should to furnish

(c) remits transactions in excess of monetary amount authorized by cardholder.

(4) conspiracy to commit one of above acts

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because any conviction under this statute requires fraud as an essential element. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951).

Aggravated felony

(1)(a)

Theft offense

A conviction under this section of the statute is probably a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005) (examining a conviction under this statute and reasoning that a conviction under this section of the statute would amount to an aggravated felony offense under 8 U.S.C. § 1101(a)(43)(G)).

Fraud offense

A conviction under this section of the statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

(1)(b)

Theft offense

A conviction under this section of the statute is not a theft offense and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

Fraud offense

A conviction under this section of the statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

(1)(c)

Theft offense

A conviction under this section of the statute is not a theft offense and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

Fraud offense

A conviction under this section of the statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

(1)(d)

Theft offense

A conviction under this section of the statute is probably not a theft offense under 8 U.S.C. § 1101(a)(43)(G) and therefore is not an aggravated felony if the sentence imposed is at least one year. A conviction under this section requires that the defendant obtain money from the issuer by use of and unmanned device or through another person and he knows that the advance will exceed his credit. This conviction is probably not a theft offense because the statute punishes the defendant for obtaining the money fraudulently from the issuer. The defendant does not take the excess amount without the owner's consent as required by a theft offense. Rather, the defendant fraudulently obtains the issuer's consent to release the money. *See Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

Fraud offense

A conviction under this section of the statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

(2)(a)

Theft offense

A conviction under this section is possibly a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. The offense is accomplished when the defendant, with intent to defraud, furnishes such money, goods, or services upon presentation of a stolen credit card or a card that he knows has been expired. This offense could be considered a conspiracy to commit a theft offense and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(G) and (U).

However, the offense is not definitely a conspiracy because there is no agreement between two or more persons to commit an unlawful act. *See* Black's Law Dictionary. Rather, the statute punishes the furnishing of such goods, money or services upon the presentation of an expired credit card. Therefore, it is also not a theft offense because the defendant need not obtain any property not belonging to the him. *See Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000) (holding that a theft offense requires that the defendant exercise unlawful control over the property of another with the intent to deprive the rightful owner of the rights and benefits of ownership).

Fraud offense

A conviction under this section of the statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

(2)(b)

Theft offense

A conviction under this section of the statute is possibly a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. This section of the statute requires that the defendant be a person authorized to furnish money, goods or services upon the presentation of a credit card and that he, with intent to defraud, fails to furnish such money, goods or services which he represents to the issuer that he has furnished. This offense can be considered a conspiracy to commit a theft offense and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(G) and (U).

However, the offense is not definitely a conspiracy because there is no agreement between two or more persons to commit an unlawful act. *See* Black's Law Dictionary. Rather, the statute punishes the furnishing of such goods, money or services upon the presentation of an expired credit card. The offense is also not a theft offense because the defendant need not obtain any property not belonging to the him. *See Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000) (holding that a theft offense requires that the defendant exercise unlawful control over the property of another with the intent to deprive the rightful owner of the rights and benefits of ownership).

Fraud offense

A conviction under this section of the statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

(2)(c)

Theft offense

A conviction under this section of the statute is not a theft offense and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence imposed is at least one year. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

Fraud offense

A conviction under this section of the statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

(4)

Theft offense

A conviction for conspiracy to commit any of the above acts is a conspiracy to commit a theft offense and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(G) and (U) if the underlying crime is a theft offense and the sentence imposed is at least one year. *See* analysis for underlying offenses.

Fraud offense

A conviction under this section of the statute is a conspiracy to commit a fraud offense and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(M)(i) and (U) if the loss to the victim exceeds $10,000. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

18.2-197 Criminally receiving goods and services fraudulently obtained

Elements

- receives money, goods, services or anything else of value
- obtained in violation of Va. Code Ann. § 18.2-195 (credit card fraud)
- with the knowledge or belief that the same were obtained in violation of the credit card fraud statute

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because it involves the possession of stolen goods (in this case, goods fraudulently obtained), with the knowledge that such goods were stolen. *See, e.g., Matter of Z*, 7 I&N Dec. 253 (BIA 1956); *Matter of R*, 6 I&N Dec. 772 (BIA 1955).

Aggravated felony

Theft offense

A conviction under this statute is a theft offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentence is at least one year. The statute punishes receipt of stolen goods knowing the same to have been unlawfully taken. *See Matter of Bahta*, 22 I&N Dec. 1338 (BIA 2000) (holding that the exercise of unlawful control over property with the purpose to deprive is a theft offense, and such a theft offense would also encompass receiving and possessing stolen goods knowing that the same were stolen); *see also U.S. v. Vasquez-Florez* (10th Cir. 2001) (possession of stolen vehicle is a theft offense because it involves the knowing exercise of control over another person's property without consent).

Fraud offense

A conviction under this statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

18.2-204.1 Fraudulent use of birth certificates, drivers' licenses

Elements

(A)

- obtain, possess, sell, or transfer
- the birth certificate of another
- for the purpose of establishing a false identity for himself or for another person

(B)

- obtain, possess, sell, or transfer
- any document
- for the purpose of establishing a false status, occupation, membership, license, or identity for himself of any other person

(C)

- if birth certificate or document is obtained, possessed, sold or transferred with the intent to use such document to purchase a firearm, class 6 felony

Crime involving moral turpitude

A conviction under any section of this statute is a crime involving moral turpitude. A conviction for using false identification is sufficient to prove moral turpitude. Because this statute punishes more than mere possession, since it punishes possession with the purpose of using the document to establish a false identity, it is a crime involving moral turpitude. *See Matter of Serna*, 20 I&N Dec. 579 (BIA 1992)

Aggravated felony

Document fraud

A conviction under this statute is not a document fraud offense and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(P) if the sentence imposed is at least one year.

The Virginia statute does not have the same elements as 18 U.S.C. § 1543, which is one of the document fraud offenses listed in 8 U.S.C. § 1101(a)(43)(P). 18 U.S.C. § 1543 punishes the furnishing for another's use a false, forged, counterfeited, mutilated or altered passport or instrument. The Virginia statute only punishes sale or transfer of someone else's document, not an altered or mutilated document. Also, the Virginia statute punishes the sale, transfer or possession of a birth certificate; 18 U.S.C. § 1543 punishes the mutilation, using, or furnishing to another a mutilated passport. Although a passport can be one of the "other documents" described in Va. Code Ann. § 18.2-204.1(B), the Virginia statute is meant to punish the sale or use of another's birth certificate, not passport. Therefore, the Virginia statute does not have the same elements as 18 U.S.C. § 1543.

Also, the Virginia statute does not punish the use, forging, altering, or possession of counterfeited immigration documents, which are the offenses punishable under 18 U.S.C. § 1546(a), the other offense listed in the aggravated felony section at 8 U.S.C. § 1101(a)(43)(P). For these reasons, a conviction under this statute is not an aggravated felony.

Fraud offense

A conviction under this statute is probably a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

Other immigration consequences

A conviction under section (C) of this statute will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(C), an offense relating to firearms, if the weapon used in the offense is a firearm as described in 18 U.S.C. § 921(a)(3).

18.2-204.2 Manufacture, sale, etc., or possession of fictitious, facsimile or simulated official license or identification

Elements

(A) class 1 misdemeanor
- manufacture, advertise for sale, sell, possess or in any way reproduce
- any fictitious, facsimile or simulated drivers' license, passport, identification card
- in a manner that it could be mistaken for a valid license or identification

(C) possession alone of such a card is a class 2 misdemeanor

Crime involving moral turpitude

A conviction under this statute is not necessarily a crime involving moral turpitude. A conviction for using false identification is sufficient to prove moral turpitude. However, mere possession, even with the knowledge that it was altered, but without its use or intent to use it unlawfully, is not a crime involving moral turpitude. *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992). A conviction under this statute for any of the acts that involve the use or sale or a document is a crime involving moral turpitude. A conviction under this statute for any of the acts that involve mere possession of the document is not a crime involving moral turpitude. Therefore, whether this offense is a crime involving moral turpitude depends on the record of conviction.

Aggravated felony

Document fraud

A conviction under this statute is possibly a document fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(P) if the sentence imposed is at least one year. The aggravated felony definition includes the counterfeiting, forgering, altering or falsely making any immigrant card or nonimmigrant visa, permit, border crossing card, alien registration or receipt card or other immigration document, or attempt to use, possess or obtain such card. 8 U.S.C. § 1101(a)(43)(P), *referencing* 18 U.S.C. § 1546(a) and 1543. Not all offenses punishable under the Virginia statute are included in the federal offense. Mainly, the Virginia statute includes state driver's licenses and documents that are not federal immigration documents; 18 U.S.C. § 1546(a) only punishes the counterfeiting, etc. of immigration documents. However, the "identification card" described in Va. Code Ann. § 18.2-204.2 could include some of the immigration documents listed in 18 U.S.C. § 1546(a). Therefore, whether this offense is an aggravated felony depends on the record of conviction.

The other statute referenced in 8 U.S.C. § 1101(a)(43)(P) is 18 U.S.C. § 1543, which punishes the counterfeiting, mutilation, or forgery of a passport or instrument purporting to be a passport or using, attempting to use, or furnishing to another for use such a false, altered, or mutilated passport. Va. Code Ann. § 18.2-204.2 punishes the manufacturing of or sale of a fictitious of a U.S. passport as one of the listed documents. Therefore, a conviction for this offense may be a document fraud offense and an aggravated felony under 8 U.S.C. § 1101(a)(43)(P). It is necessary to consult the record of conviction to determine whether the offense is an aggravated felony. If the defendant is convicted for the first time of document fraud and the offense was committed only for the purpose of assisting, abetting, or aiding a spouse, child, or parent to violate the immigration laws, this is an exception to the aggravated felony definition.

18.2-206 Procuring an animal, aircraft, vehicle or boat with intent to defraud

Elements

- procure an animal, aircraft, vehicle, boat or vessel
- by fraud or misrepresentation as some other person
- with the intent to cheat or defraud such other person

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because fraud is an essential element of the offense. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951).

Aggravated felony

Fraud offense

A conviction under this statute is a fraud offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

Theft offense

A conviction under this statute is not a theft offense and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the sentenced imposed is at least one year. The offense does not involve the taking of property from the rightful owner without the owner's consent. Rather, the offense involves the owner of the property voluntarily surrendering the property based on the fraud. The Fourth Circuit distinguished between theft and fraud offenses in the aggravated felony definition and found that fraud offenses involve unlawfully obtained consent of the owner, whereas theft offenses involve takings without the consent of the owner. *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).

CRIMES INVOLVING CONTROLLED SUBSTANCES

18.2-248.1 Sale, gift, distribution or possession with intent to sell, give, or distribute controlled substance

Elements

- sell, give, distribute or possess with intent to sell, give or distribute marijuana

(a) violation with respect to:

(1) less than ½ oz. of marijuana is class 1 misdemeanor

(2) more than ½ oz but not more than 5 pounds is class 5 felony

(3) more than 5 pounds is felony punishable by 5-30 years

- if prove that gave, distributed, or possessed with intent to give or distribute marijuana only as an accommodation to another and not with intent to profit from any consideration received or expected nor to induce the recipient or intended recipient of the marijuana to use or become addicted to or dependent upon such marijuana, class 1 misdemeanor

(b) class 4 felony

- give, distributes, or possesses marijuana
- as an accommodation and not with intent to profit
- to an inmate of a state or local correctional facility

(c) imprisonment of 5-30 years

- manufactures marijuana OR
- possesses marijuana with intent to manufacture such substance
- not for his own use

(d) minimum 5 year sentence for third or subsequent felony offense under this section

Crime involving moral turpitude

This offense is probably a crime involving moral turpitude because the statute has a knowing requirement. *See Josephs v. Comm.*, 390 S.E.2d 491 (Va. Ct. App. 1990) (reasoning that possession of a controlled drug gives rise to defendant's knowledge of its character). The BIA has held that where drug distribution or possession offenses involve a knowing requirement, they are crimes involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs was a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946). Therefore, a conviction under this statute is probably a crime involving moral turpitude.

Aggravated felony

(a)(1) Gift or distribution or possession with intent to give, distribute less than ½ oz of marijuana

Controlled substances

A conviction under this section of the statute, which punishes distribution, etc. of ½ oz. of marijuana or less, is not necessarily an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). This section of the statute does not require remuneration, so the offense therefore does not come within the common understanding of an "illicit trafficking offense," which requires some commercial element. *See Lopez v. Gonzales*, 127 S. Ct.

625 (2006); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). The Virginia statute punishes the gift of less than ½ oz. Also, under Virginia law, the definition of the term "distribute" extends well beyond the transfer of drugs for remuneration. *See Wood v. Comm.*, 197 S.E.2d 200 (Va. 1973) (interpreting the term "distribute" a predecessor to Va. Code Ann. § 18.2-248.1 to include "not only the illegal sale, barter, exchange or gift of controlled drugs but also any delivery or transfer, actual or constructive, of possession or title to such drugs from one person to another."). In addition, in the federal statutes, the term "distribution" does not necessarily mean "sale" because 21 U.S.C. § 841(d)(3) gives a lighter punishment to distribution for no remuneration of a small amount of marijuana. *Id.*; *see also* 21 U.S.C. §§ 802(11), (8) (defining distribution of a controlled substance as delivering such substance, and defining delivering as the actual, constructive, or attempted transfer of a controlled substance). Therefore, not all offenses punishable under this statute have a commercial nature such that it is a trafficking offense.

In addition, the offense is not a felony punishable under 18 U.S.C. § 924(c)(2) as required by 8 U.S.C. § 1101(a)(43)(B). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990). Under 21 U.S.C. § 841(b)(4), a violation for distribution of a small amount of marijuana for no remuneration is treated as a simple possession offense under 21 U.S.C. § 844, which is a misdemeanor offense in the federal system. Because it would not be punishable as a felony in the federal system, it is not an aggravated felony. *Lopez v. Gonzales*, 127 S. Ct. 625 (2006).

A conviction under this section of the statue is divisible. A conviction under this section of the statute is likely to be an aggravated felony if the record of conviction reflects that the offense had a commercial element. *See Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). However, the BIA has held that for a drug trafficking offense to constitute an aggravated felony, it must carry a maximum punishment of more than one year. *See Matter of Davis*, 20 I&N Dec. 536 (BIA 1992); *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002); *Matter of Santos-Lopez*, 23 I&N Dec. 419 (BIA 2002). The Virginia offense is punishable as a class 1 misdemeanor and therefore does not exceed punishment of one year. Nonetheless, the Supreme Court in *Lopez* reasoned that any drug distribution offense that has a commercial element is an aggravated felony because it involves illicit trafficking in a controlled substance. Therefore, if the record of conviction reflects that the distribution was commercial in nature, it is probably an aggravated felony under 8 U.S.C. § 1101(a)(43)(B).

(a)(2) and (3) Gift or distribution or possession with intent to give, distribute more than ½ oz of marijuana

Controlled substances

Convictions under these sections are probably aggravated felonies because they are punishable as felonies under 18 U.S.C. § 924(c)(2) as required by 8 U.S.C. § 1101(a)(43)(B). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 841(a) punishes distribution, dispensing, or possession with intent to distribute a controlled substance. Also, the conviction is a felony under both the state and federal systems. Therefore, it is an aggravated felony. It is possible that the gift or distribution of a little more than ½ oz. of marijuana for no remuneration is not an aggravated felony because it

is not punishable as a felony under the federal statutes and does not involve illicit trafficking in a controlled substance. *See* analysis for Va. Code Ann. § 18.2-248.1(a)(1).

(a) Accommodation section

Controlled substances

An offense under the section of (a) of the statute, which punishes a defendant for giving, distributing or possessing with intent to give or distribute marijuana as an accommodation to another individual and not to profit thereby, is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). A conviction under this section would not meet the definition of illicit trafficking, since it explicitly states that a defendant would seek no remuneration for the drug. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). Also, the offense is not punishable as a felony under either state or federal law. *See Lopez*, 127 S. Ct. 625. Under 21 U.S.C. § 841(b)(4), a conviction for distribution of a small amount of marijuana for no remuneration is treated as a simple possession offense under 21 U.S.C. § 844, which is a misdemeanor offense. Therefore, a conviction under this statute is not a drug trafficking aggravated felony under 8 U.S.C. § 1101(a)(43)(B).

(b) Accommodation for inmate

Controlled substances

A conviction under this section of the statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). A conviction under this section would not meet the definition of illicit trafficking, since it explicitly states that a defendant would seek no remuneration for the drug. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). In addition, a conviction under this section of the statute is not an aggravated felony because it is not punishable as a felony in the federal system. *See Lopez*, 127 S. Ct. 625. 21 U.S.C. § 841(a) punishes distribution, dispensing, or possession with intent to distribute a controlled substance. 21 U.S.C. § 841(b)(4) treats distribution for no remuneration as a misdemeanor under the federal system.

(c) Manufacture or possession with intent to manufacture

Controlled substances

A conviction under this section of the statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because the offense in punishable as a felony under federal law. Manufacturing and possessing with intent to manufacture a drug are both punished as a felonies under 18 U.S.C. § 924(c)(2), and therefore meet the definition of aggravated felony under 8 U.S.C. § 1101(a)(43)(B). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). Manufacturing and possessing with intent to manufacture are punished as felonies under 21 U.S.C. § 841(a).

(d) Third or subsequent offense

Controlled substances

A conviction under this section of the statute may be an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). If the defendant is convicted of a subsequent offense under the Controlled Substances Act, federal laws treat the subsequent offense as a felony. *See* 21 U.S.C. § 841(b)(3). However, in order for this offense to be an aggravated felony, it is

probably necessary for the record of conviction from the prior offense to be part of the record of conviction for the subsequent offense, because this is required by the federal system. *See Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006).

If the original offense is a felony under federal law, any subsequent offense is an aggravated felony under federal law. *See* analysis for sections of Va. Code Ann. § 18.2-248.1.

Other immigration consequences

An conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because this statute does not punish simple possession but rather possession with intent to distribute, give, sell, etc., it is not likely to come within the exception.

18.2-248.01 Transporting controlled substances into the Commonwealth

Elements

- transport into the Commonwealth
- by any means
- with intent to sell or distribute
- one ounce or more of cocaine, coca leaves or any salt, compound, derivative or preparation thereof

Crime involving moral turpitude

This offense is a crime involving moral turpitude because it punishes knowing transportation of drugs, since there is an intent to sell element in the statute. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs was a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946).

Aggravated felony

Controlled substances

Transportation with intent to sell or distribute is an aggravated felony because it is punishable as a felony under the 18 U.S.C. § 924(c) as required by 8 U.S.C. § 1101(a)(43)(B). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). This offense is similar to importation of a controlled substance, which is punished under 21 U.S.C. § 952 (importation of controlled substances into the territory of the U.S.). The fact that the Virginia statute does not punish importation into the U.S. is of no importance in determining whether the substantive elements match up because the importation into the U.S. is merely a federal jurisdiction requirement. *See Matter of Vasquez-Muniz*, 23 I&N Dec. 1415 (BIA 2000). In addition, this offense is an "illicit trafficking in a controlled substance" offense because the offense is commercial in nature. *See Lopez*, 127 S. Ct. 625; *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because this statute does not punish simple possession but rather transportation with intent to distribute, give, sell, etc., and the drug is not marijuana, it does not come within the exception.

18.2-248.5 Illegal stimulants and steroids

Elements

(A) punishment for 1-10 years

- knowingly manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute
- any anabolic steroid

(B) class 1 misdemeanor

- knowingly sell or otherwise distribute
- without prescription
- to a minor any pill, capsule, or tablet containing any combination of caffeine and ephedrine sulfate

Crime involving moral turpitude

This offense is a crime involving moral turpitude because it punishes knowing transportation of drugs, since there is an intent to sell element to the statute. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs to be a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946).

Aggravated felony

(A) Manufacture, sell, give, distribute, or possess with intent to do above

Controlled substances

A conviction under this section of the statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). Manufacture, sale, distribution, or possession with intent to distribute are punishable as felonies in the federal system. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); 21 U.S.C. § 841(a) (punishing manufacture, sale, distribution, or possession with intent to distribute). Anabolic steroids are on federal schedule III, and the Virginia offense punishes manufacturing, selling, giving or possession with intent to manufacture, sell, give or distribute such steroids.

(B) Sale or distribution to minor

Controlled substances

A conviction under this section of the statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because selling or distributing to a minor any controlled substance is punishable as a felony in the federal system. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); 21 U.S.C. § 859(a) (punishing sale of controlled substances to minor); *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990). Although this statute punishes

distribution of a chemical or combination thereof and not a controlled substance, this offense is still punishable as a felony under 18 U.S.C. § 924(c). 21 U.S.C. § 841(g)(1) punishes the distribution of a listed chemical as a felony. Ephedrine is a list I chemical in the federal system. 21 U.S.C. § 802(34)(C). Therefore, this Virginia offense is an aggravated felony.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because this statute does not punish simple possession but rather manufacture, sale, distribution, or possession with intent to distribute, give, sell, etc., and the drug is not marijuana, it does not come within the exception.

18.2-250 Simple possession of a controlled substance

Elements

- knowingly or intentionally possess a controlled substance
- punishment and classification vary depending on schedule of drug

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude. Because the language of the statute reads "it is unlawful for any person knowingly or intentionally to possess a controlled substance," the guilty mind requirement will render the conviction a crime involving moral turpitude. *See, e.g.*, *Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968) (where intent is not mentioned in statutes defining simple possession, there is no crime involving moral turpitude); *Matter of R-*, 4 I&N Dec. 644 (BIA 1952) (conviction for unlawful dispensing of drugs is not crime involving moral turpitude because there is no element of intent, motive or knowledge for a conviction).

Aggravated felony

Controlled substances

A conviction under this statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). A conviction under this section does not meet the definition of illicit trafficking, since the offense involves possession only. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). In addition, a conviction under this section of the statute is not an aggravated felony because it is not punishable as a felony in the federal system. *See Lopez*, 127 S. Ct. 625. A first time simple possession offense is not punishable as a felony in the federal system. 21 U.S.C. § 844(a). Therefore, a conviction under this Virginia statute is not an aggravated felony.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. However, the drugs punishable by these schedules

include drugs other than marijuana. Marijuana possession is punished separated under Va. Code Ann. § 18.2-250.1. Therefore, none of the offenses punishable under this statute will fit within the exception to the ground of deportability.

18.2-250.1 Possession of marijuana unlawful

Elements
(A) misdemeanor
- knowingly and intentionally
- possess marijuana
- second possession offense carries heavier punishment, but still class 1 misdemeanor

Crime involving moral turpitude

This offense probably is a crime involving moral turpitude because it involves knowingly and intentionally possessing a controlled substance and therefore it is not a mere regulatory statute. *See*, *e.g.*, *Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968) (where intent is not mentioned in statutes defining simple possession, there is no crime involving moral turpitude); *Matter of R-*, 4 I&N Dec. 644 (BIA 1952) (conviction for unlawful dispensing of drugs is not crime involving moral turpitude because there is no element of intent, motive or knowledge for a conviction).

Aggravated felony

First offense simple possession

Controlled substances

A conviction under this statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). A conviction under this section does not meet the definition of illicit trafficking, since the offense involves possession only. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). In addition, a conviction under this section of the statute is not an aggravated felony because it is not punishable as a felony in the federal system. *See Lopez*, 127 S. Ct. 625. A first time simple possession offense is not punishable as a felony in the federal system. 21 U.S.C. § 844(a). Therefore, a conviction under this section of the statute is not an aggravated felony.

Second offense simple possession

Controlled substances

A conviction under this section of the statute may be an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). If the defendant is convicted of a subsequent offense under the Controlled Substances Act, federal laws treat the subsequent offense as a felony. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); 21 U.S.C. § 841(b)(3). However, in order for this offense to be an aggravated felony, it is probably necessary for the record of conviction from the prior offense to be part of the record of conviction for the subsequent offense, because this is required by the federal system. *See Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because this statute punishes simple possession of marijuana, it is possible that a conviction will fit within the exception, unless the record of conviction indicates that the defendant possessed more than 30 grams of marijuana or that the defendant possessed such drug for other than his or her own use. A second offense for possession of marijuana will not fit within the exception because the exception only applies to *one* simple possession of marijuana offense.

