

CRIMES AGAINST THE PERSON

18.2-32 First and second degree murder

Elements

- killing of another
- by:
 - o poison, lying in wait, imprisonment, starving, OR
 - o by any willful, deliberate, and premeditated killing, OR
 - o 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 conviction under this statute does not meet the definition 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 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. § 18.2-41 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 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 partly 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 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 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:
 - o character or
 - o person or
 - o property of another person
 - o or accuse him of any offense
 - o 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. § 16(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. *See 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-* interpreted 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 violation 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 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 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).

Waiting in home for protected person to arrive

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 or 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, cunnilingus, 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 offenses 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).