

**VBBA JDR Committee**  
**BENCH BAR CONFERENCE JUNE 22, 2017**  
**12:00-1:00 p.m.**  
**BREAK-OUT SECTION**  
**THIRD PARTY VISITATION IN VIRGINIA: OVERVIEW & SPECIAL**  
**CONSIDERATIONS**

Panel Participants:

The Hon. Deborah V. Bryan  
The Hon. Tanya Bullock  
Christianna Dougherty-Cunningham, Associate City Attorney  
Cheshire ('Anson Eveleigh, Esq.  
Bretta Lewis, Esq.  
Brandon Zeigler, Esq.

Topics:

- 1.) Brief Overview of the Law: *Troxel, Williams, Dotson, and more* \*\*Brandon Zeigler, Esq.
- 2.) Square Pegs - Round Holes: Cases that Don't Quite Fit  
\*\*Cheshire ('Anson Eveleigh, Esq.  
\*\*Christianna Dougherty-Cunningham, Associate City Attorney
- 3.) The GAL's View: Balancing Your Obligations as a GAL to To Promote the Best Interests of your Client in the Face Of a Different legal Standard  
\*\*Bretta Lewis, Esq.
- 4.) View From the Bench  
\*\* The Hon. Deborah V. Bryan  
The Hon. Tanya Bullock

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**VBBA GDC Committee**  
**BENCH BAR CONFERENCE JUNE 22, 2017**  
**BREAK-OUT SECTION**  
**1:05 to 2:05 PM**

"Immigration and the General District Court"

Panel Discussion— Featuring Chief Judge Gene Woolard and "Rob" Robertson with Kathryn Byler as moderator

Judge Woolard, Chief Judge of the Virginia Beach General District Court

- obtaining interpreters and translators; and
- specific dealing with immigrants before the GDC.

Rob Robertson, Esq.

- Presenting and addressing- recent changes under the current administration regarding dealing with immigration issues within the courts;
- Focusing on duties owed to clients; and

Cocktail Hour and Heavy Hors d'Oeuvres at Crocs Immediately Following the Seminar

- Traffic and misdemeanors triggering immigration issues as it pertains to current times.

Q & A- from participant attorneys directed towards Judge Woolard and Rob Robertson, Esq.

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**BENCH BAR CONFERENCE JUNE 22, 2017  
BREAK-OUT SECTION  
2:10 – 3:10**

**SANCTIONS, ATTORNEY CONDUCT, AND THE TENSION BETWEEN ETHICAL  
RESPONSIBILITIES AND PROFESSIONAL ASPIRATIONS**

- PANEL DISCUSSION – Featuring the Honorable Judge Stephen Mahan
- Rich Cromwell as moderator

Judge Mahan

Sanctions in connection with discovery, motions to compel, depositions, and in trial in light of Rule 4:12 and Ragland v. Soggin, 291 Va. 282 (2016)

\*CLE Materials to be distributed electronically and utilized during CLE. Questions and Answers from participants to Judge Mahan

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**VIRGINIA BEACH BAR ASSOCIATION LEGISLATIVE UPDATE**

June 22, 2017 3:15-5:15

2017 Bills of Interest

**Passed or Considered by the 2017 Session of the General Assembly of Virginia**

Legislative Update Panel

The Honorable Jason Miyares

The Honorable Gregory D. Habeeb

Materials Provided By and With The Permission Of:

Virginia Trial Lawyers Association



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Cocktail Hour and Heavy Hors d'Oeuvres at Crocs Immediately Following the Seminar

VBBA JDR Committee

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# BRIEF OVERVIEW OF THE LAW

## 1- Start with the statute

### § 20-124.2. Court-ordered custody and visitation arrangements

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- **B.** In determining custody, the court shall give primary consideration to the best interests of the child. The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. As between the parents, there shall be no presumption or inference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to *any other person with a legitimate interest*. The court may award joint custody or sole custody.