18.2-251.2 Possession and distribution of flunitrazepam

Elements

- knowingly
- manufacture, sell, give, distribute or possess flunitrazepam

Crime involving moral turpitude

This offense is probably a crime involving moral turpitude because it involves knowingly and intentionally possessing or distributing a controlled substance and therefore it is not a mere regulatory statute. *See, e.g.*, *Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968) (where intent is not mentioned in statutes defining simple possession, there is no crime involving moral turpitude); *Matter of R-*, 4 I&N Dec. 644 (BIA 1952) (conviction for unlawful dispensing of drugs is not crime involving moral turpitude because there is no element of intent, motive or knowledge for a conviction).

Aggravated felony

Controlled substances

A conviction under this statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because the offense is punishable as a felony under federal law. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); 21 U.S.C. § 959 (possession of flunitrazepam is a felony). In addition, 21 U.S.C. § § 841(a) punishes as a felony the manufacture, sale, distribution, or possession with intent to distribute a controlled substance. Therefore, a conviction under this Virginia statute is an aggravated felony.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because this statute punishes distribution offenses and the possession offenses punishable do not involve marijuana, any conviction under this statute does not come within the exception to the ground of deportability.

18.2-251.4 Defeating drug and alcohol screening tests

Elements

1) sell, give away, distribute, transport, or market human urine
   - with the intent of using the urine to defeat a drug or alcohol screening test

   OR

2) attempt to defeat a drug or alcohol test by the substitution of a sample;

   OR

3) adulterate a urine or other bodily fluid sample

   with the intent to defraud a drug or alcohol screening test

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude because the offense involves fraud or deceit as an essential element. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951).

Aggravated felony

Controlled substances

A conviction under this statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). A conviction under this statute is not an offense that involves illicit trafficking in a controlled substance, since urine is not a controlled substance. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); *Matter of Davis*, 20 I&N Dec. 171 (BIA 1990). It is also not punishable as a felony in the federal system because it is not listed in any of the federal statutes included in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(B).

Fraud offense

A conviction under this statute is an aggravated felony as an offense involving fraud or deceit under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000. Because this offense rarely involves a financial loss to a victim, it is probably not an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i).

Other immigration consequences

Defrauding drug test

A conviction under this section of the statute will probably render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). While it is possible that this offense is not a crime relating to a controlled substance, the "relating to" language of 8 U.S.C. § 1227(a)(2)(B) is broad and therefore, it is likely that the offense of defrauding a drug test is a crime relating to a controlled substance. *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of paraphernalia is a crime relating to a controlled substance because the crime is linked to drugs). The only exception to the controlled substance ground of deportability is simple possession for one's own use of 30 grams or less of marijuana. This offense does not fit within the exception because it is not a possession of marijuana offense.

Defrauding alcohol test

A conviction under this section of the statute will not render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B) if the defendant is convicted for defrauding an alcohol test because alcohol is not on the federal controlled substances list.

18.2-255 Distribution of certain drugs to persons under 18 prohibited

Elements

(A) punishable for 10-50 years

- person who is at least 18 years
- knowingly and intentionally
  - (i) distribute any drug classified in schedules I-IV or marijuana to any person under 18 years of age who is at least 3 years his junior; OR
  - (ii) cause any person under 18 years of age to assist in such distribution of any drug classified in schedules I-IV or marijuana

(B) class 6 felony

- person who is at least 18 years old
- knowingly and intentionally
  - (i) distribute any imitation controlled substance to a person under 18 years of age who is at least 3 years his junior; OR
  - (ii) cause any person under 18 years of age to assist in such distribution of any imitation controlled substance

Crime involving moral turpitude

(A)(i) and (ii) Distribution to minors or causing minors to assist in distribution

This offense is probably a crime involving moral turpitude because the statute has a knowing and intentional requirement. *See Josephs v. Comm.*, 390 S.E.2d 491 (Va. Ct. App. 1990) (reasoning that possession of a controlled drug gives rise to defendant's knowledge of its character). The BIA has held that where drug distribution or possession offenses involve a knowing requirement, they are crimes involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs is a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946). If the defendant is convicted of causing minors to distribute controlled substances, this offense is also a crime involving moral turpitude because the BIA has held that aiding and abetting offenses are crimes involving moral turpitude if the underlying offense is a crime involving moral turpitude. *See Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977).

(B)(i) and (ii) Distribution of imitation controlled substance or causing minors to assist in distribution of imitation controlled substance

A conviction under these sections of the statute are probably crimes involving moral turpitude because they involve fraud or deceit. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951). If the defendant is convicted of causing minors to distribute imitation controlled substances, this offense is also a crime involving moral turpitude because the

BIA has held that aiding and abetting offenses are crimes involving moral turpitude if the underlying offense is a crime involving moral turpitude. *See Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Martinez,* 16 I&N Dec. 336 (BIA 1977).

Aggravated felony

(A)(i) and (ii) Distribution to minors or causing minors to assist in distribution

Controlled substances

A conviction under either of these sections of the statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). The offense of distribution to children under 18 is punishable as a felony in the federal system, under 21 U.S.C. § 859, and therefore is an aggravated felony. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The offense of causing a minor to assist in distribution is punishable as a felony under 21 U.S.C. § 861. Therefore, a conviction under either of these sections of the statute is an aggravated felony.

(B)(i) and (ii) Distribution of imitation controlled substance or causing minors to assist in distribution of imitation controlled substance

Controlled substance

A conviction under this section of the statute for distribution of an imitation controlled substance is not necessarily an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). The offense is not punishable as a felony in the federal system. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 841(a)(2) punishes the distribution of a counterfeit substance. However, a conviction under 21 U.S.C. § 841(a)(2) requires that the counterfeit substance be a *controlled* substance. *See U.S. v. Sampson*, 140 F.3d 585 (4th Cir. 1988) (holding that counterfeit cocaine made of candle wax, flour and baking soda does not constitute a "counterfeit substance" within meaning of 21 U.S.C. § 841(a)(2) because it is not a controlled substance). Therefore, if a defendant is convicted of distributing a substance that is not a controlled substance at all, this conviction is not an aggravated felony. In addition, the offense does not involve illicit trafficking in a controlled substance if the substance is not a controlled substance. *See Lopez*, 127 S. Ct. 625; *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992).

A conviction for causing minors to assist in the distribution of an imitation controlled substance is probably not an aggravated felony. Although the offense of causing a minor to assist in distribution is punishable under 21 U.S.C. § 861, the defendant must cause a minor to assist in violating other portions of the controlled substance laws. Because distribution of an imitation controlled substance is not necessarily an aggravated felony, causing a minor to distribute imitation controlled substances is not likely to be an aggravated felony. *See Sampson*, 140 F.3d 585.

If the record of conviction reflects that the imitation substance was actually a controlled substance on the federal list, this conviction is an aggravated felony.

Fraud offense

A conviction under this section of the statute is probably an offense involving fraud or deceit and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000. A conviction for causing a minor to distribute an imitation controlled substance is an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000 because a conviction for

aiding and abetting is an aggravated felony if the underlying offense is an aggravated felony. *See Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007).

Other immigration consequences

(A)(1) and (2) Distribution to minors or causing minors to assist in distribution

A conviction under this section of the statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because this statute does not punish simple possession but rather distribution, it does not come within the exception.

(B)(1) and (2) Distribution of imitation controlled substance or causing minors to assist in distribution of imitation controlled substance

A conviction under this section of the statute will probably render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Because the offense involves distribution of an imitation controlled substance, it is less likely to be a crime *relating* to a controlled substance. However, given the broad nature of the words "relating to," it is likely that a conviction under either of these sections will be a crime relating to a controlled substance. *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of paraphernalia is a crime relating to a controlled substance because the crime is linked to drugs).

18.2-255.1 Distribution, sale or display of printed material advertising instruments for use in administering marijuana or controlled substances to minors

Elements

- knowingly
- sell, distribute, or display for sale to a minor
- any book, pamphlet, periodical, or other printed matter that he knows advertises for sale any instrument, device, article, or contrivance for advertised use in unlawfully ingesting, smoking, administering, preparing or growing marijuana or a controlled substance

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude because the statute has a knowing and intentional requirement. The BIA has held that where a drug distribution or possession offense involves a knowing requirement, it is a crime involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs to be a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946). Although this statute punishes the knowing distribution, sale or display for sale of advertisements for drug paraphernalia, it is probably a crime involving moral turpitude. The BIA reasoned in *Matter of Khourn* that drug distribution was morally turpitudinous because the defendant intends to corrupt others. Following this reasoning, since the use of paraphernalia is to take drugs, it is likely that this statute punishes acts

that equally corrupt others, especially minors, as the statute punishes the sale of such advertisements to minors.

Aggravated felony

Controlled substances

A conviction under this statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). The acts punished under this statute are punishable as a felony in the federal system. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 863(a) punishes the sale or offering for sale of drug paraphernalia, which has the same elements as the Virginia statute. Therefore, this offense is an aggravated felony because the elements of the Virginia offense are analogous to the elements of the federal felony.

Other immigration consequences

A conviction under this statute will probably render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Although the statute punishes sale, distribution, or display of advertisement of paraphernalia, it is probably a crime relating to a controlled substance due to the broad language of "relating to" in 8 U.S.C. § 1227(a)(2)(B). *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of drug paraphernalia is a crime relating to a controlled substance for the purposes of 8 U.S.C. § 1227(a)(2)(B)). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because this statute does not punish simple possession, it does not come within the exception.

18.2-255.2 Prohibiting the sale of drugs on or near certain properties

Elements

(A)

- manufacture, sell, or distribute or possess with intent to sell, give or distribute
- any controlled substance, imitation controlled substance or marijuana

(i) upon the property, including the buildings and grounds, of any public or private institution of higher education; or child day care center; or

(ii) upon public property or any property open to public use within 1,000 feet of such school property; or

(iii) on any school bus;

(iv) upon a designated school bus stop, or upon either public property or any property open to the public use which is within 1,000 feet of such school bus stop, during the time when school children are waiting to be transported or picked up from school or a school-sponsored activity

(v) upon the property, including the buildings and grounds, of any publicly owned or publicly operated recreation or community center facility or any public library;

(vi) upon the property of any state facility or upon public property or property open to public use within 1,000 feet of such institution

(B)

- second or subsequent conviction under this statute punishable by 1-5 years
- sale of marijuana only as an accommodation to another individual and not with intent to

profit or induce the recipient to use or become addicted to or dependent upon controlled substance punishable as class 1 misdemeanor

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude. The BIA has held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs was a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946). The BIA has reasoned that a statute punishing the knowing distribution of drugs was a crime involving moral turpitude because the offense was inherently turpitudinous, since it involves corrupting others by distributing drugs. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). Even if the defendant is punished under the section for distribution of imitation drugs, this offense is probably a crime involving moral turpitude because it involves fraud and deceit. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951).

Aggravated felony

(A) Manufacture, sell, or distribute or possess with intent to sell, give or distribute a controlled substance on certain properties

Controlled substances

A conviction under this section of the statute is not necessarily an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because not all offenses punishable under the Virginia statute are punishable as a felony under the federal analogue statute. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 860 punishes manufacture, distribution, dispensing, or possessing with intent to manufacture, distribute, or dispense a controlled substance on certain properties. Not all of the properties are the same in the Virginia statute and the federal statute. The Virginia statute punishes a defendant for sale in many of the same places punishable under the federal statute; however, the Virginia statute additionally punishes the sale of drugs on a school bus , at a bus stop or in front of a daycare center. Because the statutes do not have the same elements, the Virginia statute is divisible. Therefore, it is necessary to consult the record of conviction to determine whether this offense is an aggravated felony.

(A) Manufacture, sell, or distribute or possess with intent to sell, give or distribute an imitation controlled substance

Controlled substances

The offense of distribution of an imitation controlled substance is probably not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because it is not punishable under the federal statutes as a felony. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 841(a)(2) punishes the distribution of a counterfeit substance. However, because the counterfeit substance must still be a *controlled* substance, distribution of a substance that is not a controlled substance at all cannot be punished under this statute. *See U.S. v. Sampson*, 140 F.3d 585 (4th Cir. 1988) (holding that counterfeit cocaine made of candle wax, flour and baking soda does not constitute "counterfeit substance" within meaning of 21 U.S.C. § 841(a)(2)).

The offense is also not an illicit trafficking in a controlled substance because the substance is not a controlled substance. *See Lopez*, 127 S. Ct. 625; *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992).

Therefore, a Virginia conviction under this section is not necessarily an aggravated felony. However, if the record reflects that the imitation substance was actually a controlled substance on the federal list, then a conviction under this section of the statute is an aggravated felony.

(B) Distribution for no remuneration of small amount of marijuana

Controlled substances

A conviction under this section of the statute is not necessarily an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). Distribution of a small amount of marijuana for no remuneration is punishable as a misdemeanor in the federal system. *See* 21 U.S.C. § 841(b)(4). However, the federal statute punishing distribution on school and other grounds, 21 U.S.C. § 860, does not make any exception in punishment for distribution of a small amount of marijuana for no remuneration. Therefore, because the elements of the Virginia offense are similar to the elements of 21 U.S.C. § 860, which is punishable as a felony, a conviction under this section of the Virginia statute is probably an aggravated felony. However, it is necessary to consult the record of conviction because not all locations of the offense in Virginia are punishable under 21 U.S.C. § 860. *See* analysis for Va. Code Ann. § 18.2-255.2(A).

Other immigration consequences

Manufacture, sell, or distribute or possess with intent to sell, give or distribute a controlled substance

A conviction under this section of the statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because most of the offenses punished under this section punish possession with intent to distribute, give, sell, etc., it is not likely to come within the exception. However, a defendant can fit within the exception if the offense is for simple possession of marijuana only and the record of conviction indicates that the amount is 30 grams or less.

Manufacture, sell, or distribute or possess with intent to sell, give or distribute an imitation controlled substance

A conviction under this section of the statute will probably render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Because the offense involves distribution of an imitation controlled substance, it is less likely to be a crime *relating* to a controlled substance. However, given the broad nature of the words "relating to," it is likely that these offenses will be crimes relating to a controlled substance. *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of paraphernalia is a crime relating to a controlled substance because the crime is linked to drugs).

18.2-258 Knowingly keeping, establishing, permitting house where people are under the influence of drugs or selling or manufacturing drugs

Elements

- owner, lessor, agent of any lessor, manager, chief executive officer, operator, or tenant
- knowingly permits, establishes, keeps or maintains
- common nuisance, defined as:
    - office, store, shop, restaurant, hall, theater, poolroom, clubhouse, storehouse, warehouse, dwelling house, apartment, building of any kind, vehicle, vessel, boat, or aircraft
    - with the knowledge of the owner, lessor, agent of any such lessor, manager, chief executive officer, operator, or tenant thereof
    - is frequented by persons under the influence of illegally obtained controlled substances or marijuana
    - or for the purpose of illegally obtaining possession of, manufacturing or distributing controlled substances or marijuana
    - or is used for the illegal possession, manufacture, or distribution of controlled substances or marijuana

Crime involving moral turpitude

The BIA has held that knowingly maintaining or permitting a house of prostitution is a crime involving moral turpitude. *See Matter of Lambert*, 11 I&N Dec. 430 (BIA 1965); *Matter of W*, 3 I&N Dec. 231 (BIA 1948). Although this Virginia statute does not punish the keeping of a house of prostitution but rather a house where drugs are used, manufactured, or sold, it is probably a crime involving moral turpitude. The offenses that happen inside the house are crimes involving moral turpitude and therefore the owner's knowledge that such events are going on will likely render this offense a crime involving moral turpitude. *See, e.g.*, *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997) (holding that a statute punishing the knowing distribution of drugs was a crime involving moral turpitude because the offense was inherently turpitudinous since it involves corrupting others by distributing drugs); *Matter of Y*, 2 I&N Dec. 600 (BIA 1946) (holding that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs is a crime involving moral turpitude).

Aggravated felony

Controlled substances

A conviction under this statute is probably an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because it is punishable as a felony in the federal system. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 856 punishes as a felony the maintenance of a place where drugs are manufactured or sold or used. The Virginia statute also punishes the maintenance of a place where people are under the influence of illegally obtained controlled substances, which is similar to keeping a place where drugs are used under the federal statute. *But see Eudave-Mendez v. Keisler*, 2007 U.S. App. LEXIS 23415 (9th Cir. 2007) (holding that a state statute punishing the knowing maintenance of a drug house was not an aggravated felony because the state statute did not punish a defendant for knowingly and intentionally maintaining the drug house). Therefore, a

conviction under this Virginia statute is probably an aggravated felony, as only the Ninth Circuit has found that such a conviction is not. Because this offense is probably an aggravated felony, a subsequent offense under this statute is also an aggravated felony.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Although the statute does not actually punish use or distribution of controlled substances, but rather maintaining a house where such activity is going on, it is likely to come within this ground of deportability because of the broad reading of "relating to" of 8 U.S.C. § 1227(a)(2)(B). *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of paraphernalia is a crime relating to a controlled substance because the crime is linked to drugs). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Since the acts punished under this statute do not involve possession, no conviction under this statute will fit within the exception.

18.2-258.1 Obtaining drugs, procuring administration of controlled substances, etc., by fraud, deceit or forgery

Elements

(A)

- obtain or attempt to obtain any drug or procure or attempt to procure the administration of any controlled substance or marijuana
    - (i) by fraud, deceit, misrepresentation, embezzlement, or subterfuge; or
    - (ii) by forgery or alteration of a prescription or of any written order; or
    - (iii) by the concealment of a material fact; or
    - (iv) by the use of a false name or the giving of a false address

(B)

- furnish false or fraudulent information in or omit any information from, or willfully make a false statement in
- any prescription, order, report, record, or other document required under the Virginia Drug Control Act

(C)

- use in the course of manufacture or distribution of a controlled substance or marijuana
- license number which is fictitious, revoked, suspended, or issued to another person

(D)

- for the purpose of obtaining any controlled substance or marijuana
- falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, pharmacist, physician, dentist, veterinarian or other authorized person

(E)

- make or utter any false or forged prescription or false or forged written order

(F)

- affix any false or forged label to a package or receptacle containing any controlled substance

Crime involving moral turpitude

Every conviction under this statute involves moral turpitude because all sections punish offenses that involve fraud or deceit. *See generally Jordan v. DeGeorge*, 341 U.S. 223 (1951); *see also Matter of Acosta*, 14 I&N Dec. 338 (BIA 1973) (conviction punishing false statements involve moral turpitude); *Matter of Jimenez*, 14 I&N Dec. 442 (BIA 1973) (forgery involves moral turpitude).

Aggravated felony

(A) Obtaining controlled substances through fraud or deceit

Controlled substances

A conviction under this section of the statute is an aggravated felony under U.S.C. § 1101(a)(43)(B) because it is punishable as a felony under federal law. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 843(a)(3) punishes obtaining possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge. The Virginia statute punishes obtaining or attempting to obtain possession by fraud, deceit, misrepresentation, embezzlement, or subterfuge or by forgery of prescription or by concealment of a material fact or by use of a false name or address. Although the Virginia statute does not exactly parallel the language of 21 U.S.C. § 843(a)(3), all of the Virginia offenses punished under this section are punishable under the federal statute because they punish the obtaining of a controlled substance by fraud or deceit. Therefore, a conviction under this section of the Virginia statute is an aggravated felony.

Fraud offense

A conviction under this section of the statute involves fraud or deceit and therefore will be an aggravated felony as a fraud offense under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

(B) False statements in reports or applications

Controlled substances

A conviction under this section of the statute is an aggravated felony under U.S.C. § 1101(a)(43)(B) because it is punishable as a felony under federal law. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 843(a)(4)(A) punishes the furnishing of any false or fraudulent information in a report, application, record, or other documentation required under the Controlled Substances Act. Because this section of the Virginia statute is analogous to the federal statute, it is an aggravated felony.

Fraud offense

A conviction under this section of the statute involves fraud or deceit and therefore is an aggravated felony as a fraud offense under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

(C) Use of fictitious license number in the course of manufacturing or distributing a controlled substance

Controlled substances

A conviction under this section of the statute is an aggravated felony under U.S.C. § 1101(a)(43)(B) because it is punishable as a felony under federal law. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 843(a)(2) punishes the use of a fictitious, revoked, suspended, expired registration number or a registration number that belongs to

someone else. The Virginia statute tracks the federal analogue almost exactly and therefore, the offense is an aggravated felony.

Fraud offense

A conviction under this section of the statute involves fraud or deceit and therefore will be an aggravated felony as a fraud offense under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

(D) Falsely assuming the title of a manufacturer for the purpose of obtaining a controlled substance

Controlled substances

A conviction under this section of the statute is probably an aggravated felony under U.S.C. § 1101(a)(43)(B) because it is punishable as a felony under federal law. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 843(a)(4)(A) punishes the presentation of false identification where the person is receiving a listed chemical and the person is required to present identification. Although the Virginia statute does not exactly track the language of the federal statute, the offenses punished under the Virginia statute are encompassed in those punishable under the federal statute. The Virginia statute punishes a person for holding himself out to be a manufacturer, pharmacist, etc. for the purpose of obtaining any controlled substance. The federal statute punishes a defendant for presenting false identification in order to receive a listed chemical. That which the defendant seeks to obtain is different in the two statutes, but the chemical and controlled substance are substantially similar. Therefore, a conviction under this section of the statute is probably an aggravated felony.

Attempted controlled substances

A conviction under this section of the statute is probably an attempted controlled substance offense under 8 U.S.C. §§ 1101(a)(43)(B) and (U). The acts punished under this section of the Virginia statute constitute an attempt to commit a felony punishable under the federal drug statutes. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 843(a)(3) punishes as a felony obtaining any controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge. The Virginia statute punishes a defendant for obtaining a controlled substance by holding himself out to be a manufacturer, pharmacist. The acts punishable under the Virginia statute amount to attempting to obtain a controlled substance by deception, which is punishable under 21 U.S.C. § 843(a)(3). The assumption of the role of pharmacist, etc., is a substantial step toward the commission of the underlying offense and the statute contains the requisite intent to obtain a controlled substance. *See Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999). Therefore, a conviction under this section of the Virginia statute is an aggravated felony.

Fraud offense

A conviction under this section of the statute involves fraud or deceit and therefore is an aggravated felony as a fraud offense under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

(E) Make or utter any false or forged prescription or order

Controlled substances

A conviction under this section of the statute is an aggravated felony under U.S.C. § 1101(a)(43)(B) because it is punishable as a felony under federal law. *See Lopez v.*

Gonzales, 127 S. Ct. 625 (2006). 21 U.S.C. § 843(a)(4)(A) punishes the furnishing of any false or fraudulent information in a report, application, record, or other documentation required under the Controlled Substances Act. The prescription is a required document under 21 U.S.C. § 830(a), as referenced in 21 U.S.C. § 843(a)(4)(A). This section of the Virginia statute punishes the furnishing of false information on a report required in relation to distribution of legal controlled substances. Therefore, the offense is an aggravated felony.

Fraud offense

A conviction under this section of the statute involves fraud or deceit and therefore is an aggravated felony as a fraud offense under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

Forgery offense

A conviction under this section of the statute is a forgery offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(R) if the sentence imposed is at least one year.

(F) Affixing false or forged label to package containing controlled substance

Controlled substances

A conviction under this section of the statute is probably an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because it is punishable as a felony under federal law. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The acts punished under this section are substantially similar to the acts punished under 21 U.S.C. § 843(a)(5), which punishes the imprinting of a reproduced trademark on a container of any drug so as to render it a counterfeit substance. Although the Virginia statute does not punish the exact same acts because the Virginia statue punishes the switching of labels, rather than the switching of labels so as to render a package a counterfeit substance, the elements are very similar. Therefore, it is probably an aggravated felony.

The offenses punished under this section of the Virginia statute are also similar to the acts punished by 21 U.S.C. § 842(a)(4), which punishes the obliteration, removal, or alteration of a symbol or label for a controlled substance container. Therefore, the offense is probably an aggravated felony as it is very similar to 21 U.S.C. § 842(a)(4).

Fraud offense

A conviction under this section of the statute involves fraud or deceit and therefore is an aggravated felony as a fraud offense under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

Forgery offense

A conviction under this section of the statute is a forgery offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(R) if the sentence imposed is at least one year. Although the Virginia offense does not punish the actual making of a forged instrument, it punishes an offense "relating to" forgery, which is included in the aggravated felony definition.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Although the statute does not actually punish the use or distribution of controlled substances, but rather

obtaining through fraud and other like offenses, it is likely to come within this ground of deportability because of the broad reading of "relating to" of 8 U.S.C. § 1227(a)(2)(B). *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of paraphernalia is a crime relating to a controlled substance because the crime is linked to drugs). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because the acts punished under this statute do not involve possession, no conviction under this statute will fit within the exception.

54.1-3466 Possession or distribution of controlled paraphernalia

Elements

- possess or distribute controlled paraphernalia
- paraphernalia mean a hypodermic syringe, needle or other instrument or implement or combination thereof adapted for the administration of controlled dangerous substances by hypodermic injections under circumstances which reasonably indicate an intention to use such controlled paraphernalia for purposes of illegally administering any controlled drug, or gelatin capsules, glassine envelopes or any other container suitable for the packaging of individual quantities of controlled drugs in sufficient quantity to and under circumstances which reasonably indicate an intention to use any such item for the illegal manufacture, distribution, or dispensing of any such controlled drug
- evidence of such circumstances shall include, but not be limited to, close proximity of any such controlled paraphernalia to any adulterants or equipment commonly used in the illegal manufacture and distribution of controlled drugs including, but not limited to, scales, sieves, strainers, measuring spoons, staples and staplers, or procaine hydrochloride, mannitol, lactose, quinine, or any controlled drug or any machine, equipment, instrument, implement, device or combination thereof which is adapted for the production of controlled drugs under circumstances which reasonably indicate an intention to use such item or combination thereof to produce, sell, or dispense any controlled drug in violation of the provisions of this chapter

Crime involving moral turpitude

This offense is probably a crime involving moral turpitude because the statute has an implied requirement that the defendant intend to use the paraphernalia to use a controlled substance. The BIA has held that where a drug distribution or possession offense involves a knowing requirement, it is a crime involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs is a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946). Although this statute punishes the possession or distribution of drug paraphernalia, it is likely a conviction under this statute is a crime involving moral turpitude. The BIA reasoned in *Matter of Khourn* that drug distribution was morally turpitudinous because the defendant intends to corrupt others. Following this reasoning, since the use of paraphernalia is to take drugs, it is likely that this statute punishes acts which equally corrupt others or oneself. Therefore, a conviction under this statute is probably a crime involving moral turpitude.

Aggravated felony

Possession of paraphernalia

Controlled substances

A conviction under this section of the statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because it is not punishable in the federal statutes listed in 18 U.S.C. § 924(c). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The closest federal analogue to this Virginia statute is 21 U.S.C. § 863(a), which punishes the sale or offer for sale of drug paraphernalia. However, the Virginia statute punishes *possession*, not sale, transportation, or importation of drug paraphernalia, all of which are the offenses punished under 21 U.S.C. § 863(a). Therefore, a conviction for possession of paraphernalia is not an aggravated felony because there is no federal analogue to the Virginia statute in the federal drug statutes listed in 18 U.S.C. § 924(c).

Distribution of paraphernalia

Controlled substances

A conviction under this section of the statute is not necessarily an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because not all offenses listed in the section are punishable under the federal statutes listed in 18 U.S.C. § 924(c). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The closest federal analogue to this Virginia statute is 21 U.S.C. § 863(a), which punishes the sale or offer for sale of drug paraphernalia. However, the Virginia statute punishes *distribution*, not sale, transportation, or importation of drug paraphernalia, all of which are the offenses punished under 21 U.S.C. § 863(a). In another statute punishing the sale of paraphernalia, the Virginia legislature indicates a clear distinction between sale and distribution. *See* Va. Code Ann. §§ 18.2-265.3(B), (C) (reducing the punishment for distribution of paraphernalia to minors as opposed to sale of paraphernalia to minors). In addition, in the federal statute, the term "distribution" does not necessarily mean "sale" because 21 U.S.C. § 841(d)(3) gives a lighter punishment to distribution for no remuneration of a small amount of marijuana. *Id.*; *see also* 21 U.S.C. § 802(11), (8) (defining distribution of a controlled substance as delivering such substance, and defining delivering as the actual, constructive, or attempted transfer of a controlled substance). Therefore, not all distributions of paraphernalia are sales of paraphernalia. Thus, not all offenses punished under this section of the Virginia statute are aggravated felonies.

In addition, a conviction under this section of the statute is not an illicit trafficking in a controlled substance because the statute does not punish any sale of a controlled substance; it merely punishes distribution of paraphernalia. *See Lopez*, 127 S. Ct. 625; *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). Moreover, there is no commercial element because a defendant need not get any remuneration, as it is clear from the statute's structure that this section is intended to punish distribution, not sale.

However, if the record of conviction indicates that there was remuneration for the paraphernalia, the offense is probably an aggravated felony as an analogue to 21 U.S.C. § 863(a).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Although the statute punishes possession or distribution of paraphernalia, it is probably a crime relating to a controlled substance due to the broad language of "relating to" in 8 U.S.C. § 1227(a)(2)(B). *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of drug paraphernalia is a crime relating to a controlled substance for the purposes of 8 U.S.C. § 1227(a)(2)(B)). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Since this statute does not punish simple possession of a drug, it does not come within the exception.

18.2-265.3 Penalties for sale, etc., of drug paraphernalia

Elements

(A) class 1 misdemeanor
- sells or possesses with intent to sell drug paraphernalia
- knowing, or under the circumstances where one reasonably should know, that it is either designed for use or intended use by such person for use to illegally plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body marijuana or a controlled substance

(B) class 6 felony
- violation of subsection A by selling drug paraphernalia to a minor who is at least 3 years junior to the defendant

(C) class 1 misdemeanor
- violation of subsection A by distributing drug paraphernalia to a minor

Crime involving moral turpitude

This offense is probably a crime involving moral turpitude because the statute has a knowing requirement. The BIA has held that where drug distribution or possession offenses involve a knowing requirement, they are crimes involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs is a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946). Although this statute punishes the knowing distribution or sale of drug paraphernalia, a conviction under this statue is probably a crime involving moral turpitude. The BIA reasoned in *Matter of Khourn* that drug distribution was morally turpitudinous because the defendant intends to corrupt others. Following this reasoning, because the use of paraphernalia is to take drugs, it is likely that this statute punishes acts that equally corrupt others. Therefore, a conviction under this statute is probably a crime involving moral turpitude.

Aggravated felony

(A) Sell or possess with intent to sell drug paraphernalia

Controlled substances

A conviction under this section of the statute is an aggravated felony under 8

U.S.C. § 1101(a)(43)(B) because it is punishable as a felony in the federal system. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The federal analogue to this Virginia statute, 21 U.S.C. § 863(a), punishes the sale or offer for sale of drug paraphernalia. Because the elements are the same in the Virginia offense and the federal offense, a conviction under this section of the Virginia statute is an aggravated felony.

(B) Sale of paraphernalia to minors

Controlled substances

A conviction under this section of the statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because it is punishable as a felony in the federal system. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The federal analogue to this Virginia statute, 21 U.S.C. § 863(a), punishes the sale or offer for sale of drug paraphernalia. Because the elements are the same in the Virginia offense and the federal offense, a conviction under this section of the Virginia statute is an aggravated felony.

(C) Distribution of paraphernalia to minors

Controlled substances

A conviction under this section of the statute is not necessarily an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because not all offenses are punishable in the federal statutes listed in 18 U.S.C. § 924(c). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The closest federal analogue to this Virginia statute is 21 U.S.C. § 863(a), which punishes the sale or offer for sale of drug paraphernalia. However, the Virginia statute punishes *distribution*, not sale, transportation, or importation of drug paraphernalia, all of which are the offenses punished under 21 U.S.C. § 863(a). The Virginia statute specifically reduces the punishment for distribution to minors as opposed to sale to minors. Va. Code Ann. §§ 18.2-265.3(B), (C). Therefore, based on the structure of the Virginia statute, it is clear that the legislature intended to punish distribution or paraphernalia as a lesser offense than sale of paraphernalia.

The other close federal analogue to this Virginia statute is 21 U.S.C. § 859(a), which punishes the distribution of a controlled substance to a minor. The Virginia offense does not contain the same elements as 21 U.S.C. § 859(a), however, because the Virginia offense only punishes distribution of paraphernalia, not the controlled substance itself. Therefore, a conviction under this section of the Virginia statute is not an aggravated felony because it does not have a federal analogue in 18 U.S.C. § 924(c). Not all distributions of paraphernalia are sales of paraphernalia. Therefore, not all offenses punished under this section of the Virginia statute are aggravated felonies.

In addition, a conviction under this section of the statute is not an illicit trafficking in a controlled substance because the statute does not punish any sale of a controlled substance; it merely punishes distribution of paraphernalia. *See Lopez*, 127 S. Ct. 625; *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). Moreover, there is no commercial element because a defendant need not get any remuneration, as it is clear from the statute's structure that this section is intended to punish distribution, not sale.

However, if the record of conviction indicates that there was remuneration for the paraphernalia, the offense is probably an aggravated felony as an analogue to 21 U.S.C. § 863(a).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Although the statute punishes sale, distribution, or possession with intent to sell paraphernalia, it is probably a crime relating to a controlled substance due to the broad language of "relating to" in 8 U.S.C. § 1227(a)(2)(B). *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of drug paraphernalia is a crime relating to a controlled substance for the purposes of 8 U.S.C. § 1227(a)(2)(B)). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Since this statute does not punish simple possession, it does not come within the exception.

18.2-265.5 Advertisement of drug paraphernalia prohibited

Elements

- place in any newspaper, magazine, handbill or other publication any advertisement
- knowing or under the circumstances where one reasonably should know that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended by such person for use as drug paraphernalia

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude because the statute has a knowing requirement. The BIA has held that where a drug distribution or possession offense involves a knowing requirement, it is a crime involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs is a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946). Although this statute punishes the knowing advertisement of drug paraphernalia, a conviction under this statute is probably a crime involving moral turpitude. The BIA reasoned in *Matter of Khourn* that drug distribution was morally turpitudinous because the defendant intends to corrupt others. Following this reasoning, because the use of paraphernalia is to take drugs, it is likely that this statute punishes acts which equally corrupt others. Therefore, a conviction under this statute is probably a crime involving moral turpitude

Aggravated felony

Controlled substances

A conviction under this statute is probably an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(B) and (U). The actions punishable are not not directly punishable under the federal statutes listed in 18 U.S.C. § 924(c). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The closest federal analogue to this Virginia statute is 21 U.S.C. § 863(a), which punishes the sale or offer for sale of drug paraphernalia. However, the Virginia statute punishes *advertisement*, not sale, transportation, or importation of drug paraphernalia, all of which are the offenses punished under 21 U.S.C. § 863(a). The Virginia statute punishes placing ads when the defendant knows or reasonably should know that the purpose of the advertisement in whole or in part is to promote the sale of objects designed

or intended to be used as drug paraphernalia.

Another federal analogue to this Virginia offense is 21 U.S.C. § 843(c), which punishes the placing of an ad when the defendant knows it has the purpose of seeking or offering illegally to receive, buy, or distribute a controlled substance. The Virginia statute punishes the advertisement of *paraphernalia*, not a controlled substance.

Nonethless, the advertisement of drug paraphernalia is probably an attempt to sell drug paraphernalia, since it requires a substantial step towards the commission of the offense. *See Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999). Therefore, a conviction under this statute is probably an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(B) and (U).

Other immigration consequences

A conviction under this statute will probably render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Although the statute punishes advertisement of paraphernalia, it is probably a crime relating to a controlled substance due to the broad language of "relating to" in 8 U.S.C. § 1227(a)(2)(B). *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of drug paraphernalia is a crime relating to a controlled substance for the purposes of 8 U.S.C. § 1227(a)(2)(B)). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because this statute does not punish simple possession, it does not come within the exception.

DRIVING OFFENSES

18.2-51.4 Maiming as a result of DUI

Elements

- DUI
- manner so gross, wanton and culpable as to show reckless disregard for human life
- unintentionally causes
- serious bodily injury to another person resulting in permanent and significant physical impairment

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude because the Virginia statute punishes the reckless serious bodily injury, which the BIA has held is a crime involving moral turpitude. *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), and *Matter of Wojtkow*, 18 I&N Dec. 111 (BIA 1981).

The *mens rea* of the statute is criminal negligence. The Virginia common law definition of criminal negligence is that the conduct be accompanied by acts of commission or omission of a wanton or willful nature, showing a reckless or indifferent disregard of the rights of others, under circumstances reasonably calculated to produce injury, or which make it not improbable that injury will be occasioned, and the offender knows, or is charged with the knowledge of, the probable result of the offender's acts. *See Wright v. Comm*, 576 S.E.2d 242 (Va. Ct. App. 2003). The Virginia negligence definition is similar to the recklessness definition in the statutes interpreted by the BIA in *Matter of Franklin* and *Matter of Wojtkow*. Moreover, the Fourth Circuit has decided that Va. Code Ann. § 36, a statute with the same *mens rea* as this statute, has a *mens rea* of recklessness when deciding whether a conviction under the statute was an aggravated felony. *See Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005).

Therefore, a conviction under this statute is probably a crime involving moral turpitude due to the fact that the statute requires a *mens rea* of recklessness and causation of serious bodily injury. In addition, several BIA decisions have held that maiming or mayhem are crimes involving moral turpitude. *See, e.g., Matter of Ptasi*, 12 I&N Dec. 790 (BIA 1968); *Matter of Santoro*, 11 I&N Dec. 607 (BIA 1966); *Matter of P*, 7 I&N Dec. 376 (BIA 1956). Therefore, a conviction under this statute is a crime involving moral turpitude.

Aggravated felony

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(a) because there is no element of the use, attempted use, or threatened use of physical force against the person or property of another. Rather, the offense punishes reckless causation of serious bodily injury to another person. *See*

Matter of Martin, 23 I&N Dec. 491 (BIA 2002) (reasoning that for a statute to be a crime of violence under 18 U.S.C. § 16(a), it must have a *mens rea* of intentional conduct).

A conviction under this statute is also not a crime of violence under 18 U.S.C. § 16(b). In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Supreme Court held that a statute punishing DUI and causing serious bodily injury was not a crime of violence under 18 U.S.C. § 16(a) or (b). The Court held that a DUI statute that contains no *mens rea* or a *mens rea* of negligence could not be a crime of violence under 18 U.S.C. § 16.

The Court did not decide the case of a statute where the *mens rea* was recklessness. However, in *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005), the Fourth Circuit decided that even though Va. Code Ann. § 18.2-36 contains a *mens rea* of recklessness, the reasoning of *Leocal* applied and therefore, the offense was not a crime of violence. The *mens rea* of Va. Code Ann. § 18.2-36 (involuntary manslaughter) is the same as the *mens rea* of Va. Code Ann. § 18.2-51.4 (maiming as a result of driving under the influence). Under both statutes, the *mens rea* is acting "so gross, wanton and culpable as to show a reckless disregard for human life." Va. Code Ann. § 51.4; *King v. Comm.*, 231 S.E.2d 312 (Va. 1977) (interpreting *mens rea* of involuntary manslaughter under Va. Code Ann. § 18.2-36). The only additional element of a conviction under Va. Code Ann. § 51.4 is that the defendant drive under the influence of alcohol as proscribed by Va. Code Ann. § 18.2-266. This added factor does not require that the defendant have a more guilty mind, since Va. Code Ann. § 18.2-266 does not have a *mens rea* requirement. Therefore, a conviction under this statute is not a crime of violence as defined by 18 U.S.C. § 16(b).

Other immigration consequences

A conviction under this statute can be a crime relating to a controlled substance that renders a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(B). The statute is divisible, however. Only convictions punishing the operation of a vehicle while under the influence of a narcotic drug are offenses relating to a controlled substance. Therefore, it will depend on the record of conviction whether a non-citizen is deportable for a conviction under this statute. The only exception to this ground is simple possession for one's own use of 30 grams or less of marijuana. Because this statute does not punish possession, a conviction under this statute will not fit within the exception if the non-citizen is deportable under this ground.

18.2-266 Driving motor vehicle, engine, etc., while intoxicated

Elements

- drive or operate any motor vehicle, engine or train

(i) while such person has a blood alcohol concentration of .08% or more;

(ii) while such person is under the influence of alcohol;

(iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of drugs, to a degree which impairs his ability to drive or operate such vehicle, engine or train

(iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely
(v) while such person has a blood concentration of certain controlled substances

Crime involving moral turpitude

A conviction under this statute is not a crime involving moral turpitude. The BIA has held that the offense of driving under the influence, does not, without more, reflect conduct that is necessarily morally reprehensible or that indicates such a level of depravity or baseness that it involves moral turpitude. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999); *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001) (repeating *Lopez-Meza* finding). The BIA in *Matter of Lopez-Meza* reasoned that simple DUI is a regulatory offense that involves no culpable mental state requirement, such as intent or knowledge.

Aggravated felony

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under INA § 101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 because the statute contains no *mens rea*. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). Rather, a defendant is guilty when he possesses the correct amount of drug or alcohol in his system and he operates a vehicle.

Other immigration consequences

A conviction under this statute can be a crime relating to a controlled substance that renders a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(B). The statute is divisible, however. Only convictions punishing the operation of a vehicle, engine or train while under the influence of a narcotic drug are offenses relating to a controlled substance. Therefore, it will depend on the record of conviction whether a non-citizen is deportable for a conviction under this statute. The only exception to this ground is simple possession for one's own use of 30 grams or less of marijuana. Because this statute does not punish possession, a conviction under this statute will not fit within the exception if the non-citizen is deportable under this ground.

46.2-341.24 Driving a commercial vehicle while intoxicated

Elements

(A) drive or operate any commercial motor vehicle
(i) while such person has a blood alcohol concentration of .08% or more;
(ii) while such person is under the influence of alcohol;
(iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of drugs, to a degree which impairs his ability to drive or operate such vehicle, engine or train

(iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely
(v) while such person has a blood concentration of certain controlled substances

(B) violate (A)(i), (ii), or (iv) while such person has blood alcohol concentration of .04% or more

Crime involving moral turpitude

A conviction under this statute is not a crime involving moral turpitude. The BIA has held that the offense of driving under the influence, does not, without more, reflect conduct that is necessarily morally reprehensible or that indicates such a level of depravity or baseness that it involves moral turpitude. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999); *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001) (repeating *Lopez-Meza* finding). The BIA in *Matter of Lopez-Meza* reasoned that simple DUI is a regulatory offense that involves no culpable mental state requirement, such as intent or knowledge.

Aggravated felony

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under INA § 101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 because the statute contains no *mens rea*. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). Rather, a defendant is guilty when he possesses the correct amount of drug or alcohol in his system and he operates a vehicle.

Other immigration consequences

A conviction under this statute can be a crime relating to a controlled substance that renders a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(B). The statute is divisible, however. Only convictions punishing the operation of a commercial motor vehicle under the influence of a narcotic drug are offenses relating to a controlled substance. Therefore, it will depend on the record of conviction to determine whether a non-citizen is deportable for a conviction under this statute. The only exception to this ground is simple possession for one's own use of 30 grams or less of marijuana. Because this offense does not punish possession, a conviction under this statute will not fit within the exception if the non-citizen is deportable under this ground.

18.2-268.3 Refusal of test when previously convicted for DUI

Elements

- unreasonable refusal to consent to blood and breath test when arrested for DUI offense
- previous conviction under Va. Code Ann. §§ 18.2-266 (DUI); 18.2-266.1 (DUI by minor); 18.2-272 (driving after suspended license) or other similar statute

Crime involving moral turpitude

A conviction under this statute is not a crime involving moral turpitude. The statute has no *mens rea*. The offense is committed when the defendant unreasonably refuses to consent to the test. Therefore, the statute is a regulatory offense, which the BIA has held are not crimes involving moral turpitude. *See Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999); *see also Matter of P*, 6 I&N Dec. 400 (BIA 1954) (holding that criminal contempt of court for refusing to obey an injunction ordered by a court was not a crime involving moral turpitude).

Aggravated felony

Obstruction of justice

A conviction under this statute is probably not an aggravated felony as an offense relating to obstruction of justice under 8 U.S.C. § 1101(a)(43)(S) if the term of imprisonment is at least one year. A defendant, once detained on a conviction of a misdemeanor, obstructs the court order requiring his detention, yet not by force or violence. The offense therefore does not have the same elements as one of the federal obstruction of justice statutes. *See, e.g.* 18 U.S.C. §§ 1510(a) (punishing obstruction of a criminal investigation by bribery); 1505 (punishing obstruction of judicial proceedings); *see Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999) (reasoning that an obstruction of justice offense is generally defined by those offenses punishable under Title 18 Chapter 73 of the U.S. Code). Therefore, a conviction under this statute is probably not an obstruction of justice offense.

18.2-270 Penalty for driving while intoxicated; subsequent offense; prior conviction

Elements

- (B) and (C): conviction of second or subsequent offense of simple DUI
- (D): conviction of subsequent DUI offense with passenger younger than 17

Crime involving moral turpitude

A conviction under this statute is not a crime involving moral turpitude. The BIA has held that the offense of driving under the influence, does not, without more, reflect conduct that is necessarily morally reprehensible or that indicates such a level of depravity or baseness that it involves moral turpitude. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999); *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001) (repeating *Lopez-Meza* finding). In *Matter of Torres-Varela*, the BIA held a conviction for two or more prior DUI convictions was not a crime involving moral turpitude because merely aggregating two non-moral turpitude offenses did not create a crime involving moral turpitude.

Aggravated felony

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under INA § 101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 because the statute contains no *mens rea*. *See Leocal v. Ashcroft*,

543 U.S. 1 (2004). Rather, a defendant is guilty when he possesses the correct amount of drug or alcohol in his system and he operates a vehicle. The aggregation of two non-crimes of violence does not create a crime of violence. Therefore, a conviction under this statute is not a crime of violence under 18 U.S.C. § 16.

Other immigration consequences

A conviction under this statute can be a crime relating to a controlled substance that renders a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(B). The statute is divisible, however. Only convictions punishing the operation of a vehicle while under the influence of a narcotic drug are offenses relating to a controlled substance. Therefore, it is necessary to consult the record of conviction to determine whether the non-citizen is deportable for a conviction under this statute. The only exception to this ground is simple possession for one's own use of 30 grams or less of marijuana. Because this offense does not punish possession, a conviction under this statute will not fit within the exception if the non-citizen is deportable under this ground.

18.2-272 Driving after forfeiture of license

Elements

- drives or operates any motor vehicle, engine or train
- during the time which he has been deprived of the right to do so
    - (i) upon a conviction for violation of Va. Code Ann. § 18.2-268.3 (refusal to take breath test) or an offense set forth in Va. Code Ann. § 18.2-270(E) (multiple DUIs); OR
    - (ii) by a conviction under Va. Code Ann. § 18.2-271 (forfeiture of driver's license for DUI); or Va. Code Ann. § 46.2-391.2 (habitual offender); OR
    - (iii) after his license has been revoked pursuant to Va. Code Ann. § 46.2-389 (revocation of license for certain driving-related convictions) or Va. Code Ann. § 46.2-391 (habitual offender); OR
    - (iv) in violation of the terms of a restricted license

Crime involving moral turpitude

A conviction under this statute is not a crime involving moral turpitude because it does not punish driving under the influence while the person's license is suspended, unlike the statute in *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999). In *Lopez-Meza*, the BIA interpreted a statute that punished aggravated DUI, where the offender "knowingly" drove under the influence with a suspended, canceled, revoked, or refused license. In order to be convicted under the statute, the state had to prove that the defendant knew or should have known that his license was suspended. The BIA held that this offense was a crime involving moral turpitude because when a person drives under the influence, knowing that he is absolutely prohibited from driving, he commits a crime "so base and so contrary to the current accepted duties that persons owe to one another and to society in general that it involves moral turpitude."

The Virginia statute punishes only the act of *driving* or *operating* a vehicle while the individual knows that his license is suspended due to a prior DUI. To be convicted under Va. Code Ann. § 18.2-272, the defendant need not drive under the influence while his license is suspended. Nor need the defendant have his drivers license suspended for a prior DUI offense. The defendant need only have his license suspended due to certain convictions and operate a motor vehicle, engine or train. Therefore, a conviction under this statute is not a crime involving moral turpitude.

Aggravated felony

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under INA § 101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 because the statute contains no *mens rea*. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). Rather, a defendant is guilty when he operates a vehicle with a prior listed offense or has a suspended license.

Other immigration consequences

Crime relating to a controlled substance

A conviction under this statute is not necessarily a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B) that renders a non-citizen deportable. Certain of the underlying offenses may involve controlled substances. For example, a defendant can have his license taken away for operating a vehicle while under the influence of a narcotic drug under Va. Code Ann. § 18.2-266. It is possible that this offense is too attenuated from that operation under the influence of a drug to be a crime relating to a controlled substance. However, given the broad nature of the words "relating to," such a conviction is probably a crime relating to a controlled substance. *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of paraphernalia is a crime relating to a controlled substance because the crime is linked to drugs). Therefore, a conviction under this statute will possibly render a non-citizen deportable under this ground.