- § 20-124.1. Definitions  
As used in this chapter:

- "*Person with a legitimate interest*" shall be broadly construed and includes, but is not limited to, grandparents, step-grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is otherwise properly before the court. The term shall be broadly construed to accommodate the best interest of the child. A party with a legitimate interest shall not include any person (i) whose parental rights have been terminated by court order, either voluntarily or involuntarily, (ii) whose interest in the child derives from or through a person whose parental rights have been terminated, either voluntarily or involuntarily, including but not limited to grandparents, stepparents, former stepparents, blood relatives and family members, if the child subsequently has been legally adopted, except where a final order of adoption is entered pursuant to § 63.2-1241, or (iii) who has been convicted of a violation of subsection A of § 18.2-61, § 18.2-63, subsection B of § 18.2-366, or an equivalent offense of another state, the United States, or any foreign jurisdiction, when the child who is the subject of the petition was conceived as a result of such violation.

## 2- So----- I'm a person with a legitimate interest- so I get visitation, *right?*

A two-stage process is involved when Virginia courts consider the comparative rights of parents and third parties in most visitation disputes. The current controlling case is *Williams v. Williams*, 256 Va. 19 (1998), where the Virginia Supreme Court held that, before visitation by third parties can be ordered over the objection of a child's parents, the court must find actual harm to the child's health or welfare without the visitation. Consideration of the child's best interests in establishing a visitation arrangement occurs only *after* a court finds clear and convincing evidence that actual harm to the child would occur if third party



visitation were to be denied. The *Williams* actual harm standard applies when both parents are unified in their opposition to a third party visitation claim.

The Supreme Court of the United States followed suit in 2000, in *Troxel v. Granville*, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000). *Troxel* was a constitutional challenge to a Washington statute that allowed the court to grant visitation to interested parties where the same is in the best interests of the child, regardless of any change in circumstances or the positions of the parents. The Court ultimately struck that portion of the Washington statute, finding the same an infringement on the due process rights of parents. However, it is important to remember that the United States Supreme Court's decision in *Troxel* is limited to the specific due process infirmities of the Washington statute; it left to the state courts the task of developing the law to be applied in resolving child custody and visitation disputes between a parent and third party. That said, the overarching analytical principle that derives from *Troxel* and its progeny can be identified as focused on the need to determine and apply the correct burden of proof in light of the presumption that a fit parent acts in the best interest of the child.

Again, Virginia already had cases on the books which addressed when the scenario in *Williams* did not apply- thus establishing a framework for Virginia precedent. In the 1999 case of *Dotson v. Hylton*, for example, the Virginia Court of Appeals ruled that when only one parent objected to grandparents' visitation and the other parent requested it, the grandparents were not required to establish actual harm, and instead only needed to introduce clear and convincing evidence that visitation will be consistent with their grandchild's best interests. In circumstances where only one parent consents to the third party visitation, however, the burden on the party seeking visitation is reduced and the third party is only required to establish by clear and convincing evidence that the child's best interests will be served by a court award of visitation rights. See also *Yopp v. Hodges*, 43 Va. App. 427, 598 S.E.2d 760, 2004.

## \*\* A Few But Very Important Reported Decisions

*Griffin v. Griffin*, 41 Va. App. 77 (2003): mother had affair and conceived a child with a man other than her husband. The husband established a relationship with the child and continued to have contact with the child post separation with the mother. The husband sought visitation rights and mother objection. The trial court granted the husband's petition and the Court of Appeals reverse. "Absent clear and convince evidence of actual harm, the constitutional rights of the biological parents take precedence over the best interests of the child."

*Surles v. Mayer*, 48 Va. App. 146 (2006): actual harm standard barred visitation of a step-father post-divorce from the biological mother despite years of being the child's father figure.

*O'Rourke v. Vuturo*, 49 App. 139 (2006): Similar to *Griffin* but actual harm standard met. Mother had a child with a man out of wedlock. Husband agreed to raise the child as his own and was named on the birth certificate. Husband and wife divorce five years later. Expert testimony of five witnesses was heard. The court found by clear and convincing evidence that the child would suffer actual harm if Husband was denied visitation. The Court Appeals affirmed.