46.2-300 Driving without license

Elements

- drive any motor vehicle on any highway in the Commonwealth
- without a driver's license

Crime involving moral turpitude

A conviction under this statute is not a crime involving moral turpitude. This offense is a regulatory offense only and therefore is not a crime involving moral turpitude. *See Matter of Ajami*, 22 I&N Dec. 949 (BIA 1994). The statute has no *mens rea*, and is rather an offense merely to ensure that drivers in the Commonwealth are licensed to drive.

Aggravated felony

Crime of violence

This offense is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if a sentence of at least one year is imposed. The statute has no *mens rea* and therefore, it does not contain as an element the use of force against person or property of another. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). Therefore, a conviction under this statute is not a crime of violence.

18.2-323.1 Drinking while operating a motor vehicle; possession of open container while operating a motor vehicle and presumption

Elements

- consume alcoholic beverage while operating a motor vehicle upon a public highway of the Commonwealth

Crime involving moral turpitude

A conviction under this statute is not a crime involving moral turpitude. This offense is a regulatory offense only and therefore is not a crime involving moral turpitude. *See Matter of Ajami*, 22 I&N Dec. 949 (BIA 1994). There is no *mens rea*, and is rather an offense merely to ensure that drivers in the Commonwealth do not have open containers when they drive.

Aggravated felony

Crime of violence

This offense is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if a sentence of at least one year is imposed. The statute has no *mens rea* and therefore, it does not contain as an element the use of force against person or property of another. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). Therefore, a conviction under this statute is not a crime of violence.

46.2-357 Operation of motor vehicle or self-propelled machinery or equipment by habitual offender prohibited

Elements

(B)(1) class 1 misdemeanor

- any person determined or adjudicated an habitual offender
- drives any motor vehicle or self-propelled machinery or equipment on the highways of the Commonwealth while the revocation of the person's driving privilege remains in effect.
- driving does not endanger life, limb or property of another

(B)(2) felony

- any person determined or adjudicated an habitual offender
- drives any motor vehicle or self-propelled machinery or equipment on the highways of the Commonwealth while the revocation of the person's driving privilege remains in effect.
- if driving endangers the life, limb or property of another; OR

- takes place while driver is in violation of Va. Code Ann. §§ 36.1 (involuntary manslaughter by DUI); 18.2-54.1 (DUI maiming); 18.2-266 (simple DUI); 46.2-341.24 (driving a commercial vehicle while intoxicated)
    - irrespective of whether the driving itself endangers the life, limb or property of another AND
    - the person has previously been convicted of Va. Code Ann. §§ 36.1 (involuntary manslaughter by DUI); 18.2-54.1 (DUI maiming); 18.2-266 (simple DUI); 46.2-341.24 (driving a commercial vehicle while intoxicated)

Crime involving moral turpitude

(B)(1) Habitual offender without risk to life, limb or property

A conviction under this section of the statute is not a crime involving moral turpitude because this section does not punish driving under the influence while the defendant's license is suspended, unlike the statute in *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999). In *Matter of Lopez-Meza*, the BIA interpreted a statute that punished aggravated DUI, where the offender "knowingly" drove under the influence with a license that was suspended, canceled, revoked, or refused due to a prior DUI. In order to be convicted under the statute, the state had to prove that the defendant knew or should have known that his license was suspended. The BIA held that this offense was a crime involving moral turpitude because when a person drives under the influence, knowing that he is absolutely prohibited from driving, he commits a crime "so base and so contrary to the current accepted duties that persons owe to one another and to society in general that it involves moral turpitude."

The Virginia statute requires that the state give notice to the defendant before convicting him under this statute. *See Reed v. Comm.*, 424 S.E.2d 718 (Va. Ct. App. 1992). Although the state need not prove a *mens rea*, the person must be on notice that his license is suspended to be convicted under this statute. The "guilty mind" of the Virginia statute is similar to that of the statute interpreted by the BIA in *Lopez-Meza*. However, the statute does not have the same elements of the statute interpreted by the BIA in *Matter of Lopez-Meza* because that statute required that the defendant *drive drunk* while knowing that his license is suspended due to a prior DUI. The Virginia statute punishes only the act of *driving* or *operating* a vehicle while the individual knows that his license is suspended due to a prior DUI. To be convicted under Va. Code Ann. § 46.2-357, the defendant need not drive under the influence while his license is suspended. Nor need the defendant have his drivers license suspended for a prior DUI offense. The defendant need only have been convicted of multiple violations of traffic laws and formally adjudged a danger to the other uses of the highways.

(B)(2) Habitual offender and driving endangers life, limb or property

A conviction under this section of the statute is not a crime involving moral turpitude. *See* analysis for Va. Code Ann. § 46.2-357(B)(1). The fact that a conviction under this statute requires the additional element that the defendant's driving endanger life, limb or property does not change the analysis. This section of the statute does not have a recklessness *mens rea* coupled with the causation of serious bodily. *See Matter of*

Fualaau, 21 I&N Dec. 475 (BIA 1996). Rather, the statute punishes behavior that creates a risk of danger.

(B)(2) Habitual offender in violation of certain DUI Virginia statutes and previous conviction under those statutes

A conviction under this section of the statute is a crime involving moral turpitude. In *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999), the BIA interpreted a statute that punished aggravated DUI, where the offender "knowingly" drove under the influence with a license which was suspended, canceled, revoked, or refused due to a prior DUI. In order to be convicted under the statute, the state had to prove that the defendant knew or should have known that his license was suspended. The BIA held that this offense was a crime involving moral turpitude.

This section of the Virginia statute requires that the state give notice to the defendant before convicting him under this statute. *See Reed v. Comm.*, 424 S.E.2d 718 (Va. Ct. App. 1992). Although the state need not prove scienter or *mens rea*, the person must be on notice that his license is suspended to be convicted under this statute. The "guilty mind" of the Virginia statute is similar to that of the statute interpreted by the BIA in *Matter of Lopez-Meza*.

Unlike a conviction under section (B)(1) of this statute, a conviction under this section of the statute requires that the defendant commit a DUI offense while his license is suspended due to a prior DUI. All of the other Virginia statutes listed involve driving under the influence and therefore, the elements of this section of the statute are the same as that which the BIA held to be a crime involving moral turpitude in *Matter of Lopez-Meza*. For this reason, a conviction under this section of the statute is a crime involving moral turpitude.

Aggravated felony

(B)(1) Habitual offender without risk to life, limb or property

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. This offense is a misdemeanor only and therefore is only analyzed under 18 U.S.C. § 16(a). The Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held that a DUI statute that had no *mens rea* was not a crime of violence under 18 U.S.C. § 16(a). The Supreme Court reasoned that it is not possible to accidentally or negligently "use" force against anyone, as the language of 18 U.S.C. § 16 requires.

The *mens rea* of all sections of this Virginia statute is "knowingly," but it is not intentional with respect to the use of force or causation of injury. The statute only requires that the defendant know that his license was suspended. *See Reed v. Comm.*, 424 S.E.2d 718 (Va. Ct. App. 1992). The only thing that the defendant must know is that he was not allowed to drive, not that he would cause an accident. For this reason, a conviction under this section of the statute is not a crime of violence.

(B)(2) Habitual offender and driving endangers life, limb or property

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held that a DUI statute that had no *mens rea* was not a crime of violence under either 18 U.S.C. § 16(a) or (b). The Supreme Court reasoned that it is not possible to accidentally or negligently "use" force against anyone, as the language of 18 U.S.C. § 16 requires. Also, the Supreme Court reasoned that the language of 18 U.S.C. § 16(b) requires that the defendant risk using force, which contemplates a risk of volitional conduct.

The *mens rea* of all sections of this Virginia statute is "knowingly," but it is not intentional with respect to the causation of injury. The statute only requires that the defendant know that his license was suspended. *See Reed v. Comm.*, 424 S.E.2d 718 (Va. Ct. App. 1992). The only thing that the defendant must know is that he was not allowed to drive, not that he would cause an accident.

Moreover, the fact that a defendant must drive in such a way that endangers the life, limb or property of another does not mean that the offense is one that, by its nature, involves the substantial risk of use of force against the person or property of another as required by 18 U.S.C. § 16(b). There is only risk of injury encompassed by the elements of this statute. The Supreme Court in *Leocal* reasoned that the language of 18 U.S.C. § 16(b) encompassed offenses where there is a risk of use of force, not a risk of injury. Therefore, the element of endangering life, limb, or property does not convert the offense into one that, by its nature, involves the substantial risk that force will be used.

In addition, the Fourth Circuit has held that a statute punishing recklessly causing death, where the defendant acts with a reckless disregard for life, is not a crime of violence under 18 U.S.C. § 16(b). *See Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005). Following the reasoning in *Leocal* and *Bejarano-Urrutia*, a conviction under this section of the statute is not a crime of violence.

(B)(2) Habitual offender in violation of certain DUI Virginia statutes and previous conviction under those statutes

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held that a DUI statute which had no *mens rea* was not a crime of violence under either 18 U.S.C. § 16(a) or (b).

The *mens rea* of all sections of this Virginia statute is "knowingly," but it is not intentional with respect to the causation of injury. The statute only requires that the defendant know that his license was suspended. *See Reed v. Comm.*, 424 S.E.2d 718 (Va. Ct. App. 1992). The only thing that the defendant must know is that he was not allowed to drive, not that he would cause an accident.

None of the statutes mentioned in the listed offenses are crimes of violence. *See* analysis for Va. Code Ann. §§ 18.2-36.1; 18.2-54.4; 18.2-266; 46.2-341.24. Therefore, the fact that a defendant drives as a habitual offender in conjunction with committing one of those offenses does not convert the statute into a crime of violence.

Other immigration consequences

A conviction under this statute can be a crime relating to a controlled substance that renders a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(B). The statute is divisible, however. A statute punishing the operation of a vehicle while under the influence of a narcotic drug is an offense relating to a controlled substance. Therefore, it is necessary to examine the record of conviction. The only exception to this ground is simple possession for one's own use of 30 grams or less of marijuana. Because this offense does not punish possession, a conviction under this statute will not fit within the exception if the non-citizen is deportable under 8 U.S.C. § 1227(a)(2)(B).

A conviction under this statute that does not punish the operation of a vehicle under the influence of narcotics may also be a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). A defendant can be an habitual offender due to an underlying offenses which involved an offense relating to controlled substances. For example, a defendant can have his license taken away for operating a vehicle while under the influence of a narcotic drug under Va. Code Ann. § 18.2-266. It is possible that this offense is too attenuated from that operation under the influence of a drug to be a crime relating to a controlled substance. However, given the broad nature of the words "relating to," such a conviction is probably a crime relating to a controlled substance. *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of paraphernalia is a crime relating to a controlled substance because the crime is linked to drugs). Therefore, a conviction under this statute will possibly render a non-citizen deportable under this ground.

46.2-852 Reckless driving

Elements

- drives vehicle on any highway
- recklessly, or at a speed or in a manner so as to endanger the life, limb, or property of any person

Crime involving moral turpitude

A conviction under this statute is not a crime involving moral turpitude. The BIA has reasoned in dicta that reckless driving is not a crime involving moral turpitude. *See Matter of C*, 2 I&N Dec. 716 (BIA 1946). In *Matter of C*, the BIA looked at the case of a respondent who had been convicted for recklessly driving his car in such a manner that caused property damage. In dictum, the BIA reasoned that if the statute under which he was punished amounted to no more than reckless driving or gross negligence, than it would not be a crime involving moral turpitude.

The Virginia Supreme Court has interpreted the *mens rea* of this statute as disregard by the driver for the consequences of his act and an indifference to the safety of life, limb, or property. *Powers v. Comm*, 177 S.E.2d 628 (Va. 1970). The BIA has held that reckless behavior must be coupled with an offense involving serious bodily injury to constitute a crime involving moral turpitude. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996). A conviction under this statute does not require the causation of any injury,

much less serious bodily injury. Therefore, a conviction under this statute is not a crime involving moral turpitude.

Aggravated felony

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The offense is a misdemeanor, and therefore is analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b). In order for an offense to be a crime of violence under 18 U.S.C. § 16(a), it must have as an element the use, attempted use, or threatened use of physical force against the person or property of another. This offense does not have such elements. In addition, the BIA has held that for an offense to be a crime of violence under 18 U.S.C. § 16(a), it must have a *mens rea* of intentional conduct. *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002). This statute has a *mens rea* of mere recklessness and not intentional conduct as required by the BIA's interpretation of 18 U.S.C. § 16(a). Therefore, a conviction under this statute is not a crime of violence.

46.2-853 Driving vehicle that is not under control; faulty brakes

Elements

- drives a vehicle that is not under proper control or that has inadequate or improperly adjusted brakes on any highway in the Commonwealth
- such driving shall be reckless driving

Crime involving moral turpitude

A conviction under this statute is not a crime involving moral turpitude. This offense is a regulatory offense only and therefore is not a crime involving moral turpitude. *See Matter of Ajami*, 22 I&N Dec. 949 (BIA 1994). There is no *mens rea*, and is rather an offense merely to ensure that drivers in the Commonwealth have properly working breaks when they drive.

Aggravated felony

Crime of violence

This offense is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute has no *mens rea* and therefore, it does not have as an element the use of force against person or property of another as required by the definition of crime of violence at 18 U.S.C. § 16. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). Therefore, a conviction under this statute is not a crime of violence.

46.2-894 Failure to report an accident after property damage or bodily injury

Elements

- failure to report where there has been property damage: misdemeanor
- failure to report where there has been injury or death to a person or if there is more than $1000 of property damage: felony

Crime involving moral turpitude

Failure to report with property damage only

A conviction under this section of the statute is not a crime involving moral turpitude. The statute punishes knowingly fleeing the scene of the accident, not creating the conditions of such accident. *Herchenbach v. Comm.*, 38 S.E.2d 328 (Va. 1946). Moreover, the offense of causing damage to property without intentionally causing such damage is not a crime involving moral turpitude. *See, e.g., Matter of* N, 8 I&N Dec. 466 (BIA 1959); *Matter of M*, 2 I&N Dec. 686 (BIA 1946); *Matter of C*, 2 I&N Dec. 716 (BIA 1946).

Failure to report with physical injury

The Virginia statute is probably a crime involving moral turpitude where the defendant fled the scene of the accident where there was physical injury to a person. In order to establish a conviction under this statute, the Commonwealth must prove (1) that the defendant was the driver of a vehicle which he knew was involved in an accident; (2) that the accident caused personal injury to another; (3) that the defendant knew, or should have known, that another person was injured by the accident; and (4) that the defendant failed to stop immediately as close to the scene as possible and do all of the reporting required by statute. The defendant must deliberately go away without making himself known. *See Herchenbach v. Comm*, 38 S.E.2d 328 (Va. 1946). Therefore, the offense carries a "knowing" element and a causation of serious bodily injury, which can bring it within the scope of offenses found to be crimes involving moral turpitude. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996). However, the defendant in this statute does not *cause* such bodily injury, he just knowingly leaves such bodily injury rather than reporting it. This distinguishes this statute from the type of assault offense contemplated by the BIA in *Matter of Fualaau*. Nonetheless, this offense, since it runs counter to the contemporary moral and ethical values of the general public to abandon someone who has been injured, is probably a crime involving moral turpitude for this reason. *See, e.g., Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007) (holding that a statute punishing the knowing failure to stop and render aid after an accident causing injury is a crime involving moral turpitude); *De Lucia v. Flagg*, 297 F.2d 58 (7th Cir. 1961), *cert. den.*, 369 U.S. 837 (1962) (stating that the prevalent standards should be used to decide what constitutes a crime involving moral turpitude).

Aggravated felony

Failure to report with property damage only

Crime of violence

This offense is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if a sentence of at least one year is

imposed. The statute has no element that the defendant use force against the person or property of another. *See U.S. v. Carter*, 349 F. Supp. 2d 982 (E. D. Va. 2004) (conviction under Va. Code Ann. § 46.2-894 does not have as an element the use, attempted use, or threatened use of force against the person of another because the statute merely prohibits failing to stop after an accident). Therefore, a conviction under this statute is not a crime of violence.

Failure to report with physical injury

Crime of violence

This offense is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if a sentence of at least one year is imposed. A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(a) because there is no use of force against the person or property of another. *See* analysis for Va. Code Ann. § 46.2-894 (misdemeanor).

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(b). This statute is not one that, by its nature, involves a substantial risk that force against person or property will be used in the commission of the offense to satisfy the definition of 18 U.S.C. § 16(b). Rather, the injury is caused and the defendant flees the scene of the accident, so the defendant does not risk using force against person or property. The risk involved with this statute is that the injury will worsen. The Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) and the Fourth Circuit in *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005), held that an offense where there is a risk of resulting injury only is not a crime of violence under 18 U.S.C. § 16(b). Rather, the offense must be one where there is a substantial risk that force will be used against the person or property in the commission of the offense. Therefore, a conviction under this statute is not a crime of violence.

46.2-895 Failure to report (passenger)

Elements

- after driver fails to stop and report accident, any person 16 years of age or older who is a passenger
- who has knowledge of the accident
- fails to report accident
- where there has been property damage only: misdemeanor
- where there has been injury or death to a person: felony

Crime involving moral turpitude

A conviction under this statute is possibly a crime involving moral turpitude where there has been injury to person, and is not a crime involving moral turpitude where there has been only injury to property. *See* analysis for Va. Code Ann. § 46.2-894.

Aggravated felony

Crime of violence

This offense is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if a sentence of at least one year is imposed. *See* analysis for Va. Code Ann. § 46.2-894.

CRIMES INVOLVING MORALS AND DECENCY/CRIMES AGAINST PUBLIC ORDER

18.2-346 Being a prostitute or prostitution

Elements

(A) being a prostitute
- commits commit adultery, fornication, or an act described in Va. Code Ann. § 18.2-361 (carnal knowledge of animal, or of a person by the anus or by or with the mouth)
- for money or its equivalent
- or offers to commit adultery, fornication, or an act described in Va. Code Ann. § 18.2-361 and does any substantial act in furtherance thereof

(A) soliciting prostitution
- offers money or its equivalent
- to another
- for the purpose of engaging in sexual acts as enumerated in section (A)

Crime involving moral turpitude

A conviction under either section of this Virginia statute is a crime involving moral turpitude. *See, e.g.*, *Matter of W*, 4 I&N Dec. 401 (BIA 1951). In *Matter of W*, the BIA interpreted a statute that punished the commission or offering to commit any act of prostitution or lewd or indecent act. The BIA held that a violation of city ordinance relating to prostitution was a crime involving moral turpitude. Therefore, a conviction under this statute is a crime involving moral turpitude.

Aggravated felony

Prostitution

A conviction under this statute is not an aggravated felony because the offense does not relate to the owning, controlling, managing, or supervising of a prostitution business as described in 8 U.S.C. § 1101(a)(43)(K)(i). Nor does the offense relate to the transportation of a person for the purpose of prostitution for commercial advantage as described in 8 U.S.C. § 1101(a)(43)(K)(ii).

Sexual abuse of a minor

A conviction under this statute is not necessarily an aggravated felony as a sexual abuse of a minor under 8 U.S.C. § 1101(a)(43)(A) because there is no element that a minor be involved in the prostitution. However, if the facts show that a minor was involved with the prostitution, this offense is probably an aggravated felony under 8 U.S.C. § 1101(a)(43)(A). *See Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001) (holding that a conviction for sexual assault was a sexual abuse of a minor offense because the court determined the age of the victim); *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007) (no need to consult record of conviction for factual element of deportation ground); *but see Singh v. Ashcroft*, 383 F.3d 144 (3d Cir. 2004) (conviction under unlawful sexual contact statute that contained no element of the involvement of a child was not a sexual abuse of a minor aggravated felony because under the categorical approach the offense was not a sexual abuse of a minor offense).

Other immigration consequences

A conviction under this statute renders a non-citizen inadmissible from the U.S. 8 U.S.C. § 1182(a)(2)(D) provides that non-citizens who are prostituted or who have engaged in prostitution within 10 years of their applications for admission or a green card are inadmissible.

18.2-370 Indecent liberties

Elements

(A)

- lascivious intent
- knowingly and intentionally
- do one of the following acts:
  - (i) expose sexual or genital parts to child or propose that child expose sexual or genital parts to such person; or
  - (ii) propose that any child feel or fondle the sexual or genital parts of such person or propose that such person feel or fondle the sexual or genital parts of such child; or
  - (iii) propose to such child the performance of an act of sexual intercourse; or
  - (iv) entice, allure, persuade or invite any child to enter any vehicle, room, house or other place for any purposes above

(B)

- lascivious intent
- knowingly and intentionally
- receive money, property, or any other remuneration for allowing, encouraging, or enticing any person under 18 to perform in or be a subject of a sexually explicit visual material

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. The BIA has held that the offense of indecent liberties is a crime involving moral turpitude. *See Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966); *Matter of G*, 6 I&N Dec. 461 (BIA 1954). In *Matter of Garcia*, the respondent was convicted under a statute for taking indecent liberties with a nine-year old girl without committing or intending to commit the crime of rape. A conviction under this Virginia statute is a crime involving moral turpitude because even though the statute does not require touching, it is still an offense that is sexual in nature against a child. In addition, the statute contains a *mens rea* of "knowing and intentionally." Therefore, a conviction under this statute is a crime involving moral turpitude.

Aggravated felony

Sexual abuse of a minor

A conviction under this statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(A) (sexual abuse of a minor). The BIA has held that a criminal offense is an offense relating to sexual abuse of a minor under 8 U.S.C. § 101(a)(43)(A) even if there is no touching of the child required under the statute. *See Matter of Rodriguez-*

Rodriguez, 22 I&N Dec. 991 (BIA 1999) (holding that indecency with a child by exposure is an aggravated felony as a sexual abuse of a minor offense under 8 U.S.C. § (a)(43)(A)); *see also U.S. v. Izaguirre-Flores*, 405 F.3d 270 (5th Cir. 2005) (holding that a statute punishing indecent liberties with a child was a conviction for an aggravated felony as sexual abuse of a minor).

Other immigration consequences

A conviction under this statute will probably subject a non-citizen to the ground of deportability as a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)(i).

18.2-370.1 Taking indecent liberties with child by person in custodial or supervisory relationship

Elements

- adult who maintains custodial or supervisory relationship with a child under 18
- lascivious intent
- knowingly and intentionally:
  - (i) propose that any such child feel or fondle the sexual or genital parts of such person or that such person feel or handle the sexual or genital parts of the child; or
  - (ii) proposes to such child the performance of an act of sexual intercourse; or
  - (iii) exposes his or her sexual or genital parts to such child; or
  - (iv) proposes that any such child expose his or her sexual or genital parts to such person; or
  - (v) proposes to the child that the child engage in sexual intercourse, sodomy, or fondling of sexual or genital parts of another; or
  - (vi) sexually abuses the child

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. *See* analysis for Va. Code Ann. § 370 (indecent liberties).

Aggravated felony

Sexual abuse of a minor

A conviction under this statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(A) (sexual abuse of a minor). *See* analysis for Va. Code Ann. § 370 (indecent liberties).

Other immigration consequences

A conviction under this statute will probably subject a non-citizen to the ground of deportability as a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)(i).

18.2-371 Contributing to the delinquency of a minor

Elements

- person over 18, including parent of any child
  - (i) willfully contributes to, encourages, or causes any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected as defined in Va. Code Ann. § 16.1-228; or
  - (ii) engages in consensual sexual intercourse with a child 15 or older not his spouse, child, or grandchild

Crime involving moral turpitude

A conviction under this statute is not necessarily a crime involving moral turpitude. It is necessary to look at the record of conviction to determine the offense for which the defendant was convicted. The Virginia Supreme Court has held that a conviction under a former version of this statute is not a crime involving moral turpitude because its scope is broad and encompasses crimes that do not involve moral turpitude. *See Tasker v. Comm.*, 121 S.E.2d 459 (Va. 1961) (holding that cross-examination of a witness who had been convicted under this statute would not be allowed for impeachment purposes because the crime did not involve moral turpitude). However, the holding of the Virginia Supreme Court as to whether this offense is a crime involving moral turpitude does not control for the analysis of whether the offense is a crime involving moral turpitude under the immigration laws.

(i) Rendering a child in need of supervision

A conviction under this section of the statute is not a crime involving moral turpitude. A defendant can be convicted under this statute for rendering a child "in need of supervision," which is defined as a child who, "while subject to compulsory school attendance, is habitually and without justification absent from school." Va. Code Ann. §§ 18.2-371, 16.1-228. Such a crime does not involve moral turpitude because it does not involve willful abandonment of a child where the child is left in destitute or necessitous circumstances. *See Matter of R*, 4 I&N Dec. 192 (BIA 1950); *Matter of S*, 2 I&N Dec. 553 (BIA 1946).

(i) Rendering a child delinquent

A conviction under this section of the statute is not necessarily a crime involving moral turpitude. Virginia Code § 18.2-371 cites Va. Code Ann. § 16.1-228 for the definition of what is a delinquent child for the offense of contributing to the delinquency of a minor. The definition of "delinquent act" under Va. Code Ann. § 16.1-228 is:

> (i) an act designated a crime under the law of this Commonwealth, or an ordinance of any city, county, town or service district, or under federal law, (ii) a violation of Va. Code Ann. § 18.2-308.7 (possession of a handgun), or (iii) a violation of a court order as provided for in Va. Code Ann. § 16.1-292, but shall not include an act other that a violation of Va. Code Ann. § 18.2-308.7, which is otherwise lawful, but is designated a crime only if committed by a child

The provision of Va. Code Ann. §§ 18.2-371 and 16.1-228 punishing contributing to the delinquency of a minor is a broad statute that encompasses acts that do not involve moral turpitude. Namely, if the defendant does any act that encourages a child to break any law, that parent can be convicted under the statute. The BIA has held that similar statutes did not involve moral turpitude without examining the record of conviction. *See Matter of W*, 5 I&N Dec. at 240; *Matter of F*, 2 I&N Dec. 610 (BIA 1946); *Matter of P*, 2 I&N Dec. 117 (BIA 1944).

For example, in *Matter of W*, the BIA considered a Canadian contributing to the delinquency of a minor statute that punished willfully contributing to a child's being or becoming a juvenile delinquent. The definition of "juvenile delinquent" under the statute was "any child who violates an provision of the criminal code or who is guilty of sexual immorality or similar form of vice, or who is liable by reason of any act to be committed to an industrial school or juvenile reformatory." The BIA decided that the respondent's conviction was a crime involving moral turpitude because the record of conviction showed that the respondent rendered a child statutorily delinquent because the child engaged in sexual immorality or any similar form of vice. The BIA reasoned, however, that the statute was broad and contained acts that did not involve moral turpitude. Therefore, without this showing of sexual misconduct in the record, the BIA would not have found the conviction to be one involving moral turpitude.

The Virginia contributing to the delinquency of a minor statute and statutory definition of "delinquent child" is similar to the provisions of the statute that the BIA found not to involve moral turpitude in *Matter of W*. Both statutes punish a parent for willfully contributing to the delinquency of a minor, and a delinquent minor is any child who violates any law. The act of encouraging a minor to break any law, regardless of how minor the criminal code violation, would be punishable under the statute.

In another case also entitled *Matter of W*, 2 I&N Dec. 795 (BIA 1947), the BIA held that the promotion of juvenile delinquency was not a crime involving moral turpitude because the respondent in that case had merely set a bad example and did not exercise his will by force or otherwise on the minors. This section of the Virginia statute punishes a defendant for merely encouraging a minor to commit some delinquent act, and does not punish a defendant for enticing or persuading a minor to commit some delinquent act. *See Bibbs v. Comm.*, 106 S.E. 363 (Va. 1921).

Therefore, a conviction under this section of the statute is probably not a crime involving moral turpitude. However, if the record of conviction reflects that the child's delinquent act was a crime involving moral turpitude, a conviction under this section of the statute is probably a crime involving moral turpitude.

(i) Rendering a child abused or neglected by infliction of injury

A conviction under this section of the statute for willfully rendering a child abused is a crime involving moral turpitude. "Abused or neglected" is defined by Va. Code Ann. § 16.1-228(1), and an abused or neglected child means "any child whose parents or other person responsible for his care creates or inflicts, threatens to create or inflict, or allows to be created of inflicted upon such child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement or impairment of bodily functions..."

The statute has a willful element, and the statute also requires that the parent inflict physical injury or allow such physical injury to be inflicted upon the child. *See Matter of Nodahl*, 12 I&N Dec. 338 (BIA 1967), *aff'd, Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969). In *Nodahl*, the BIA found the following statute to involve moral turpitude: "any person who willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition is guilty of a felony." The BIA found that this offense was inherently base as to be a crime involving moral turpitude. Because a conviction under this section of the Virginia statute for rendering a child abused contains similar elements as the statute that the BIA found to be a crime involving moral turpitude in *Nodahl*, a conviction under this section of the Virginia statute is a crime involving moral turpitude.

(i) Rendering a child abuse or neglected by failing to provide necessary care

A conviction under this section of the statute for willfully rendering a child neglected is probably a crime involving moral turpitude. "Abused or neglected" is defined by Va. Code Ann. § 16.1-228(2), and an abused or neglected child means "…any child whose parents or other person responsible for his care neglects or refuses to provide care necessary for his health."

Because the child must be left without the care necessary for his health, a conviction under this section of the statute is probably a crime involving moral turpitude, because the act is done willfully and the child is left in destitute or necessitous circumstances. *See, e.g., Matter of R*, 4 I&N Dec. 192 (BIA 1950); *Matter of S*, 2 I&N Dec. 553 (BIA 1946).

(i) Rendering a child abused or neglected by abandoning such child

A conviction under this section of the statute for rendering a child abused or neglected is probably a crime involving moral turpitude. To be convicted under this section of the statute, the person responsible for the child's care must abandon the child. Va. Code Ann. § 16.1-228(3).

This section of the statute punishes willful conduct, yet the statute does not describe whether or not such abandonment must leave the child in destitute or necessitous circumstances. *See, e.g., Matter of R*, 4 I&N Dec. 192 (BIA 1950); *Matter of S*, 2 I&N Dec. 553 (BIA 1946). Because abandonment of a child usually leaves the child in destitute or necessitous circumstances, a conviction under this section of the statute is probably a crime involving moral turpitude.

(i) Rendering a child abused or neglected by allowing sexual act to be committed upon such child

A conviction under this section of the statute for rendering a child abused or neglected is a crime involving moral turpitude. In order to be convicted under this section of the statute, the person responsible for the child's care must commit or allow to be committed any sexual act upon the child in violation of law. Va. Code Ann. § 16.1-228(4).

Generally, sexual acts committed upon a child are crimes involving moral turpitude. *See, e.g., Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966) (taking indecent liberties with a child is a crime involving moral turpitude). Even though the defendant

under this statute can be convicted for allowing the act to be committed upon the child and not committing the act him or herself, it is a crime involving moral turpitude. Aiding and abetting offenses are part of the substantive offense for the purposes of determining whether a crime involves moral turpitude. *See, e.g., Matter of Short*, 20 I&N Dec 136 (BIA 1989); *Matter of Martinez,* 16 I&N Dec. 336 (BIA 1977). Therefore, a conviction under this section of the statute is a crime involving moral turpitude.

(i) Rendering a child abused or neglected by unreasonable absence

A conviction under this section of the statute for rendering a child abused or neglected is probably not a crime involving moral turpitude. A conviction under this section of the statute requires that the child be without parental care or guardianship caused by the unreasonable absence or the mental or physical incapacity of the child's parent, guardian, legal custodian or other person standing in loco parentis. Va. Code Ann. § 16.1-228(5).

A conviction under this section is probably not a crime involving moral turpitude because, although the statute punishes willful conduct, it does not require that the child be left in destitute or necessitous circumstances. Moreover, if a person can be convicted under this statute for willfully falling into mental or physical incapacity and therefore being unable to care for a child, the failure to care for the child is not a willful act because the defendant would not be capable of committing such a willful act. Therefore, a conviction under this section of the statute is probably not a crime involving moral turpitude because, although a conviction technically requires a willful act, the child need not be left in destitute or necessitous circumstances. *See Matter of R*, 4 I&N Dec. 192 (BIA 1950); *Matter of S*, 2 I&N Dec. 553 (BIA 1946).

(i) Rendering a child abused or neglected by knowingly leaving the child with an unrelated person whom the parent knows is a convicted sex offender

A conviction under this section of the statute for rendering a child abused or neglected is probably not a crime involving moral turpitude. A conviction under this section of the statute punishes a parent or caretaker for knowingly leave the child with an unrelated person whom the parent or caretaker knows is a convicted sex offender. Va. Code Ann. § 16.1-288(6).

A conviction under this section of the statute is probably not a crime involving moral turpitude because, although the statute punishes willful conduct, it does not require that the child be left in destitute or necessitous circumstances. *See, e.g., Matter of R*, 4 I&N Dec. 192 (BIA 1950); *Matter of S*, 2 I&N Dec. 553 (BIA 1946). Nor does the statute require knowledge that the child will be subject to sexual abuse by the caretaker or aiding and abetting in the sexual abuse of a child. *See, e.g., Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989). Rather, the acts punished under this statute merely create a risk of sexual abuse to the child.

(i) Rendering a child in need of services

A conviction under this section of the statute for rendering a child in need of services is probably a crime involving moral turpitude. The definition of a child in need of services under this statute is: "(i) a child whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of the child or

(ii) a child under the age of 14 whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of another person." Va. Code Ann. § 16.1-228.

The elements of a conviction for rendering a child in need of services under this section of the statute is analogous to child neglect statutes found by the BIA to be crimes involving moral turpitude. *See, e.g., Matter of R*, 4 I&N Dec. 192 (BIA 1950); *Matter of S*, 2 I&N Dec. 553 (BIA 1946). Generally, a child neglect statute is a crime involving moral turpitude if the offense requires willful conduct and the child is left in destitute or necessitous circumstances. The Virginia statute punishing the rendering of a child in need of services requires that the act be willful and that the child behave in such a way that the child's or another person's life is seriously threatened. The child's conduct must present a clear and substantial danger to the child's or another person's life or health. *See* Va. Code Ann. § 16.1-288. The statute therefore punishes behavior that leaves the child in necessitous circumstances because the child's life or another person's life is seriously threatened by the child's actions. Moreover, this section of the statute punishes willful conduct. Therefore, a conviction for rendering a child in need of services under this section of the statute is probably a crime involving moral turpitude.

(ii) Engaging in consensual sexual intercourse with a child

A conviction under this section of the statute for engaging in consensual sexual intercourse with a child 15 or older not his spouse, child or grandchild is a crime involving moral turpitude. Statutory rape has generally been held to be a crime involving moral turpitude, whether or not the victim consents to the sexual intercourse. *See, e.g., Castle v. INS*, 541 F.2d 1064 (4th Cir. 1976) (carnal knowledge of a 15-year old female was a crime involving moral turpitude); *Matter of* P, 5 I&N Dec. 392 (carnal abuse of a female child under the age of 16, even though she gives full consent, is a crime involving moral turpitude); *Matter of F*, 2 I&N Dec. 610 (BIA 1946) (having sexual intercourse with a 15-year old girl is a crime involving moral turpitude).

Aggravated felony

(i) Rendering a child in need of supervision

A defendant can be convicted under this statute for rendering a child "in need of supervision," which is defined as a child who, "while subject to compulsory school attendance, is habitually and without justification absent from school." Va. Code Ann. §§ 18.2-371, 16.1-228. Such a crime would not amount to an aggravated felony because the elements do not fit any of the aggravated felony definitions.

(i) Rendering a child delinquent

Contributing to the delinquency of a minor is possibly an aggravated felony. Va. Code Ann. § 18.2-371 cites Va. Code Ann. § 16.1-228 for the definition of what is a "delinquent child" for the offense of contributing to the delinquency of a minor. The definition of "delinquent act" under Va. Code Ann. § 16.1-228 includes a violation of any law. The provision of Va. Code Ann. §§ 18.2-371 and 16.1-228 punishing contributing to the delinquency of a minor is a broad statute that encompasses acts that would not qualify as aggravated felonies. Namely, if a parent does any act that encourages a child to break any law, that parent can be convicted under the statute.

Crime of violence

A conviction under this section of the statute is possibly a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A defendant convicted under this statute may be guilty of solicitation to commit a crime of violence if the minor commits a crime of violence and the defendant is convicted for encouraging or causing the child to commit such act.

It is possible that solicitation to commit a crime of violence is not an aggravated felony because Congress did not include in 8 U.S.C. § 1101(a)(43)(U). Rather, section (U) of the aggravated felony definition includes attempts or conspiracies to commit a substantive offense. The offense of solicitation has been analyzed by some courts in the context of the ground of deportability of a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The Ninth Circuit has held that a solicitation to commit a controlled substance offense is not a conviction for the substantive offense. *See Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999); *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997). However, the BIA has held that solicitation to possess drugs is a crime relating to a controlled substance. *See Matter of Beltran*, 20 I&N Dec. 521 (BIA 1992). The BIA reasoned that solicitation was similar to the offense of attempt or conspiracy, but the main difference with attempt or conspiracy is that the offeree does not accept the offer when the crime is solicitation. The BIA reasoned that this offense is basically the same as attempt or conspiracy and therefore is the substantive offense.

Therefore, a conviction under this section of the statute for encouraging a child to commit a crime of violence is likely to be a crime of violence under 8 U.S.C. §§ 1101(a)(43)(F) and (U).

Sexual abuse of a minor

A conviction under this section of the statute is not necessarily a sexual abuse of a minor offense under 8 U.S.C. § 1101(a)(43)(A). However, should the offense that rendered the child delinquent be a sexual offense, a conviction under this section of the statute is probably an aggravated felony under sexual abuse of a minor. The BIA has held that a criminal offense is an offense relating to sexual abuse of a minor under 8 U.S.C. § 101(a)(43)(A) even if there is no touching of the child required under the statute. *See Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999) (holding that indecency with a child by exposure is an aggravated felony as a sexual abuse of a minor offense under 8 U.S.C. § (a)(43)(A)); *see also U.S. v. Izaguirre-Flores*, 405 F.3d 270 (5th Cir. 2005) (holding that a statute punishing indecent liberties with a child was a conviction for an aggravated felony as sexual abuse of a minor).

(i) Rendering a child abused

A conviction under this section of the statute for willfully rendering a child abused is not necessarily a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. "Abused or neglected" is defined by Va. Code Ann. § 16.1-228(1), and an abused child means "any child whose parents or other person responsible for his care creates or inflicts, threatens to create or inflict, or allows to be created of inflicted upon such child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement or impairment of bodily functions..."

Rendering a child abused by omission that causes physical injury
Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is only analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because it is a misdemeanor. The statute does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another. Rather, the statute punishes a defendant for willfully contributing to, encouraging, or causing any act, omission or condition that renders a child abused under the statutory definition. This statutory definition does not include an element of the actual use, attempted use, or threatened use of physical force. *See, e.g., U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (conviction of injury to a child, which involves causing a child to suffer bodily injury or mental impairment by omission or act, is not a crime of violence under 18 U.S.C. § 16(a)); *see also U.S. v. Lopez-Patino*, 391 F.3d 1034 (9th Cir. 2004) (statute punishing causing a child to suffer abuse or physical injury or permitting child to be placed in a situation where health is endangered is not a crime of violence because person could cause injury without the use of force).

Rendering a child abused by inflicting or threatening to inflict physical injury
Crime of violence

A conviction under this section of the statute is a crime of violence under 18 U.S.C. § 16 and therefore is an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is only analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because it is a misdemeanor. The statute punishes a defendant for inflicting or threatening to inflect upon a child a physical or mental injury by other than accidental means. To be convicted, a defendant must willfully and affirmatively do an act that causes, inflicts, or threatens to inflict physical or mental injury. The intentional infliction of physical injury is likely to be a crime of violence under 18 U.S.C. § 16(a) because the statute punishes intentionally causing physical injury. *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002); *but see Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2002) (holding that intentional infliction of physical injury is not a crime of violence where the statute does not indicate that the causation of physical injury was through the use of force).

However, the BIA's decision in *Matter of Martin* has been undermined by the Supreme Court's 2004 decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). In *Leocal*, the Court held that when an element of a statute was causation of injury, that did not automatically mean that the statute had as an element the use, attempted use, or threatened use of physical force to cause such injury. However, the *Leocal* holding is not exactly on point because the statute interpreted in *Leocal* had no *mens rea*. Therefore, because *Martin* has not been overruled and is the only BIA precedent on point, it is likely that a conviction under this section of the Virginia statue is a crime of violence under 18 U.S.C. § 16.

Rendering a child abused by inflicting or threatening to inflict mental injury

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is only analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because it is a misdemeanor. The intentional infliction of mental injury is not likely to be a crime of violence under 18 U.S.C. § 16(a) as the infliction or threatened infliction of physical injury. It is not likely that mental injury is caused by the use of force, since the use of force would normally cause physical injury. The fact that mental injury has been caused is not likely evidence of the use or threatened use of physical force. Therefore, an infliction or threatened infliction of mental injury is not a crime of violence under 18 U.S.C. § 16(a).

Rendering a child abused by encouraging another to inflict injury

Crime of violence

A conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(F) and (U) if the sentence imposed is at least one year. This section of the statute includes liability for solicitation to inflict physical or mental injury, which Congress did not include in 8 U.S.C. § 1101(a)(43)(U). Rather, section (U) of the aggravated felony definition includes attempts or conspiracies to commit a substantive offense. The offense of solicitation has been analyzed by some courts in the context of the ground of deportability of a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The Ninth Circuit has held that a solicitation to commit a controlled substance offense is not a conviction for the substantive offense. *See Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999); *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997). However, the BIA has held that solicitation to posses drugs is a crime relating to a controlled substance. *See Matter of Beltran*, 20 I&N Dec. 521 (BIA 1992). The BIA reasoned that solicitation was similar to the offense of attempt or conspiracy, but the main difference with attempt or conspiracy is that the offeree does not accept the offer when the crime is solicitation. The BIA reasoned that this offense is basically the same as attempt or conspiracy and therefore is the substantive offense.

It is more likely that solicitation was not listed in 8 U.S.C. § 1101(a)(43)(U) because Congress presumed that this offense was part of the substantive offense, since in other areas of immigration law the substantive offense encompasses aiding and abetting. *See, e.g., Matter of Short*, 20 I&N Dec 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977). Therefore, a conviction for solicitation to inflict injury is probably also an aggravated felony under the analysis above; a solicitation to inflict mental injury is probably not an aggravated felony.

(i) Rendering a child abused or neglected by failing to provide necessary care

A conviction under this statute for willfully rendering a child neglected is not an aggravated felony. "Abused or neglected" is defined by Va. Code Ann. § 16.1-228, and a neglected child means "…any child whose parents or other person responsible for his care neglects or refuses to provide care necessary for his health."

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is only analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because it is a misdemeanor. The statute does not contain as an element the use, attempted use, or threatened use of physical force against the person or property of another. Rather, the statute punishes a defendant for willfully contributing to, encouraging, or causing any act, omission or condition that renders a child neglected under the statutory definition. A defendant can be convicted for encouraging another person to neglect a child, or for failing to act and therefore causing a child to be neglected. This statutory definition does not include an element of the actual use, attempted use, or threatened use of physical force. *See, e.g., U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (conviction of injury to a child, which involves causing a child to suffer bodily injury or mental impairment by omission or act, is not a crime of violence under 18 U.S.C. § 16(a)); *U.S. v. Lopez-Patino*, 391 F.3d 1034 (9th Cir. 2004) (statute punishing causing a child to suffer abuse or physical injury or permitting child to be placed in a situation where health is endangered is not a crime of violence because person could cause injury without the use of force).

(i) Rendering a child abused or neglected by abandoning such child

A conviction under this section of the statute is not an aggravated felony. A conviction under Va. Code Ann. § 371 for rendering a child abused or neglected requires that the person responsible for the child's care to abandon the child. Va. Code Ann. § 16.1-228(3).

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is only analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because it is a misdemeanor. A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(a) because this statutory definition does not include an element of the actual use, attempted use, or threatened use of physical force. *See, e.g., U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (conviction of injury to a child which involves causing a child to suffer bodily injury or mental impairment by omission or act is not a crime of violence under 18 U.S.C. § 16(a)); *U.S. v. Lopez-Patino*, 391 F.3d 1034 (9th Cir. 2004) (statute punishing causing a child to suffer abuse or physical injury or permitting child to be placed in a situation where health is endangered is not a crime of violence because person could cause injury without the use of force).

(i) Rendering a child abused or neglected by allowing sexual act to be committed upon such child

A conviction under this section of the statute is an aggravated felony. A conviction under this section of Va. Code Ann. § 371 for rendering a child abused or neglected requires that the person responsible for the child's care commits or allows to be committed any sexual act upon the child in violation of law. Va. Code Ann. § 16.1-228(4).

Sexual abuse of a minor

A conviction under this section of the statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(A) as a sexual abuse or a minor. Sexual acts upon a child, even if they do not involve touching, have been held to be sexual abuse of a minor offenses and therefore aggravated felonies under 8 U.S.C. § 1101(a)(43)(A). *See Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999).

By encouraging another to commit sexual act

Sexual abuse of a minor

A conviction for encouraging another to commit a sexual act upon a child is probably an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(A) and (U). This section of the statute punishes solicitation to commit a sexual act upon a child, which Congress did not include in 8 U.S.C. § 1101(a)(43)(U). Rather, section (U) of the aggravated felony definition includes attempts or conspiracies to commit a substantive offense. The offense of solicitation has been analyzed by some courts in the context of the ground of deportability of a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The Ninth Circuit has held that a solicitation to commit a controlled substance offense is not a conviction for the substantive offense. *See Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999); *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997). However, the BIA has held that solicitation to possess drugs is a crime relating to a controlled substance. *See Matter of Beltran*, 20 I&N Dec. 521 (BIA 1992). The BIA reasoned that solicitation was similar to the offense of attempt or conspiracy, but the main difference with attempt or conspiracy is that the offeree does not accept the offer when the crime is solicitation. The BIA reasoned that this offense is basically the same as attempt or conspiracy and therefore is the substantive offense.

It is more likely that solicitation was not listed in 8 U.S.C. § 1101(a)(43)(U) because Congress presumed that this offense was part of the substantive offense, since in other areas of immigration law the substantive offense encompasses aiding and abetting. *See, e.g.*, *Matter of Short*, 20 I&N Dec 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977). Therefore, a conviction for solicitation to commit a sexual act upon a child is probably an aggravated felony under the analysis above.

(i) Rendering a child abused or neglected by unreasonable absence

A conviction under this section of the statute is not an aggravated felony. A conviction under Va. Code Ann. § 371 for rendering a child abused or neglected requires that the child be without parental care or guardianship caused by the unreasonable absence or the mental or physical incapacity of the child's parent, guardian, legal custodian or other person standing in loco parentis. Va. Code Ann. § 16.1-228(5).

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is only analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because it is a misdemeanor. A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(a) because this statutory definition does not include an element of the actual use, attempted use, or threatened use of physical force. The mere abandonment of a child does not have as an element the use, attempted

use, or threatened use of physical force against the child. *Cf. U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (conviction of injury to a child, which involves causing a child to suffer bodily injury or mental impairment by omission or act, is not a crime of violence under 18 U.S.C. § 16(a)); *U.S. v. Lopez-Patino*, 391 F.3d 1034 (9th Cir. 2004) (statute punishing causing a child to suffer abuse or physical injury or permitting child to be placed in a situation where health is endangered is not a crime of violence because person could cause injury without the use of force).

(i) Rendering a child abused or neglected by knowingly leaving the child with an unrelated person whom the parent knows is a convicted sex offender

A conviction under this section of the statute is not an aggravated felony. A conviction under this section of the statute punishes a parent or caretaker for knowingly leave the child with an unrelated person whom the parent or caretaker knows is a convicted sex offender. Va. Code Ann. § 16.1-288(6).

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is only analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because it is a misdemeanor. A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(a) because this statutory definition does not include an element of the actual use, attempted use, or threatened use of physical force. Leaving a child in the care of someone who may abuse the child does not have as an element the use, attempted use, or threatened use of physical force against the child. *Cf. U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (conviction of injury to a child, which involves causing a child to suffer bodily injury or mental impairment by omission or act, is not a crime of violence under 18 U.S.C. § 16(a)); *U.S. v. Lopez-Patino*, 391 F.3d 1034 (9th Cir. 2004) (statute punishing causing a child to suffer abuse or physical injury or permitting child to be placed in a situation where health is endangered is not a crime of violence because person could cause injury without the use of force).