*Rice v. Rice*, 49 Va. App. 192 (2006): The Court of Appeals affirmed the trial court's ruling allowing mother to make the best interests determination and denying the paternal grandparents visitation with their grandchild, who was not allowed to have contact with her father (their son) as a result of sexual abuse by him. The Court did not address the actual harm standard, finding that the lesser best interests standard had not even been met.

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**NOTES:**

# SQUARE PEG ROUND HOLE SYNDROME

## 1.) Virginia's Rejection of the "De Facto Parent" Doctrine/ The Same Sex Marriage Problem

The doctrine of *de facto* or psychological parent has been utilized in other jurisdictions to rebut the Troxel presumption in favor of biological parents. The doctrine argues that where a biological parent has actively encouraged a parent-child relationship with a cohabiting partner who assumed parental responsibilities for a length of time sufficient to establish a bond with the child, see, e.g., Holtzman v. ; Knott (In re H.S.H.-K.), 193 Wis. 2d 649, 533 N.W.2d 419, 435-36 (Wis. 1995), the partner may assert the Fourteenth Amendment rights of a parent set forth in Troxel and Williams and is entitled to invoke the more favorable standard when seeking visitation. In recent years, many states have enacted legislation codifying this principal (ie. Delaware).

Virginia has rejected this doctrine. *See Stadter v. Siperko*, 52 Va. App. 81 (2008). *Stadter* dealt with a same-sex couple, who had conceived the child through IVF. The non-biological parent was an active participant in the child's life, carried the child on her insurance, and post-separation, paid child support. The *Stadter* court held that because "there already exists in Virginia a legal framework for the protection of the interests of a child who might suffer actual harm when separated from a person with a legitimate interest, as well as a mechanism to litigate fully the concerns of the person seeking visitation, we need not rewrite Virginia law to recognize the *de facto* parent doctrine in visitation." Citing Williams, at 92, 661 S.E.2d at 499; *cf. Griffin*, 41 Va. App. at 86, 581 S.E.2d at 903 (applying the *Williams* actual harm test where the husband erroneously thought he was the biological father, treated the child as his own, and participated in the child's early development for one and a half years).

### \*\*Damon v. York? [Virginia Beach Case]

*Damon v. York*, 54 Va. App. 544 (2009): When the child was 5 years old, Mother her had her girlfriend move in with them; the couple was subsequently married in Canada. The child was ultimately placed with the father and maternal grandmother after a founded DSS case. The mother and the girlfriend ended their relationship but the girlfriend sought visitation with the child after having ceased contact with the child for almost two years. The Court found the girlfield not be a person of legitimate interest. NOTE: The Court in *Damon* cited the Mother's marriage to the girlfriend as "void" as given the date of the opinion, same sex marriage was not yet recognized in Virginia. *Today, the ruling remains good law- but if heard today- would likely be affirmed under the actual harm standard.*

## 2.) Fitness of a Parent and the *Dotson* Standard; applying actual harm in the face of one consenting and one non-consenting parent?

The overarching analytical principle that one can derive from *Troxel* and its progeny can be identified *as focused on the need to determine and apply the correct burden of proof in light of the presumption that a fit parent acts in the best interest of the child.*

So- where both parents are fit.....

- Both object = actual harm (*Williams*)
- One objects = best interests (*Dotson*)

So- what if one parent is not fit?

- 1.) Who and what determines fitness? Is that a separate proceeding?
- 2.) If a parent is determined unfit, which standard do you apply?

### ***An Argument to Ponder...***

The statutes and extensive body of case law in Virginia set forth the very limited circumstances wherein the Court may award visitation to a third party. In all researched performed and the cases reviewed, including the landmark case, *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054 (2000), the courts are repeatedly presented with two fit parents. No cases could be found in which the court applied the best interest standard in a case where one parent was deemed unfit.

In *Troxel, supra*, the United States Supreme Court was presented with circumstances where one parent requested that visitation be accorded to a third party, and the other parent objected to the request, but both parents were fit. The *Troxel* Court found that both parents were fit; the key aspect of the case because there is a presumption that fit parents act in the best interest of their children. *Troxel* at 68. The Court stated that “so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.” *Id.* at 68-69. The statutory Best Interests Test “unconstitutionally infringes on the fundamental parental right if it authorizes a court to ‘disregard and overturn any decision by a fit custodial parent’ concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge’s determination of the child’s best interest.” *Griffin v. Griffin*, 41 Va. App. 77, 82, 581 S.E.2d 899, 901-902 (2003) (citing *Troxel* at 67) (emphasis added).

Virginia followed the protections afforded in the *Troxel* case in *Williams v. Williams*, 256 Va. 19, 501 S.E.2d 417 (1998). In *Williams*, the grandparents filed a petition seeking visitation with their

granddaughter and both parents objected. The Virginia Supreme Court expressly found the parents to be “mentally, physically, and morally fit, and were capable of meeting their child’s financial, educational, moral, and social needs.” *Williams* at 20. The Court held that before visitation can be ordered over the objection of the child’s parents, a court must first find actual harm to the child’s health or welfare without such visitation. “Thus, when **fit parents** object to non-parental visitation, a trial court should apply the best interests’ standard in determining visitation only after it finds harm if visitation is not ordered.” *Griffin v. Griffin*, 41 Va. App. 77, 83, 581 S.E.2d 899, 900 (2003) (citing *Williams*, 256 Va. at 22) (emphasis added).

In *Dotson v. Hylton*, 29 Va. App. 635, 513 S.E.2d 901 (1999), the Court was again presented with two fit parents, notwithstanding the fact that the father in *Dotson* was sentenced to ten years in the penitentiary. Prior to being sentenced to prison, the father had joint legal custody and reasonable visitation pursuant to a divorce decree entered three years prior. Once he was sentenced, the father did not object to the mother obtaining full custody, but he asked for continued visitation and visitation for his mother (paternal grandmother). The mother objected to the continued visitation to father and to the paternal grandmother. The trial court found that visitation to the father was in the child’s best interest and permitted visitation outside the jail and by letters and telephone calls once he was in the penitentiary. The trial court did not find the father to be unfit as the court found that the “father had visitation before he was jailed and the court felt it should continue when he was not in the jail.” *Id.* at 640. The court further granted the grandmother visitation once a month, applying the Best Interest Standard. The Court held that “[w]hen only one parent objects to a grandparent’s visitation and the other parent requests it, the trial Court is not required to follow the standard set forth in *Williams*.” *Dotson*, 29 Va. App. at 639 (emphasis added). The Court specifically found that a denial of visitation to the father was not in the child’s best interest, and the mother in *Dotson* never asserted that the father was unfit to participate in parental decision making.

*Yopp v. Hodges*, 43 Va. App. 427, 598 S.E.2d 760 (2004) for the same reasons as *Dotson*, would also not directly apply where fitness of one parent was in question. In *Yopp*, the maternal grandparents petitioned for visitation with the grandchild. The mother opposed the visitation and the father requested it. The Court explicitly found that “[t]he mother did not claim, nor does any evidence establish, that the biological father is an ‘unfit’ parent.” *Yopp* at 438. The trial court granted visitation to the maternal

grandparents applying the Best Interest Standard. The mother appealed arguing the trial court should have followed *Williams*. The Court of Appeals affirmed the trial court's application of the Best Interest Standard. The *Yopp* Court stated:

The standard enunciated in *Dotson* applies here because father expressly supported the maternal grandparents' request for visitation with the child and the mother has never asserted, and does not now assert, that father is an unfit parent who should be deemed legally incapable of participating in parental decision making. Custody and visitation disputes **between two fit** parents involve one parent's fundamental right pitted against the other parent's fundamental right. The discretion afforded trial courts under the best-interests test, Va. Code §20-124.3, reflects a finely balanced judicial response to this parental deadlock.