Sexual abuse of a minor

A conviction under this section of the statue is not a sexual abuse of a minor offense and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(A). This offense does not require that the defendant commit any sexual abuse of a child or allow such acts to be committed upon a child. Rather, the offense punishes a defendant for creating that risk to the child. The statute punishes behavior that is too attenuated from actual sexual abuse of the minor and therefore a conviction under the statute is not an aggravated felony.

(i) Rendering a child in need of services

A conviction under this section of the statute is not an aggravated felony. A conviction under Va. Code Ann. § 18.2-371 for willfully rendering a child in need of services is probably not an aggravated felony. "Child in need of services" is defined by Va. Code Ann. § 16.1-228, and a child in need of services means "a child whose behavior, conduct or condition presents or results in a serious threat to the well-being and safety of the child or a child under the age of 14 whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of another

person…to find that a child falls within these provisions, the conduct complained of must present a clear and substantial danger to the child's life or health or to the life or health of another person, the child or his family is in need of treatment, rehabilitation or services not presently being received, and the intervention of the court is essential to provide the treatment, rehabilitation or services needed by the child or his family."

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is only analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because it is a misdemeanor. The statute does not contain as an element the use, attempted use, or threatened use of physical force against the person or property of another as required by 18 U.S.C. § 16(a). Rather, the statute punishes a defendant for willfully contributing to, encouraging, or causing any act, omission or condition that renders a child in need of services under the statutory definition. A defendant can be convicted for encouraging another person to render a child in need of services, or for failing to act and therefore causing a child to be in need of services. This statutory definition does not include an element of the actual use, attempted use, or threatened use of physical force. *See, e.g., U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (conviction of injury to a child, which involves causing a child to suffer bodily injury or mental impairment by omission or act, is not a crime of violence under 18 U.S.C. § 16(a)); *U.S. v. Lopez-Patino*, 391 F.3d 1034 (9th Cir. 2004) (statute punishing causing a child to suffer abuse or physical injury or permitting child to be placed in a situation where health is endangered is not a crime of violence because person could cause injury without the use of force).

(ii) Engaging in consensual sexual intercourse with a child

Sexual abuse of a minor

A conviction under Va. Code Ann. § 18.2-371(ii) for engaging in consensual sexual intercourse with a child 15 or older not his spouse, child or grandchild is an aggravated felony under 8 U.S.C. § 1101(a)(43)(A) (sexual abuse of a minor). Statutory rape has been held to be an aggravated felony under 8 U.S.C. § 1101(a)(43)(A) as a sexual abuse of a minor offense. *See, e.g., Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001); *U.S. v. Martinez-Carillo*, 250 F.3d 1101 (7th Cir. 2001) (holding that the court should use a common sense definition of minor when interpreting 8 U.S.C. § 1101(a)(43)(A), which normally involves a child who is under 18 years of age).

Other immigration consequences

A conviction under most subsections of this statute will render a non-citizen deportable for a crime of child abuse, child neglect, or child abandonment under 8 U.S.C. § 1227(a)(2)(E)(i). However, it is possible that a defendant is not deportable under this ground if convicted for rendering a child in need of supervision, rendering a child delinquent, or for leaving the child with a known sex offender.

18.2-371.1 Abuse or neglect of children

Elements

(A)

- parent or guardian or person responsible for child
- willful act or omission or refusal to provide any necessary care for child's health
- causes or permits serious injury to life or health of child – serious injury = (i) disfigurement, (ii) fracture, (iii) severe burn or laceration, (iv) mutilation, (v) maiming, (vi) forced ingestion of dangerous substances, or (vii) life-threatening internal injuries

(B)

- parent or guardian or person responsible for child
- willful act or omission or refusal to provide any necessary care for child's health is so gross, wanton, and culpable as to show a reckless disregard for human life

Crime involving moral turpitude

(A) Willful act, omission, or refusal to provide assistance that causes or permits serious injury

A conviction under this section of the statute is a crime involving moral turpitude. The BIA has held in several cases that the offense for child abandonment is a crime involving moral turpitude if the act is done willfully and the child is left in destitute or necessitous circumstances. *See, e.g., Matter of R*, 4 I&N Dec. 192 (BIA 1950); *Matter of S*, 2 I&N Dec. 553 (BIA 1946). The BIA has distinguished these offenses from the offense for mere nonsupport where the child is not left in destitute or necessitous circumstances, which is not a crime involving moral turpitude.

A conviction under this section of the statute involves a willful commission of the neglect or abandonment of the child. Also, the child is left in destitute or necessitous circumstances because the child suffers serious injury as a result of the abuse or neglect. Therefore, the statute is likely to be interpreted as a crime involving moral turpitude as the statutes interpreted by the BIA in *Matter of R* and *Matter of S*. *Id.*; *see also In re Adcock*, 12 Immigr. Rptr. B1-175 (BIA Feb. 4, 1994) (unpublished) (holding that a conviction under Va. Code Ann. § 18.2-371.1(A) was a crime involving moral turpitude because the intent element is willful and the resulting injury is death or serious injury to a child's health).

(B) Reckless act without bodily injury

A conviction under this section of this statute is not a crime involving moral turpitude. A conviction under this section of the statute does not require that the child be left in destitute or necessitous circumstances. *See Matter of R*, 4 I&N Dec. 192 (BIA 1950); *Matter of S*, 2 I&N Dec. 553 (BIA 1946). The statute does not require that anything happen to the child; it only requires that the parent or guardian act with reckless disregard for human life.

Generally, offenses where the *mens rea* is recklessness are only crimes involving moral turpitude if there is also causation of serious bodily injury. *See Matter of Fualaau*,

21 I&N Dec. 475 (BIA 1996). A conviction under this section of the statute has a *mens rea of* recklessness because the defendant must do a willful act or omission in the care of the child that is so gross, wanton and culpable as to show a reckless disregard for human life. However, a conviction under this statute does not require the showing of causation of serious bodily injury. Therefore, a conviction under this section of the statute is not a crime involving moral turpitude.

Aggravated felony

(A) Willful omission or refusal to provide care which causes serious injury

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year.

The offense is not a crime of violence under 18 U.S.C. § 16(a) because there is no element of the use, attempted use, or threatened use of physical force against the person or property of another. Rather, the offense involves the *refusal* to act or an *omission*. The Supreme Court has interpreted the crime of violence to include some sort of active violence. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). In addition, the BIA and the Fifth Circuit have held that an omission that results in risk of serious injury or death is not a crime of violence. *U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002); *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999).

Even though the *mens rea* of the offense is willful, which may rise to the level of intentional conduct, intentional conduct cannot amount to a crime of violence under 18 U.S.C. § 16(a) unless it also contains as an element the use, attempted use, or threatened use of physical force against the person or property of another.

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16(b) because the offense is not one which, by its nature, involves a substantial risk that force will be used against person or property of another. Rather, there is a risk that injury will result from the conduct punishable under the statute. The Supreme Court in *Leocal* affirmed that section 16(b) punishes conduct which presents a risk of use of force, not conduct which presents a risk of resulting physical injury. The Fourth Circuit reaffirmed this principle in *Bejarano-Urrutia v. Ashcroft*, 413 F.3d 444 (4th Cir. 2005). Therefore, a conviction under this section of the statute is not a crime of violence.

(A) Willful act that causes serious injury

Crime of violence – 18 U.S.C. § 16(a)

A conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. Unlike the omission that causes injury, this section of the statute requires an affirmative act that causes serious injury. In *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002), the BIA held that an assault statute punishing the intentional causation of bodily injury was a crime of violence under 18 U.S.C. § 16(a). The BIA read in the "use of force" element, even though the statute did not contain one. The BIA reasoned that it could infer the use of force when someone intentionally causes injury. *See id.*; *but see Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (interpreting the same statute and finding that it was not a crime of violence under 18 U.S.C. § 16(a)

because the means of causing injury is not in the statute so it could not infer that the defendant used force to cause such injury).

The Virginia courts have interpreted the *mens rea* of "willful" as denoting an act which is intentional, or knowing, or voluntary, as distinguished from accidental. *Collado v. Comm.*, 533 S.E.2d 625 (Va. Ct. App. 2000); *Ellis v. Comm.*, 513 S.E.2d 453 (Va. Ct. App. 1999). Therefore, the Virginia statute has similar elements to the statute interpreted by the BIA in *Matter of Martin* because the Virginia statute also has the elements of intentionally causing bodily injury.

The BIA's decision in *Matter of Martin* has been undermined by the Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). In *Leocal*, the Court held that when an element of a statute was causation of injury, that did not automatically mean that the statute had as an element the use, attempted use, or threatened use of physical force to cause such injury. However, the *Leocal* holding is not exactly on point because the statute interpreted in *Leocal* had no *mens rea*.

Therefore, because *Matter of Martin* has not been expressly overruled, a conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(a).

Crime of violence - 18 U.S.C. § 16(b)

A conviction under this portion of this section of the statute is probably a crime of violence under 18 U.S.C. § 16(b). The BIA has held that a manslaughter statute that punishes the intent to cause bodily injury and the actual causation of death is a crime of violence under 18 U.S.C. §16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). *See Matter of Vargas-Sarmiento*, 23 I&N Dec. 651 (BIA 2004). The Second Circuit has upheld the BIA's decision and reasoned that the New York manslaughter statute interpreted by the BIA, which punished the causation of serious injury or death while intending to cause death or serious injury, was a crime of violence under 18 U.S.C. § 16(b). *Vargas-Sarmiento v. U.S.D.O.J.*, 448 F.3d 159 (2d Cir. 2006). The Second Circuit reasoned that even though such an offense would not necessarily be a crime of violence under 18 U.S.C. § 16(a) pursuant to its reasoning in *Chrzanoski v. Ashcroft*, 327 F.3d 188 (3d Cir. 2003), it would be a crime of violence under 18 U.S.C. § 16(b) because the focus of 18 U.S.C. § 16(b) is the nature of the offense and not only the elements of the offense. By this reasoning, a conviction under this section of the Virginia statute is probably crime of violence under 18 U.S.C. § 16(b).

(B) Reckless omission or refusal to act

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. This offense is not a crime of violence under 18 U.S.C. § 16(a) or (b) because there is no act required; the defendant may be punished for an omission or failure to act. *See* analysis for Va. Code Ann. § 18.2-371.1(A) (willful omission that causes bodily injury).

In addition , the *mens rea* of the statute is recklessness, not intentional conduct. Therefore, it cannot meet the crime of violence definition under 18 U.S.C. § 16(a) as interpreted by the BIA in *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002), which held that for an offense to be a crime of violence under 18 U.S.C. § 16(a), there must be intentional conduct that results in bodily injury. This section of the statute requires

neither an intentional act nor causation of bodily injury and therefore is not a crime of violence under 18 U.S.C. § 16(a).

A conviction under this section of the statute is also not a crime of violence under 18 U.S.C. § 16(b). The Fourth Circuit has held that an involuntary manslaughter which had a *mens rea* of recklessness was not a crime of violence under 18 U.S.C. § 16(b). *See Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005); *see also Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006) (holding that recklesly causing serious injury with a dangerous weapon was not a crime of violence under 18 U.S.C. § 16(b)).

(B) Reckless act

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year.

A conviction under this section of the statute is also not a crime of violence under 18 U.S.C. § 16(b) because the *mens rea* of the statute is recklessness. The Fourth Circuit has held that an involuntary manslaughter which had a *mens rea* of recklessness was not a crime of violence under 18 U.S.C. § 16(b). *See Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005); *see also Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006). Therefore, a conviction under this section of the Virginia statute is not a crime of violence under 18 U.S.C. § 16(b).

Other immigration consequences

A conviction under this statute is a conviction for a crime related to child abuse, abandonment or neglect that will render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(E).

18.2-374 Production, publication, sale, possession, etc., of obscene items

Elements

(1) knowingly prepare any obscene item for the purposes of sale or distribution
(2) print, copy, manufacture, produce, or reproduce any obscene item for purposes of sale or distribution
(3) publish, sell, rent, lend, transport in interstate commerce, distribute or exhibit any obscene item, or offer to do any of these things
(4) have in possession with intent to sell, rent, lend, transport, or distribute any obscene items – possession in public or in a public place of any obscene item is prima facia evidence of violation of this section

Crime involving moral turpitude

A conviction under this statute is probably not a crime involving moral turpitude because the statute does not punish lewd or lascivious acts. Generally, statutes that punish lewd or lascivious acts are crimes involving moral turpitude. However, this statute does not punish such an act, but rather punishes the transfer of materials depicting

such acts. *See, e.g., Matter of P*, 8 I&N Dec. 424 (BIA 1959); *Matter of C*, 3 I&N Dec. 790 (BIA 1949).

Also, the BIA has held that sending obscene letters through the mail is not a crime involving moral turpitude. *See Matter of D*, 1 I&N Dec. 190 (BIA 1942). The BIA reasoned that although the statute punished the mailing of a letter suggesting fornication, the underlying offense of fornication was not a crime involving moral turpitude and therefore, the sending of such material was not a crime involving moral turpitude. The Virginia offense is similar to the offense interpreted by the BIA in *Matter of D* because it prohibits offenses relating sharing obscene materials. The Virginia statute has as an element the requirement that the defendant knowingly do such acts, which indicates that the defendant must act intentionally. However, in order for an offense to be a crime involving moral turpitude, the crime requires the guilty mind plus an offense that involves moral turpitude. Therefore, a conviction under this statute is probably not a crime involving moral turpitude.

Aggravated felony

Pornography

A conviction under this statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(I) because all of the offenses described in this section of the aggravated felony definition deal with child pornography. *See* 18 U.S.C. § 2252, listed in 8 U.S.C. § 1101(a)(43)(I) (punishing transporting, receiving, distributing, selling, possessing with intent to sell, or possessing child pornography). This Virginia statute makes no reference to child pornography. Therefore, it is probably not an aggravated felony. However, if the facts indicate that the offense involves child pornography, it is possibly an aggravated felony. *Cf. Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001) (holding that a conviction for sexual assault was a sexual abuse of a minor offense because the court determined the age of the victim); *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007) (no need to consult record of conviction for factual element of deportation ground); *but cf. Singh v. Ashcroft*, 383 F.3d 144 (3d Cir. 2004) (conviction under unlawful sexual contact statute that contained no element of the involvement of a child was not a sexual abuse of a minor aggravated felony because under the categorical approach the offense was not a sexual abuse of a minor offense).

18.2-374.1 Production, publication, sale, possession with intent to distribute, financing, etc., of sexually explicit items involving children

Elements

(B) class 5 felony

1)
- accosts, entices or solicits a person younger than 18
- with intent to induce or force such person to perform in or be a subject of sexually explicit visual material; OR

2)
- produces or makes or attempts or prepares to produce or make
- sexually explicit visual material which utilizes or has as a subject a younger than 18; OR

3)
- knowingly takes part in or participates in the filming, photographing or other reproduction of sexually explicit visual material by any means, including but not limited to computer-generated reproduction
- which utilizes or has as a subject a person younger than 18; OR

4)
- sells, gives away, distributes, electronically transmits, displays with lascivious intent, purchases, or possesses with intent to sell, give away, distribute, transmit or display with lascivious intent
- sexually explicit visual material which utilizes or has as a subject a person younger than 18

(C) class 4 felony
- knowingly finances or attempts or prepares to finance
- sexually explicit visual material which utilizes or has as a subject a person younger than 18

For the purposes of this article, the term "sexually explicit visual material" means a picture, photograph, drawing, sculpture, motion picture film, digital image or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, or sexual excitement, sexual conduct or sadomasochistic abuse, or a book, magazine or pamphlet which contains such a visual representation. An undeveloped photograph or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent. Va. Code Ann. § 18.2-374.1(A).

Crime involving moral turpitude

This offense is probably a crime involving moral turpitude because most sexual offenses against children are crimes involving moral turpitude. *See, e.g, Matter of Imber*, 16 I&N Dec. 256 (BIA 1977) (sexual misconduct with minor is a crime involving moral turpitude); *Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966). Even though this statute punishes offenses that are remote from the actual sexual contact with the child, such as selling or distributing child pornography, it is likely that all offenses punished under this statute are crimes involving moral turpitude. In *Matter of D*, 1 I&N Dec. 190 (BIA 1942), the BIA held that mailing of an obscene letter was not a crime involving moral turpitude because the letter suggested fornication, which was not a crime involving moral turpitude. By that reasoning, this offense is a crime involving moral turpitude because any acts of fornication with children are crime involving moral turpitude. Therefore, the distribution of such material is probably a crime involving moral turpitude.

This statute also punishes aiding and abetting, because section (C) punishes the financing of the production of child pornography. Generally, aiding and abetting offenses are part of the substantive offense for the purposes of determining whether a crime involves moral turpitude. *See, e.g., Matter of Short*, 20 I&N Dec 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977). Therefore, any conviction under this statute is probably a crime involving moral turpitude.

Aggravated felony

(B)(1) Soliciting minor for child pornography

Pornography

A conviction under section (B)(1) is an aggravated felony under 8 U.S.C. § 1101(a)(43)(I) because the elements of the offense are the same as 18 U.S.C. § 2251(a), which is described in the aggravated felony definition. The Virginia offense, like the federal offense, punishes enticing or soliciting a minor to be the subject of some sexually explicit performance.

(B)(2) and (3) Production and assisting in the production of child pornography

Pornography

A conviction under either section (B)(2) or (3) is an aggravated felony under 8 U.S.C. § 1101(a)(43)(I) because the elements of the offense are the similar to 18 U.S.C. § 2251(a), which punishes the use of a minor in any sexually explicit conduct for the purpose of producing any visual depiction thereof. The Virginia statutes punishes the production of such materials or the participation in such production.

(B)(4) Distribution of child pornography

Pornography

A conviction under section (B)(4) is an aggravated felony under 8 U.S.C. § 1101(a)(43)(I) because the elements of the offense are the same as 18 U.S.C. § 2252(a), which punishes the sale, distribution or possession of such materials. The Virginia statute punishes the sale, distribution or other transmission of such materials.

(C) Financing child pornography

Pornography

A conviction under section (C) is an aggravated felony under 8 U.S.C. § 1101(a)(43)(I) because the elements of the offense are the similar to 18 U.S.C. § 2251(a), which punishes the use of a minor in any sexually explicit conduct for the purpose of producing any visual depiction thereof. This section of the statute punishes the financing or preparing to finance such creation of sexually explicit material involving children, which is similar to aiding and abetting in the commission of the substantive offense. A conviction for aiding and abetting an aggravated felony is an aggravated felony. *See Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007).

18.2-374.1:1(A) Possession of child pornography

Elements

- knowingly possess
- any sexually explicit visual material
- utilizing or having as a subject a person younger than 18

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude. Although there are no specific cases on possession of child pornography, most sexual

offenses against children are crimes involving moral turpitude. *See, e.g*, *Matter of Imber*, 16 I&N Dec. 256 (BIA 1977) (sexual misconduct with minor is a crime involving moral turpitude); *Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966). Even though this statute punishes offenses that are remote from the actual sexual contact with the child, such as mere possession of such material, the offense is probably a crime involving moral turpitude. In *Matter of D*, 1 I&N Dec. 190 (BIA 1942), the BIA held that mailing of an obscene letter was not a crime involving moral turpitude because the letter suggested fornication, which was not a crime involving moral turpitude. By that reasoning, this Virginia offense is probably a crime involving moral turpitude because any acts of fornication with children are crimes involving moral turpitude. Therefore, the possession of such material is probably a crime involving moral turpitude.

Aggravated felony

Pornography

A conviction under this section is an aggravated felony under 8 U.S.C. § 1101(a)(43)(I) (statutes punishing activities relating to child pornography). Possession of child pornography is punished under 18 U.S.C. § 2252(a)(4)(B), which punishes the knowing possession of one or more books, magazines, periodicals, films, video tapes or other matter that contain any visual depiction that has been sent over interstate commerce. Even though the Virginia statute does not contain the element that the goods be sent over interstate commerce, that is merely a jurisdictional hook for the federal statute; otherwise the statute contains the same elements as the federal statute. *See generally Matter of Vasquez-Muniz*, 23 I&N Dec. 1415 (BIA 2000) (the BIA examines the substantive elements of an offense to determine whether a state offense fits the federal offense and therefore is an aggravated felony without reference to the jurisdictional element of the federal offense).

Sexual abuse of a minor

A conviction under this statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(A). The statute does not punish any type of conduct with a minor; rather, the statute punishes the possession of materials involving minors. Therefore, it is not a sexual abuse of a minor offense.

18.2-387 Indecent exposure

Elements

- intentionally
- makes obscene display or exposure of his person, or the private parts thereof
- in any public place or in any other place where others are present
- or procures another to so expose himself

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude because the defendant must act intentionally to be convicted under this statute. The BIA interpreted an indecent exposure statute in *Matter of H*, 7 I&N Dec. 301 (BIA 1956). In *Matter of H*, the statute under which the respondent was convicted punished knowingly making any open or indecent exposure of his or her own person or of the person of

another. Someone could be convicted under the language of the statute for acting through negligent disregard of the presence of others and the exposure was occasioned by physical necessity. Because there was no evil intent in the statute, it was not a crime involving moral turpitude. *See id.*; *see also Matter of Mueller*, 11 I&N Dec. 268 (BIA 1965) (holding that publicly and indecently exposing a sex organ was not a crime involving moral turpitude because there was no intent element).

The Virginia Court of Appeals has found that a conviction under this statute is not a crime involving moral turpitude for the purposes of using a prior conviction under this statute to impeach a witness. *See Chrisman v. Comm.*, 348 S.E.2d 399 (Va. Ct. App. 1986). However, this decision is not binding on an immigration court determining whether this statute is a crime involving moral turpitude. Thus, because of the intentional requirement of the statute, a conviction under this statute is probably a crime involving moral turpitude.

Aggravated felony

Sexual abuse of a minor

A conviction under this statute is not necessarily a sexual abuse of a minor offense under 8 U.S.C. § 1101(a)(43)(A). However, if the facts reflect that the indecent exposure is to a child, the offense is probably an aggravated felony as a sexual abuse of a minor under 8 U.S.C. § 1101(a)(43)(A). *See U.S. v. Zavala-Sustaita,* 214 F.3d 601 (5th Cir. 2000), *cert. denied*, 531 U.S. 982 (2000) (indecency with a child by exposure is an aggravated felony under sexual abuse of a minor category); *Matter of Rodriguez-Rodriguez,* 22 I&N Dec. 991 (BIA 1999) (holding that indecency with a child by exposure is an aggravated felony under 8 U.S.C. §1101(a)(43)(A) sexual abuse of a minor).

The indecent exposure to a child is not an element of the offense and therefore, under the categorical approach, the offense should not be classified as a sexual abuse of a minor aggravated felony. However, a conviction under this statute is probably a sexual abuse of a minor offense if the facts reflects that the defendant committed an indecent exposure to a minor. *See Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001) (holding that a conviction for sexual assault was a sexual abuse of a minor offense because the court determined the age of the victim); *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007) (no need to consult record of conviction for factual element of deportation ground); *but see Singh v. Ashcroft*, 383 F.3d 144 (3d Cir. 2004) (conviction under unlawful sexual contact statute that contained no element of the involvement of a child was not a sexual abuse of a minor aggravated felony because under the categorical approach the offense was not a sexual abuse of a minor offense).

18.2-388 Profane swearing and intoxication in public

Elements

- profanely swears or curses or is intoxicated in public
- "in public" means a place in open view, visible to the community, and could include defendant's private property *See Crislip v. Comm.*, 554 S.E.2d 96 (Va. Ct. App. 2001)

Crime involving moral turpitude

The Virginia offense for being drunk in public or profanely swearing or cursing in public is not a crime involving moral turpitude. The offense is generally a *mala prohibitum* offense and is not a *malum in se* offense. There is no intent element in the statute; the defendant need only swear or curse or be drunk in public view. *See Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999).

The BIA has held that a statute punishing vagrancy is not a crime involving moral turpitude. *See Matter of G-R-*, 5 I&N Dec. 18 (BIA 1953). The BIA in *Matter of G-R-* interpreted a statute that punished a defendant for being idle, lewd, or dissolute person, or associate of known thieves. The statute generally punished the condition, but could also punish certain acts such as a single incident of dancing in the nude. The BIA reasoned that because the statute punished the condition of vagrancy into which a defendant has fallen, it was not a crime involving moral turpitude.