*Yopp v. Hodges*, 43 Va. App. 427, 438, 598 S.E.2d 760, 765-66 (2004) (citing *Griffin*, 41 Va. App. at 83, 581 S.E. 2d at 902) (emphasis added).

Where one parent asserts that the other is an unfit parent who is legally incapable of participating in parental decision making. Should the Court agree, once such a determination is made, the fact that the unfit parent may want a third party to have contact with his children should bear no weight on this Court's decision.

*Or should it?*

### 3.) Third Party Visitation of Children in Foster Care

In many cases, parents of children in care still have their parental rights. However- they are no longer custodians and no longer acting "*in loco parentis*". Typically, the courts leave third party visitation up to the Agency's discretion as the acting "parent" and defer visitation petitions until the end of the proceedings. However, in some cases, parties press the issue. At that juncture, the courts typically apply the best interests standard. Is that because no parent objects, or is it because the court *sui sponte* deems the parents unfit? What about children in care not for abuse and neglect (chins, delinquency, etc.) If a parent in one of those cases objects to grandma's request for visitation, should the actual harm standard apply? There are no cases on point in Virginia discussing this issue. However- here are some other things to ponder:

1.) Nothing in the statutes curtails the court's jurisdiction to hear a custody case of a child in care. (While the foster care states are more specifics, and require more findings to be made to satisfy their requirements, Virginia Code § 16.1-241 makes it perfectly clear that the trial court has jurisdiction over custody matters. . "when read in conjunction with the other pertinent statues, Virginia Code § 16.1-281 simply requires that when the custody of an abused and neglected child is at issue, the trial court must make specific written findings of fact, designed to protect the child from the dangers for which he or she was removed from the home. *See* Virginia Code §§ 16.1-281, 16.1-282, 16.1-282.1. In other words, the trial court is free to decide the issue of custody as it sees fit, so long as it incorporates into the record a finding that [states

the requirements of the foster care statutes.” *Lynchburg DSS v. Cook*, 276 Va. 465 (2008). Thus, it follows that the court’s authority to hear a visitation petition of a child in care as well is not necessarily curtailed - though there are no cases on point.)

2.) By statute, a “final order of adoption” divests any person whose interest in the child derives from or through the birth parent, including but not limited to grandparents, of all legal rights and obligation in respect to the child including the right to petition any court for visitation with the child. *See* Va. Code Ann. § 63.2-1215. *Harvey v. Flockhart*, 65 Va. App. 131 (2015). Since *Flockhart*, JDR Courts have generally held this to be true of relatives whose standing would be derivative of a parent whose rights have been terminated and all appeals exhausted, even if a final order of adoption has not been issued.

3.) A foster parent is not a person of legitimate interest and had no standing to file a petition for visitation; a foster parent’s interest in the child is derivative of a contract with the local department. *In Re: C*, 2015 Va. Cir. (unpub.) Lexis 183 (Rockingham County Cir. 2015).

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### SCENARIOS:

\*\* What standard should apply?

- 1.) John Doe is presently incarcerated serving 50 years for child pornography and related offenses. Should John even be released, he is to have no contact with minors, even his own children. John Doe has a biological child with Jane. John wants Jane to let his mother visit with their child. Jane objects.
- 2.) Larry Smith is incarcerated for the murder of his wife Lorraine. Larry and Lorraine had two children, who are presently in the custody of Lorraine’s parents by court order after a contested trial between both set of grandparents. Larry’s mother wants to visit with the children; Lorraine’s parents object.
- 3.) Steven and Rob have been married for four years; Steve and Rob used a surrogate to have a child using Steven’s biological material. They both work full time and the child is in day care during the day. They spend equal time with the child. When the child is three, they divorce. They Rob files for visitation.
- 4.) Ryan and Sarah are chronic heroin abusers who have a child in common. After finding Ryan passed out on the floor, Sarah calls 911. EMTs arrive to revive and take Ryan to the hospital, but seeing the track marks on Sarah’s arms and observing that she was slurring her speech, they take her as well and call cps. Neither parent can make a plan for the child; child comes into care. Sarah’s mother petitions for visitation. The Agency has no objection because Grandma has been appropriate and passed a drug screen and background checks. Sarah objects.