Following the BIA's reasoning in *Matter of G-R-*, a conviction under this Virginia statute is not a crime involving moral turpitude because the statute punishes the state into which one has fallen, i.e. intoxication. The Virginia statute also punishes acts such as profanely swearing or cursing, but these acts could be the equivalent of dancing in the nude, which was punishable under the California statute that the BIA found not to be a crime involving moral turpitude in *Matter of G-R-*.

Aggravated felony

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is only analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because it is a misdemeanor. This statute contains no element of the use, attempted use, or threatened use of physical force against the person or property of another. The statute punishes profane words alone, which do not involve the use or threatened use of force. Moreover, the statute does not punish intending to use force against anyone. *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002) (intentional conduct necessary for an offense to be a crime of violence under 18 U.S.C. § 16(a)). The statute only punishes the use of profane language and therefore is not a crime of violence.

18.2-405 Rioting

Elements

- unlawful use of force or violence
- by three or more persons acting together
- which seriously jeopardize the public safety, peace or order
- if person carries at the time of riot any firearm or other deadly or dangerous weapon, class 5 felony

Crime involving moral turpitude

A conviction under this statute is probably not a crime involving moral turpitude. Although the statute requires that the defendants act with force or violence to seriously jeopardize the public safety, there is no requirement that the conduct result in serious

bodily injury. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996) (reasoning that a *mens rea* of recklessness coupled with a causation of serious bodily injury is a crime involving moral turpitude).

Furthermore, the intent element of the statute does not amount to a crime involving moral turpitude. *Matter of Ajami*, 22 I&N Dec. 949. The *mens rea* of the statute is unlawful, not intentional. *See Reyes-Morales v. Gonzales*, 435 F.3d 937 (8th Cir. 2006) (holding that a statute punishing threatening behavior, without a *mens rea*, was not a crime involving moral turpitude). The statute punishes a group of people for the unlawful use of force or violence. Unlawful force or violence is not the same as intentionally using force or violence or intentionally causing injury. Therefore, a conviction under this statute is probably not a crime involving moral turpitude.

Aggravated felony

Misdemeanor

Crime of violence

A conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is only analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because it is a misdemeanor.

The offense is probably one that has as an element the use, attempted use, or threatened use of physical force against the person or property of another as required by 18 U.S.C. § 16(a). The statute punishes acting with force or violence. However, the *mens rea* of the statute is unlawful, not intentional. The BIA has held that in order for an offense to be a crime of violence under 18 U.S.C. § 16(a), the statute must punish intentional conduct. *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002); *see also Leocal v. Ashcroft*, 543 U.S. 1 (2004) (reasoning that a statute which has no *mens rea* or a *mens rea* of negligence is not a crime of violence under 18 U.S.C. § 16(a)).

Nonetheless, because the Virginia statute punishes the use of force or violence, it is likely that courts reviewing this statute would find that this statute contains as an element of the use of force, regardless of the fact that such use is unlawful, not intentional. The Supreme Court in *Leocal* was interpreting the statute, 18 U.S.C. § 16(a), to determine that the "use" of force meant that a person must act with some level of intent, since a person could not accidentally "use" force. The Virginia statute has the same language, "use of force." Therefore, the Supreme Court's interpretation of "use" could also apply to an interpretation of this Virginia statute to hold that "use" means some active employment of force or violence.

Thus, a conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(a).

Felony

Crime of violence

A conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is probably a crime of violence unde18 U.S.C. § 16(a). *See* analysis for Va. Code Ann. § 405 (misdemeanor)

This offense is also probably a crime of violence under 18 U.S.C. § 16(b) because it is an offense that, by its nature, involves a substantial risk that the defendant will use force against the person or property of another. The statute punishes acting as a group with force or violence that seriously jeopardizes the public safety, peace or order. Many of the actions punished under this statute may result in the defendants using physical force against the person or property of another. However, the Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), reasoned that in order for an offense to be a crime of violence under 18 U.S.C. § 16(b), the statute must have some *mens rea* that is more then mere negligence. This statute does not have a *mens rea* because it punishes the *unlawful* use of force or violence by a group. Also, the fact that such acts seriously jeopardize the public safety, peace or order does not elevate the offense to a crime of violence under 18 U.S.C. § 16(b). The Supreme Court in Leocal held that statutes punishing conduct which creates a risk of injury are not crimes of violence under 18 U.S.C. § 16(b) because there must be a risk of use of force in order to classify the offense as a crime of violence under 18 U.S.C. § 16(b).

However, because the Virginia statute punishes the use of force or violence, even though that is unlawful use, the offense is probably one where the defendant must risk using physical force against another, regardless of the fact that such use is unlawful, not intentional. Thus, a felony conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(b) if the sentence is at least one year.

Other immigration consequences

This offense may render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(C) (crimes relating to firearms) if the person is convicted for carrying a firearm or deadly or dangerous weapon during a riot. However, the list of weapons that a defendant under this statute may use is broader than the federal list at 18 U.S.C. § 921(a), so it is necessary to consult the record of conviction to determine what weapon the defendants used to commit the offense.

18.2-406 Unlawful assembly

Elements

- three or more persons assembled
- share the common intent to advance some lawful or unlawful purpose
- by the commission of an act or acts of unlawful force or violence likely to jeopardize public safety, peace or order
- and the assembly actually tends to inspire persons of ordinary courage with well-grounded fear of serious and immediate breaches of public safety, peace or order
- class 5 felony if person carried weapon at the time of unlawful assembly

Crime involving moral turpitude

A conviction under this statute is probably not a crime involving moral turpitude. Although the statute requires that the defendants act with force or violence to seriously jeopardize the public safety, there is no requirement that the conduct result in serious bodily injury. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996). Rather, the conduct must result in persons of ordinary courage fearing serious and immediate breaches of

public safety. This statute, although it parallels threat statutes, is not similar enough to the threats statutes that have been found to be morally turpitudinous. *See Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004) (holding that a statute punishing threats to terrorize is a crime involving moral turpitude); *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999) (holding that a statute punishing a pattern of intentional, credible threats is a crime involving moral turpitude). Rather, a person threatened by this Virginia statute need only fear a breach of public safety, peace or order. The victim does not need to fear any particularized harm, bodily injury, or death to his person.

Furthermore, the intent element of the statute does not amount to a crime involving moral turpitude. *Matter of Ajami*, 22 I&N Dec. 949. The *mens rea* of the statute is unlawful, not intentional. *See Reyes-Morales v. Gonzales*, 435 F.3d 937 (8th Cir. 2006) (holding that a statute punishing threatening behavior, without a *mens rea*, was not a crime involving moral turpitude). The statute punishes a group of people for assembling to advance a lawful or unlawful purpose by the commission of an act of unlawful force or violence. Unlawful force or violence is not the same as intentionally using force or violence or intentionally causing injury. Therefore, a conviction under this statute is probably not a crime involving moral turpitude.

Aggravated felony

Misdemeanor

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is only analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because it is a misdemeanor. The offense is probably not one that has as an element the use, attempted use, or threatened use of physical force against the person or property of another as required by 18 U.S.C. § 16(a). Although the statute punishes the intent to advance a purpose by acts of force or violence, this is not sufficient to amount to a threat of use of force.

In *Szucz-Toldy v. Gonzales*, 400 F.3d 978 (7th Cir. 2005), the Seventh Circuit held that harassment by phone was not a crime of violence under 18 U.S.C. § 16(a). The elements of the harassment statute were (1) making a telephone call and (2) with the intent to abuse, threaten, or harass someone at the called number. The court held that the statute did not have as an element the threatened use of force because the statute only punished the making of the phone call with the requisite intent. The court looked only at the elements of the statute and held that there was no element of threatened use of force. The Virginia unlawful assembly statute is similar to the statute interpreted by the Seventh Circuit because the Virginia statute does not require that the defendant actually engage in any acts of force or violence. Rather, the crime is completed when the group unlawfully assembles with the *intent* to advance some purpose by acts of force or violence. Therefore, a conviction under this statute is not a crime of violence.

Felony

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if

the sentence imposed is at least one year. A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(a). *See* analysis for Va. Code Ann. § 18.2-406 (misdemeanor).

A conviction under this statute is also not a crime of violence under 18 U.S.C. § 16(b) because the offense is not one that, by its nature, involves a substantial risk that the defendant will use force against the person or property of another. The statute punishes acting as a group assembled to advance some purpose by the commission of an act of unlawful force or violence likely to jeopardize the public safety, peace or order. The acts punishable under the statute are completed when the group gathers with the requisite intent. There need not be any actual carrying out of such intent. Therefore, there is no risk of use of force in the commission of the offense because the offense is completed once the group gathers with the requisite intent.

The fact that the acts intended would seriously jeopardize the public safety, peace or order does not elevate the offense to a crime of violence under 18 U.S.C. § 16(b) because 18 U.S.C. § 16(b) punishes statues where there is a risk of use of force, not a risk of physical injury. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). Therefore, a conviction under this statute is not a crime of violence.

Other immigration consequences

A conviction under this statute may render a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(C) (crimes relating to firearms) if the person is convicted for carrying a firearm or deadly or dangerous weapon during the unlawful assembly. However, the list of weapons that a defendant under this statute may use is broader than the federal list at 18 U.S.C. § 921(a), so it is necessary to consult to record of conviction to determine whether the defendant is deportable under this ground.

18.2-415 Disorderly conduct

Elements

(A)

- with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof
- in any street, highway, public building, or while in public place
- engages in conduct having a direct tendency to cause acts of violence by the person or persons at whom, individually, such conduct is directed

(B)

- with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof
- willfully being intoxicated, whether willfully or not, and whether such intoxication results from self-administered alcohol or drug of whatever nature
- disrupts any meeting of the governing body of any political subdivision of this Commonwealth or any school, place of religious worship, etc.
- if the disruption prevents or interferes with the orderly conduct of the meeting OR
- if the disruption has a direct tendency to cause acts of violence by the person or persons at whom, individually, the disruption is directed

(C)

- with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof
- willfully or while intoxicated, whether willfully or not, and whether such intoxication results from self-administered alcohol or drug or whatever nature
- disrupts the operation of any school or any activity conducted or sponsored by any school
- if the disruption prevents or interferes with the orderly conduct of the operation or activity OR
- if the disruption has a direct tendency to cause acts of violence by the person or persons at whom, individually, the disruption is directed

Crime involving moral turpitude

A conviction under this statute is not a crime involving moral turpitude. The BIA has held that disorderly conduct involves moral turpitude when the statute punishes lewd or lascivious acts. *Matter of Alfonso-Bermudez*, 12 I&N Dec. 225 (BIA 1967); *cf. Matter of G-R-*, 5 I&N Dec. 18 (BIA 1953) (reasoning that statute punishing vagrancy is not a crime involving moral turpitude because statute punishes condition of vagrancy into which the defendant has fallen and not certain acts). This statute does not involve lewd or lascivious conduct and therefore is not a crime involving moral turpitude.

Aggravated felony

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is only analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because it is a misdemeanor. Although the statute punishes engaging in conduct having a direct tendency to cause acts of violence by the person at whom the conduct is directed, it is not a crime of violence under 18 U.S.C. § 16(a) because the statute does not contain as an element the use, attempted use, or threatened use of physical force. Rather, the statute punishes engaging in conduct having a direct tendency to cause acts of violence or disrupting some gathering. The fact that the statute has a tendency to cause another to use force or violence to stop the disorderly conduct does not indicate that the statute itself contains as an element the use, attempted use, or threatened use of physical force. This post-offense reaction by the victim does not incorporate an element of the use of force into the disorderly conduct statute. Therefore, a conviction under this statute is not a crime of violence.

18.2-416 Punishment for using abusive language to another

Elements

- in the presence or hearing of another
- curse or abuse such other person, or use any violent abusive language to such person concerning himself or any of his relations
- or otherwise use such language
- under circumstances reasonably calculated to provoke a breach of peace

Crime involving moral turpitude

This offense is not a crime involving moral turpitude. Under the assault line of crime involving moral turpitude cases, this offense is not a crime involving moral turpitude because there is no causation of serious bodily injury. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996). Also, the statute does not involve threatening behavior in any way. *See Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004); *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999). In addition, the offense is not like any of the disorderly conduct offenses that the BIA has found to be crimes involving moral turpitude because the offense does not involve any lewd conduct; it merely punishes abusive language. *See Matter of Alfonso-Bermudez*, 12 I&N Dec. 225 (BIA 1967).

Aggravated felony

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is only analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because it is a misdemeanor. This statute contains no element of the use, attempted use, or threatened use of physical force against the person or property of another and therefore is not a crime of violence under 18 U.S.C. § 16(a). The statute punishes insulting words alone, which do not involve the use or threatened use of force. The fact that the words punished by the statute are likely to cause violence does not render the crime a crime of violence under 18 U.S.C. § 16(a) because that secondary violence by the victim is not an element of the original offense. Moreover, the statute does not punish intending to use force against anyone. *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002) (intentional conduct is necessary for an offense to be a crime of violence under 18 U.S.C. § 16(a)). The statute only punishes the use of language that is reasonably calculated to provoke a breach of the peace. Therefore, a conviction under this statute is not a crime of violence.

18.2-427 Use of profane, threatening or indecent language over public airways

Elements

- use obscene, vulgar, profane, lewd, lascivious, or indecent language OR
- make any suggestions or proposal of an obscene nature, OR
- threaten any illegal or immoral act with the intent to coerce, intimidate, or harass any person
- over any telephone or citizens band radio

Crime involving moral turpitude

A conviction under this section of the statute is probably not a crime involving moral turpitude. Courts have decided that convictions for certain lewd, lascivious, and obscene *acts* are crimes involving moral turpitude. *See e.g., Cronin v. Tilinghast*, 38 F.2d 231 (1st Cir. 1930). However, courts have never decided that convictions involving obscene, lewd, or lascivious *speech* are crimes involving moral turpitude. The prohibitions in Va. Code Ann. § 18.2-427 can be construed as merely regulatory

prohibitions or disturbances of the peace and not crimes involving moral turpitude, because the evil proscribed is merely the use of the public airways to transmit the prohibited speech, but not the speech itself. *But see Perkins v. Comm.*, 402 S.E.2d 229 (Va. Ct. App. 1991) (reasoning that the legislature intended to punish harassing conduct under the Va. Code Ann. § 18.2-427 and not merely speech). The BIA has held that statutes punishing merely disturbing the peace are not crimes involving moral turpitude. *See Matter of Alfonso-Bermudez*, 12 I&N Dec. 225 (BIA 1967) (disturbing the peace, without lewd acts, is not a crime involving moral turpitude); *Matter of M*, 2 I&N Dec. 196 (BIA 1944) (holding in dicta that disturbing the peace is not a crime involving moral turpitude);

A defendant must act with the intent to coerce, harass, or intimidate in order to be convicted under this statute. *See Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004) (holding that a statute punishing making threats with the purpose to terrorize the victim was a crime involving moral turpitude); *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999) (holding that a stalking statute that punishes a pattern of credible threats against the victim is a crime involving moral turpitude). The threats prohibited by this statute are different than the pattern of threats that the BIA found to involve moral turpitude in *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999). Under this Virginia statute, the threats may not rise to the level of a threat to kill a person or inflict physical injury upon another in the context that causes the individual receiving the threat to reasonably fear for his safety or the safety of another. In addition, the threats made under the Virginia statute are different than the threats under the statute interpreted in *Matter of Ajami.* A conviction under this statute only requires that the defendant threaten to do *any* illegal or immoral act. In addition, the language of this Virginia statute is similar to a statute punishing threatening behavior, which the Eighth Circuit held was not a crime involving moral turpitude in *Reyes-Morales v. Gonzales*, 435 F.3d 937 (8th Cir. 2006) (holding that intentionally making telephone calls with reason to know that such calls would cause, and did cause, the recipient to feel frightened was not a crime involving moral turpitude). Therefore, a conviction under this statute is probably not a crime involving moral turpitude.

Aggravated felony

Crime of violence

A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The statute is only analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b), because it is a misdemeanor. The offense does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another as required by 18 U.S.C. § 16(a).

In *Szucz-Toldy v. Gonzales*, 400 F.3d 978 (7th Cir. 2005), the Seventh Circuit held that harassment by phone was not a crime of violence under 18 U.S.C. § 16(a). The elements of the harassment statute were (1) making a telephone call and (2) with the intent to abuse, threaten, or harass someone at the called number. The court held that the statute did not have as an element the threatened use of force because the statute only punished the making of the phone call with the requisite intent. The court looked only at the elements of the statute and held that there was no element of threatened use of force.

The Virginia statute has similar elements to the harassment statute interpreted by the Seventh Circuit in *Szucz-Toldy*. The Virginia statute's elements are completed when the defendant uses a telephone or a CB radio with the intent to coerce, intimidate, or harass any person. Virginia courts have held that this statute does not prohibit behavior, but the *intent* to coerce, intimidate, or harass. *See Perkins v. Comm.*, 402 S.E.2d 229 (Va. Ct. App. 1991); *Walker v. Dillard*, 523 F.2d 3 (4th Cir. 1975), *cert. denied*, 423 U.S. 906 (1975). Therefore, this Virginia statute contains no element of the use or threatened use of force because the act of using a phone with the intent to intimidate or harass is insufficient to establish the threatened use of force.

The Virginia statute can also be distinguished from a threats statute that the Eleventh Circuit found to have as an element the threatened use of physical force. *See U.S. v. Bonner*, 85 F.3d 522 (11th Cir. 1996). In *Bonner*, the defendant had been convicted under a federal statute for threatening to use violence against the president, which the Eleventh Circuit found to have as an element of the threatened use of force. The Virginia statute only includes a threat to do illegal or immoral conduct with an intent to intimidate, coerce or harass. There is no intent to do violence or use force against the person on the other end of the phone. *See id.*; *see also Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003) (holding that a statute punishing threats to commit a crime resulting in bodily injury is a crime of violence under 18 U.S.C. § 16(a) because the statute has as an element the threatened use force). Therefore, a conviction under this statute is not a crime of violence under 18 U.S.C. § 16(a).

CRIMES AGAINST THE ADMINISTRATION OF JUSTICE

18.2-434 Perjury

Elements

- in any written statement under penalty of perjury
  - willfully subscribes as true
  - material matter which he does not believe is true
- in any lawfully administered oath
  - willfully swears falsely
  - regarding a material matter

Crime involving moral turpitude

A conviction under Va. Code Ann. § 18.2-434 is a crime involving moral turpitude because the statute requires that the defendant perjure himself on a material issue. *Angelone v. Dabney*, 560 S.E.2d 253 (Va. App. Ct. 2002); *see Matter of H*, 1 I. & N. Dec. 669 (BIA 1943) (holding that if a perjury conviction requires that the defendant perjure himself on a material matter, it is a crime involving moral turpitude) *Matter of G-Y-G-*, 4 I&N Dec. 211 (BIA 1950) (finding that because a perjury statute required materiality it was a crime involving moral turpitude); *Matter of R*, 2 I&N Dec. 819 (BIA 1947) (holding that a Canadian perjury statute with no materiality element was not a crime involving moral turpitude).

Aggravated felony

Perjury offense

A conviction under this statute is perjury offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year.

Fraud offense

A conviction under this statute is probably an offense involving fraud or deceit; therefore, it is an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

18.2-438 Bribes to officers or candidates for office

Elements

- give, offer, or promise gift or gratuity to
  - executive, legislative, or judicial officer
  - sheriff or police officer
  - candidate for office (before or after takes seat)
- with intent to influence

Crime involving moral turpitude

Bribery is a crime involving moral turpitude. *See Matter of H*, 6 I&N Dec. 358 (BIA 1954) (holding that a bribery statute is a crime involving moral turpitude because bribery is a base and vile act whereby the government has been cheated out of services to which the community is rightfully entitled and because it involves the obstruction of

lawful governmental functions by deceit, graft, trickery and dishonest means); *see also Matter of S*, 2 I&N Dec. 225 (BIA 1944) (conviction for defrauding the U.S. government was a crime involving moral turpitude because statute punished intentionally depriving the U.S. of its lawful governmental functions by corrupting its officers in the performance of their official duties); *Okabe v. I.N.S.*, 671 F.2d 863 (5th Circuit 1982) (a bribery conviction is a crime involving moral turpitude because a corrupt mind is an essential element of the offense).

The elements of the Virginia bribery statute are similar to those that the BIA and Fifth Circuit have found to constitute a crime involving moral turpitude. Under this Virginia statute, an attempt to corrupt, evidenced by an offer or promise of a gift, constitutes bribery on the part of the offeror or promisor as fully and completely as if a corrupt gift had been made and accepted. *Ford v. Comm.*, 15 S.E.2d 50 (Va. Ct. App. 1941). It is an attempt to undermine the proper and orderly administration of justice. Therefore, a conviction under this statute is a crime involving moral turpitude.

Aggravated felony

Bribery offense

A conviction under this statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(S) as a bribery offense if the sentence imposed is at least one year.

18.2-460 Obstruction of justice

Elements

(A) class 1 misdemeanor
- without just cause
- knowingly
- obstructs judge, magistrate, justice, juror, Commonwealth attorney, witness or any law-enforcement officer engaged in the performance of his duties
- or refuses without just cause to cease such obstruction when requested to do so by judge, magistrate, justice, juror, Commonweath attorney, witness or law-enforcement officer

(B) class 1 misdemeanor
- by threats or force
- knowingly attempts to intimidate or impede a judge, magistrate, justice, juror, Commonwealth attorney, witness, or any law-enforcement officer, engaged in the performance of his duties
- or to obstruct or impede the administration of justice in any court

(C) class 5 felony
- by threats of bodily harm or force
- knowingly attempts to intimidate or impede a judge, magistrate, justice, juror, witness, or any law-enforcement officer engaged in the performance of his duties
- or to obstruct or impede the administration of justice in any court relating to certain controlled substance offenses

(D) class 1 misdemeanor
- knowingly and willfully
- makes any materially false statement or representation

- to a law enforcement officer who is in the course of conducting an investigation of a crime of another

Crime involving moral turpitude

(A) Obstruction without force or threats

A conviction under this statute is probably not a crime involving moral turpitude. The Eleventh Circuit has used the federal offense of obstruction of justice at 18 U.S.C. § 1503 as an example of what constitutes a crime involving moral turpitude because fraud is an essential element of the offense. *See Knoetze v. U.S.*, 634 F.2d 207 (11th Cir. 1981). The Virginia statute has similar language to the federal statute, so it could be a crime involving moral turpitude under this analysis. However, the Virginia statute does not require fraud as an element of the obstruction of justice offense and the Eleventh Circuit's decision turned on the fraudulent nature of the offense. The Virginia statute can be violated by refusing to kneel when asked by an arresting police officer, which has no fraud component. *See, e.g., Payne v. Comm.*, 2003 Va. App. LEXIS 616 (Va. Ct. App. Dec. 2, 2003) (unpublished). Rather, the Eleventh Circuit focused on the corrupt nature of influencing the judicial process. Not all violations of the Virginia law include fraudulently influencing an official process.

In addition, a conviction under section (A) of this statute is not a crime involving moral turpitude because force, violence, or threats are not an essential element of the offense. *See Martin v. Comm.*, 406 S.E.2d 15 (Va. 1991), *cert. denied*, 502 U.S. 945 (1991) (reasoning that the absence of language in subsection (A) relating to the use of a weapon indicates a legislative intent to include as a misdemeanor obstruction of justice less violent types of conduct and conduct not accompanied by any weapons). Therefore, a conviction under section (A) can be distinguished from statutes involving threats that the BIA found to be crimes involving moral turpitude. *See Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999) (holding that a course of conduct involving credible threats to do bodily injury is a crime involving moral turpitude).

A conviction under this statute is not a crime involving moral turpitude because there is no requirement that the defendant cause serious bodily injury. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996). A defendant can be convicted under this statute with conduct that is less than a simple assault. *See, e.g., Woodson v. Comm.*, 421 S.E.2d (Va. Ct. App. 1992), *aff'd*, 429 S.E.2d 27(Va. 1993). Also, there is no requirement that the defendant assault the victim with a deadly weapon. *See Matter of Logan*, 17 I&N Dec. 367 (BIA 1980) (assault with a deadly weapon is a crime involving moral turpitude).

It is true that the Virginia statute includes an element of "knowing." However, an offense is a crime involving moral turpitude if it has the requisite intent *plus* the acts punished are turpitudinous. *See Matter of B*, 2 I&N Dec. 867 (BIA 1947). Acts such as refusing to get down on the ground when ordered to by a police officer are not inherently turpitudinous. Resisting arrest without an aggravating factor, such as fleeing and endangering others, is not a crime involving moral turpitude. *See Mei v. Ashcroft*, 393 F.3d 737 (7th Cir. 2004). However, one of the reasons why the Seventh Circuit in *Mei* found the fleeing statute to be a crime involving moral turpitude was because the defendant had to deliberately flaunt the authority of the officer in fleeing. This Virginia statute requires that the defendant deliberately defy the authority of the law-enforcement

officer because it punishes the defendant for failing or refusing to cease such obstruction of justice when requested to do so by the officer. The deliberate defiance of authority alone, however, may not be sufficient to amount to a crime involving moral turpitude without the additional aggravating factor of fleeing the scene and endangering others. It is therefore unlikely that this offense is a crime involving moral turpitude.

(B) Obstruction through threats or force

A conviction under this section of the statute is probably a crime involving moral turpitude because there is a *mens rea* of knowingly and an element of threats or force. *See Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004) (threatening a crime of violence is a crime involving moral turpitude); *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999) (making several credible threats against a victim is a crime involving moral turpitude because the intentional transmission of threats is evidence of a vicious motive or a corrupt mind).

(C) Obstruction through threats of bodily harm or force

A conviction under this section of the statute is probably a crime involving moral turpitude because there is a *mens rea* of knowingly and an element of threats of bodily harm or force. *See Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004) (threatening a crime of violence is a crime involving moral turpitude); *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999) (making several credible threats against a victim is a crime involving moral turpitude because the intentional transmission of threats is evidence of a vicious motive or a corrupt mind).

(D) Obstruction through false statements

A conviction under this section of the statute is a crime involving moral turpitude because it requires false statement by the defendant to convict under the statute. Offenses involving false statements are generally found to be crimes involving moral turpitude. *See, e.g., Matter of Acosta*, 14 I&N Dec. 338 (BIA 1973); *Matter of B*, 1 I&N Dec. 121 (BIA 1941).

Aggravated felony

(A) Misdemeanor obstruction without force or threats

Crime of violence

A conviction under section (A) of the statute is not a crime of violence and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this section of the statute is a misdemeanor offense only and therefore is not analyzed under 18 U.S.C. § 16(b). A conviction under this section of the statute is not a crime of violence under 18 U.S.C. § 16(a) because there is no element of use, attempted use, or threatened use of physical force when a defendant fails to obey a police officer.

Obstruction of justice

A conviction under this section is not necessarily an offense relating to obstruction of justice and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year. Not all offenses punishable under this section qualify as one of the offenses generally thought to come within the obstruction of

justice offenses in Title 18 chapter 73 of the U.S. Code. *See Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999). Rather, it is possible to be convicted under this section of the statute for the obstruction of one's own arrest, not the obstruction of the judicial process. The BIA has reasoned that it is substantially unlikely that an offense of simply obstructing or hindering one's own arrest is an aggravated felony under 8 U.S.C. § 1101(a)(43)(S). *See Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). Therefore, it is necessary to consult to record of conviction to determine the offense for which the defendant was convicted.

(B) Misdemeanor through threats or force

Crime of violence

A conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this section of the statute is a misdemeanor offense and therefore is not analyzed under 18 U.S.C. § 16(b). A conviction under this statute is a crime of violence under 18 U.S.C. § 16(a) because the offense must be carried out by threats or force. Carrying out the offense by force includes as an element the use of force. A conviction for threats is probably a crime of violence because it involves the threatened use of force. *See U.S.A. v. De la Fuente*, 353 F.3d 766 (9th Cir. 2003) (holding that mailing threatening communications is a crime of violence under 18 U.S.C. § 16(a) as a threatened use of force). Although the statute does not specify what types of threats it punishes, it is likely that the statute punishes the threatened use of force against the person of another. *See* analysis for Va. Code Ann. § 18.2-60 (threats).

Also, the *mens rea* under this statute is knowingly, which amounts to intentional conduct. The BIA has held in order for an offense to be a crime of violence under 18 U.S.C. § 16(a), there must be an element of intentional use, attempted use, or threatened use of physical force. *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002). Therefore, a conviction under this statute is probably a crime of violence under 18 U.S.C. § 16(a).

Obstruction of justice

A conviction under this section is not necessarily an offense relating to obstruction of justice and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year. Not every offense punishable under this section of the statute qualifies as one of the offenses generally thought to come within the obstruction of justice offenses in Title 18 chapter 73 of the U.S. Code. *See Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999). It is possible to be convicted under this statute for obstruction of one's own arrest, not the obstruction of the judicial process. The BIA has reasoned that it is substantially unlikely that an offense of simply obstructing or hindering one's own arrest is an aggravated felony under 8 U.S.C. § 1101(a)(43)(S). *See Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). Therefore, it is necessary to consult to record of conviction to determine the offense for which the defendant was convicted.

(C) Felony obstruction through threats of bodily harm or force

Crime of violence

A conviction under this section of the statute is probably a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is a crime of violence under 18 U.S.C. § 16(a) because the offense must be carried out by threats or force. Carrying out the offense by force includes as an element the use of force. A conviction for threats is probably a crime of violence because it involves the threatened use of force. *See U.S.A. v. De la Fuente*, 353 F.3d 766 (9th Cir. 2003) (holding that mailing threatening communications is a crime of violence under 18 U.S.C. § 16(a) as a threatened use of force). Although the statute does not specify what types of threats it punishes, it is likely that the statute punishes the threatened use of force against the person of another. *See* analysis for Va. Code Ann. § 18.2-60 (threats).

A conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16(b). *See* analysis for Va. Code Ann. § 18.2-60 (threats).

Obstruction of justice

A conviction under this section is not necessarily an offense relating to obstruction of justice and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year. Not every offense punishable under this section of the statute qualifies as one of the offenses generally thought to come within the obstruction of justice offenses in Title 18 chapter 73 of the U.S. Code. *See Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999). It is possible to be convicted under this statute for obstruction of one's own arrest, not the obstruction of the judicial process. The BIA has reasoned that it is substantially unlikely that an offense of simply obstructing or hindering one's own arrest is an aggravated felony under 8 U.S.C. § 1101(a)(43)(S). *See Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). Therefore, it is necessary to consult to record of conviction to determine the offense for which the defendant was convicted.

(D) Misdemeanor obstruction through false statements

Fraud offense

A conviction under this section of the statute is a fraud offense because it involves fraud or deceit, and therefore will be an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds $10,000.

Obstruction of justice

A conviction under this section is probably an offense relating to obstruction of justice and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year. The offense qualifies as an obstruction of justice offense because it requires that the defendant make an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice. *See Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999); *see also Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) (holding that an accessory after the fact offense is an obstruction of justice offense under 8 U.S.C. § 1101(a)(43)(S) because the offense involves lying to an officer to prevent the arrest of another person).

18.2-478 Escape from jail or custody by force or violence without setting fire to jail

Elements

- person who is lawfully imprisoned in jail and not tried or sentenced on a criminal offense
- escapes from jail
- by force or violence
- other than by setting fire thereto

OR

- person who is lawfully in the custody of any police officer on a charge of a criminal offense
- escapes from such custody by force or violence

Crime involving moral turpitude

A conviction under this statute is a crime involving moral turpitude. There are several old BIA cases that hold that escape is not a crime involving moral turpitude when there is no requirement of intent and force. *See, e.g.*, *Matter of B*, 5 I&N Dec. 538 (BIA 1952); *Matter of J*, 4 I&N Dec. 512 (BIA 1951); *Matter of M*, 2 I&N Dec. 871 (BIA 1947); *Matter of Z*, 1 I&N Dec. 235 (BIA 1942). Because Va. Code Ann. § 18.2-478 expressly includes the use of force in escaping, a conviction under this statute is a crime involving moral turpitude.

Aggravated felony

Crime of violence

A conviction under this statute is a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The offense is a crime of violence under 18 U.S.C. § 16(a) because it has as an element the use, attempted use, or threatened use of physical force against the person or property. The statute specifically states that the defendant must escape from custody by force or violence. Therefore, the elements of this statute meet the definition of a crime of violence under 18 U.S.C. § 16(a).

Obstruction of justice

A conviction under this statute is probably an offense relating to obstruction of justice and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year. The defendant's escape would violate the court order authorizing his arrest and imprisonment. This offense is similar to at least one federal obstruction of justice statute. *See* 18 U.S.C. § 1509 (punishing obstruction of a court order by threats or force); *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999) (reasoning that an obstruction of justice offense is generally defined by those offenses punishable under Title 18 Chapter 73 of the U.S. Code).

18.2-479 Escape without force or violence or setting fire to jail

Elements
(A) class 1 misdemeanor
- person who is lawfully confined in jail or lawfully in custody of any court of officer thereof or any law-enforcement officer on a charge or conviction of a misdemeanor
- escapes
- otherwise than by force or violence or by setting fire to the jail

(B) class 6 felony
- same elements as (A), but person is confined on charge of felony

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude. There are several old cases that hold that escape is not a crime involving moral turpitude when there is no requirement of intent and force. *See, e.g., Matter of B*, 5 I&N Dec. 538 (BIA 1952); *Matter of J*, 4 I&N Dec. 512 (BIA 1951); *Matter of M*, 2 I&N Dec. 871 (BIA 1947); *Matter of Z*, 1 I&N Dec. 235 (BIA 1942). Because Va. Code Ann. § 18.2-479(B) expressly excepts the use of force in escaping, under these BIA cases, this Virginia offense is not a crime involving moral turpitude. For example, the BIA in *Matter of M* reasoned that as long as the statute did not require the use of force, threats or other violence to escape, it was not turpitudinous because merely escaping wasn't inherently evil, since it is the "basic, although wrong, desire of the human being for liberty of action and freedom from restraint."

However, there is a later decision where the Attorney General vacated the BIA's decision and determined that harboring or concealing a person who is under a warrant for arrest is a crime involving moral turpitude because it is an act that is contrary to justice and an act of baseness. *See Matter of Sloan*, 12 I&N Dec. 840 (BIA 1968). The BIA in that case had reasoned that because escape was not a crime involving moral turpitude, the offense of harboring of an escapee was not a crime involving moral turpitude. The Attorney General vacated this BIA decision with the broad sweeping language mentioned above about what is a crime involving moral turpitude; namely, that it is an act that is contrary to justice. Escape is contrary to justice, and therefore, based on the reasoning in *Matter of Sloan*, a conviction under this statute is probably a crime involving moral turpitude.

Aggravated felony

(A) Misdemeanor escape

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. This offense is a misdemeanor only and therefore must be analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b). The offense does not contain as an element the use, attempted use, or threatened use of physical force against the person or property of another. Rather, the statute specifically states that the defendant escapes

otherwise than by force or violence or by setting fire to the jail. Therefore, this offense is not a crime of violence.

Obstruction of justice

A conviction under this statute is probably not an offense relating to obstruction of justice under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year. A defendant, once detained on a conviction of a misdemeanor, obstructs the court order requiring his detention, yet not by force or violence. The offense therefore does not have the same elements as one of the federal obstruction of justice statutes. *See* 18 U.S.C. § 1509 (obstruction of court order by threats or force); *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999) (reasoning that an obstruction of justice offense is generally defined by those offenses punishable under Title 18 Chapter 73 of the U.S. Code). Therefore, a conviction under this statute is probably not an obstruction of justice offense.

(B) Felony escape

Crime of violence

A conviction under this statute is not a crime of violence under 18 U.S.C. § 16(a). *See* analysis for Va. Code Ann. § 18.2-479, misdemeanor escape.

A conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. *See U.S. v. Aragon*, 983 F.2d 1306 (4th Cir. 1993) (reasoning that assisting in the escape attempt of a prisoner is a crime of violence under 18 U.S.C. §16(b) because there is a substantial risk that force will be used if the defendant encounters a prison guard in the process of the escape). The Virginia offense specifically excepts the use of force or violence or setting fire to the jail as a means to escape; therefore, the Fourth Circuit's decision on a general escape statute in *Aragon* is not directly applicable. Under the Virginia statute, the defendant need not resort to force or violence, because that type of conduct in committing escape is specifically excluded from the statutory language. Therefore, there is no substantial risk that force will be used against the person or property of another if in most cases punished under the statute, the defendant escapes by non-forceful, non-violent means. For these reasons, a conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16(b).

Obstruction of justice

A conviction under this statute is probably not an offense relating to obstruction of justice under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year. A defendant, once detained on a conviction of a felony, obstructs the court order requiring his detention, yet not by force or violence. The offense therefore does not have the same elements as one of the federal obstruction of justice statutes. *See* 18 U.S.C. § 1509 (obstruction of court order by threats or force); *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999) (reasoning that an obstruction of justice offense is generally defined by those offenses punishable under Title 18 Chapter 73 of the U.S. Code). Therefore, a conviction under this statute is probably not an obstruction of justice offense.

18.2-479.1 Resisting lawful arrest

Elements

(A) intentionally preventing or attempting to prevent law-enforcement officer from lawfully arresting him
(B) intentionally = fleeing from officer when
(i) officer applies force to person, or
(ii) officer communicates the person that he is under arrest and
(a) officer has legal authority and immediate physical ability to arrest person and
(b) reasonable person who receives such communication knows or should know that he is not free to leave

Crime involving moral turpitude

(A) Intentionally preventing or attempting to prevent officer from arresting

A conviction under this section of the statute is probably not a crime involving moral turpitude. The Seventh Circuit has decided that a statute punishing aggravated fleeing from a law-enforcement officer is a crime involving moral turpitude. *See Mei v. Ashcroft*, 393 F.3d 737 (7th Cir. 2004). In *Mei*, the Seventh Circuit interpreted a statute that punished the willful failure or refusal to obey a police officer's order to stop. The Seventh Circuit reasoned that although the statute did not expressly contain a *mens rea* of willfulness, the statute contained a proxy for willfulness, since it punished a defendant for exceeding the speed limit by at least 21 miles per hour, which evidenced increased dangerousness warranting a heavier penalty. The court reasoned that the offense was a crime involving moral turpitude because it required the deliberate fleeing at high speed from an officer who, the fleer knows, wants him to stop. The court thus held that this "deliberate flouting of lawful authority and endangering the officer, other drivers, passengers, and pedestrians" was a crime involving moral turpitude.

The Virginia statute, like the statute interpreted in *Mei*, has a *mens rea* of intentional conduct. However, unlike the statute interpreted in *Mei*, the Virginia statute does not require that the person resist arrest by exceeding the speed limit by an excessive amount. Indeed, section (A) of the Virginia statute only punishes the prevention of a law enforcement officer from arresting; it does not punish fleeing from the officer. However, the Seventh Circuit determined that the offense was one involving moral turpitude because of the deliberate flouting of lawful authority. Despite the fact that this section requires a deliberate flouting of authority, it is probably not a crime involving moral turpitude.

(B) Intentionally fleeing from officer

A conviction under this section of the statute is probably a crime involving moral turpitude. *See Mei v. Ashcroft*, 393 F.3d 737 (7th Cir. 2004) (statute punishing the willful failure or refusal to stop by fleeing in a vehicle is a crime involving moral turpitude).

The Virginia statute, like the statute interpreted in *Mei*, has a *mens rea* of intentional conduct. However, unlike the statute interpreted in *Mei*, the Virginia statute does not require that the person resist arrest by exceeding the speed limit by an excessive amount. Indeed, the Virginia statute can be violated by running away rather than fleeing

in a car. However, the Seventh Circuit determined that the offense was one involving moral turpitude because of the deliberate flouting of lawful authority.

In addition, the Seventh Circuit in *Mei* found that such fleeing endangers the officer, other drivers, passengers, and pedestrians. The acts of a Virginia defendant resisting arrest could also endanger pedestrians or the officer even if the defendant is not in a car. One of the ways that a person can be convicted under this statute is by attempting or fleeing from the law-enforcement officer when the officer applies force to the defendant. This type of activity could endanger the life of the police officer because the officer is applying physical force and therefore the defendant risks endangering the officer or others nearby.

Even if the Virginia defendant could resist arrest in such a way that does not endanger the safety of others, the requirement that the defendant intentionally disobey a police officer by fleeing from the officer who is trying to arrest him may result in this offense being a crime involving moral turpitude. Therefore, a conviction under section (B) of this statute is probably a crime involving moral turpitude.

Aggravated felony

Crime of violence

A conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16 and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. The offense is a misdemeanor and therefore is analyzed under 18 U.S.C. § 16(a), not 18 U.S.C. § 16(b). The offense does not contain as an element the use, attempted use, or threatened use of physical force against the person or property of another as required by 18 U.S.C. § 16(a). Although the defendant may be convicted for fleeing when an officer applies force to him, that is not the same as the defendant using force against that officer. The act of fleeing itself is not an element that is the equivalent of using, attempting, or threatening to use physical force against the person or property of another.

Obstruction of justice

A conviction under this section is not an offense relating to obstruction of justice and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year. None of the offenses punishable under this statute qualifies as one of the offenses generally thought to come within the obstruction of justice offenses in Title 18 chapter 73 of the U.S. Code. *See Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999). It is possible to be convicted under this statute for obstruction of one's own arrest, not the obstruction of the judicial process. The BIA has reasoned that it is substantially unlikely that an offense of simply obstructing or hindering one's own arrest will be viewed as an aggravated felony under 8 U.S.C. § 1101(a)(43)(S). *See Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

46.2-817 Disregarding signal by law-enforcement officer to stop

Elements

(A)

- having received a visible or audible signal from any law-enforcement officer to bring his motor vehicle to a stop
- drives such motor vehicle in a willful and wanton disregard of such signal

OR

- attempts to escape or elude such law-enforcement officer

(B)

- having received a visible or audible signal from any law-enforcement officer to bring his motor vehicle to a stop
- drives such motor vehicle in a willful and wanton disregard of such signal
- so as to interfere with or endanger the operation of the law-enforcement vehicle or endanger a person

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude. The Seventh Circuit has decided that a statute for aggravated fleeing from a law-enforcement officer is a crime involving moral turpitude. *See Mei v. Ashcroft*, 393 F.3d 737 (7th Cir. 2004). In *Mei*, the Seventh Circuit interpreted a statute that punished the willful failure or refusal to obey a police officer's order to stop. The Seventh Circuit reasoned that although the statute did not expressly contain a *mens rea* of willfulness, the statute contained a proxy for willfulness, since it punished a defendant for exceeding the speed limit by at least 21 miles per hour, which evidenced increased dangerousness warranting a heavier penalty. The court reasoned that the offense was a crime involving moral turpitude because it required the deliberate fleeing at high speed from an officer who, the fleer knows, wants him to stop. The court thus held that this "deliberate flouting of lawful authority and endangering the officer, other drivers, passengers, and pedestrians" was a crime involving moral turpitude. *See id.*; *see also Knapik v. Ashcroft*, 384 F.3d 84 (3d Cir. 2004) (reckless endangerment is a crime involving moral turpitude because the statute punishes depravity, recklessness, and grave risk of death).

The Virginia statute, like the statute interpreted in *Mei*, has a *mens rea* of willful conduct. The level of intent for the Virginia statute is also higher than the level of intent found to be a crime involving moral turpitude by the Third Circuit in *Knapik*.

The Seventh Circuit in *Mei* also determined that the offense was one involving moral turpitude because of the deliberate flouting of lawful authority. In addition, the Seventh Circuit found that such fleeing endangers the officer, other drivers, passengers, and pedestrians. The Virginia statute requires that the defendant act in such a manner as to interfere with the operation of the law-enforcement vehicle or endanger a person. Despite the fact that section (A) of the statute does not require as an element that the defendant act in such a way as to endanger others, a conviction under this statute is probably a crime involving moral turpitude under either section because of the willful conduct proscribed by the statute and the deliberate flouting of authority.

Aggravated felony

(A) Misdemeanor failure to stop

Crime of violence

A conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. This offense is a misdemeanor and therefore is only analyzed under 18 U.S.C. § 16(a) to determine whether it is a crime of violence.

The offense is not likely to be a crime of violence because there is no element of the use, attempted use, or threatened use of physical force against the person or property of another. The defendant must deliberately drive his vehicle in a willful and wanton manner to elude a law-enforcement officer, but there it is not necessary that the defendant intentionally use force against this law-enforcement officer or anyone else. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). In *Leocal*, the Supreme Court held that a DUI offense was not a crime of violence under 18 U.S.C. § 16(a) because there was no element of use of force against the person or property of another, since a defendant could not accidentally use force against person or property. Although this Virginia statute contains a *mens rea*, unlike the DUI statute interpreted in *Leocal*, the intentional conduct is only with respect to the failure to obey the order to stop. To be convicted under this statute, a defendant need not intentionally use any force against any person or thing. Rather, a defendant need only intentionally fail to follow the officer's orders. Therefore, the offense is probably not a crime of violence.

(B) Felony failure to stop

Crime of violence – 18 U.S.C. § 16(a)

A conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16 and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence imposed is at least one year. A conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16(a) because there is no use, attempted use, or threatened use of physical force against the person or property of another. The statute punishes driving in a willful and wanton disregard so as to endanger a law-enforcement vehicle or a person. However, the mere endangerment alone is not enough to amount to the use or threatened use of force. There is no element of the intentional use of force in order to endanger property or person. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004) (holding that a driving offense was not a crime of violence under 18 U.S.C. § 16(a) because there was no element of use of force against the person or property of another since it is impossible to accidentally "use" force against someone or something).

Crime of violence – 18 U.S.C. § 16(b)

A conviction under this statute is probably not a crime of violence under 18 U.S.C. § 16(b) because the offense is not such that there is a substantial risk that force will be used against the person or property of another. To be convicted under this statute, the defendant must act with willful and wanton disregard and subsequently drive his vehicle in a manner that endangers either property or person. There is no risk of using force; rather, there is only risk of resulting injury to person or property as a result of the driving. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005). In *Leocal*, the Supreme Court held that a DUI offense that had as an element the causation of serious bodily injury was not a crime of violence under 18

U.S.C. § 16(b) because the risk under 18 U.S.C. § 16(b) is the risk of using force, not the risk of resulting physical injury. In *Bejarano*, the Fourth Circuit held that involuntary manslaughter was not a crime of violence under 18 U.S.C. § 16(b) because there was no risk of using force; rather, there was only risk that the defendant's acts would cause injury. By this same reasoning, a conviction under this section of the statute is not a crime of violence because the offense is not one that by its nature involves the substantial risk that force will be used against the person or property of another as required by 18 U.S.C. § 16(b).

Obstruction of justice

A conviction under this statute is not an offense relating to obstruction of justice and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(S) if the sentence imposed is at least one year. None of the offenses punishable under this statute qualifies as one of the offenses generally thought to come within the obstruction of justice offenses in Title 18 chapter 73 of the U.S. Code. *See Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999). It is possible to be convicted under this statute for obstruction of one's own arrest, not the obstruction of the judicial process. The BIA has reasoned that it is substantially unlikely that an offense of simply obstructing or hindering one's own arrest will is an aggravated felony under 8 U.S.C. § 1101(a)(43)(S). *See Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

4.1-322 Possession or consumption of alcoholic beverages by interdicted persons

Elements

- a person who has been interdicted pursuant to Va. Code Ann. § 4.1-333 (prohibiting sale of alcohol to person who has been convicted of DUI or has shown himself to be an habitual drunkard); Va. Code Ann. § 4.1-334 (prohibiting sale of alcohol to person who has been found guilty of illegal manufacture, possession, transportation or sale of alcohol);
- possesses alcohol OR is drunk in public under Va. Code Ann. § 18.2-388 (drunk in public)

Crime involving moral turpitude

A conviction under this statute is not a crime involving moral turpitude because the offense is a regulatory offense and requires no *mens rea*. *See, e.g., Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999).

The BIA has found that driving while under the influence is a crime involving moral turpitude when the statute punished DUI on a suspended license due to a prior DUI. *See Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999). In *Matter of Lopez-Meza*, the BIA interpreted a statute that punished aggravated DUI, where the offender "knowingly" drove under the influence with a suspended, canceled, revoked, or refused license. The reasoning in that decision will most likely not apply to Va. Code Ann. § 4.1-322 because there is no "knowing" component of the statute. In addition, the Virginia statute does not punish DUI on a suspended license, but rather punishes a defendant for possessing or consuming alcohol, or being drunk in public when the person is prohibited

from consuming alcohol due to certain prior convictions. For these reasons, a conviction under this statute is not a crime involving moral turpitude.

Aggravated felony

A conviction under this statute is not an aggravated felony because the elements of the offense do not match the elements of any aggravated felony under 8 U.S.C. § 1101(a)(43).