Notes:

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## The GAL's View: Balancing Your Obligations as a GAL to Promote the Best Interests of your Client in the Face Of a Different Legal Standard

**Introduction** - As a GAL, the “best interests” analysis is usually part and parcel of our reports and recommendations, but when a different standard applies, it may be difficult to know what information to include in the reports or how to decide what recommendations to make. It may be difficult to know what facts to rely upon when analyzing how they apply to a standard other than a “best interests” standard.

For instance, when parental rights are at issue in a third-party custody or visitation case, the GAL may be in a different position to understand all sides of the story than any of the other attorneys, because often, the GAL may have more open communication with the parents than DHS, may have more access to the foster parents and child than the parents' attorneys, and may be better able to assess independently whether the circumstances that led to removal have been substantially remedied.

Additionally, when grandparents or other (third) parties seek custody or visitation in a civil case where DHS is not involved, the GAL has an opportunity to obtain medical, counseling, and other records, and to gather information from all relevant points of view. The GAL is also able to observe the child interacting with the litigants, which is particularly helpful to the Court when there is no social worker or CASA to provide this information. Attorneys for the parents will not typically have seen the child, and typically cannot interview the other parties due to ethical constraints, so GALs can and should be



instrumental in providing the Court with information or a perspective that is unavailable to the other attorneys.

The goal of the following outline is to assist GALs in understanding how to conduct the most helpful investigation possible in cases where different standards apply. It may also be useful for counsel for the parents to understand what facts may be most useful in the GAL's investigation and how the GAL's perspective may differ from the attorneys' in light of the case law and applicable standards.

## 1. Fitness of Parents -

The "physical and mental condition of each parent" is one of the factors a GAL must weigh when making a recommendation, but when does a mental or physical condition render a parent unfit, and how can the GAL best investigate whether the facts indicate that the parent is, in fact, unfit? Because the objection of a "fit parent" is part of the test to determine which standard to apply, how does a GAL best assist the Court in making a determination of parental fitness?

There is no actual legal definition of "unfitness," so, as with many legal issues, the facts of each case will drive a determination of parental fitness. For the most part, the definition of "unfit" will be similar in DHS cases and civil custody cases, but if DHS is involved, a finding of physical or emotional abuse, a protective order, removal of a prior child, termination of parental rights with respect to a prior child or prior removal of the subject child due to imminent danger created by the subject parent, will be important considerations to discuss in any recommendation to the Court regarding whether a parent is fit.

Additionally, an important difference between DHS and non-DHS cases involves whether a third party is a relative or a non-relative. Although DHS gives preferential treatment to parties seeking to be considered as placement options to relatives, in civil cases where a third party is seeking custody or visitation, there is no distinction between a relative and non-relative<sup>1</sup>.

A. Mental Health - Experts seem to agree that a mental health diagnosis is not a *de facto* determination of unfitness, but that some conditions are severe enough that treatment of the condition will be a critical factor in determining whether a parent is fit.

From the GAL perspective, mental health records and a history of treatment or lack thereof will be important to review to determine if the parent is addressing any serious

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<sup>1</sup> 2001--- In *Switzer v. Smith*, the Court of Appeals held that all non-parents, whether relatives or not, are treated equally in custody cases. *Switzer* involved a custody claim between the paternal grandparents and a couple who was not biologically related to the child but nevertheless was found to have a legitimate interest, as they had been raising the child ever since the mother asked them to care for the child while she underwent surgery. Va. Ct. of Appeals, Unpublished, No. 0779-00-3.

mental health conditions. Bipolar disorder, personality disorders, schizophrenia, or other psychological issues may be serious enough to render a parent unfit, or may be treated successfully enough to allow a parent to contribute and participate in a positive way to a child's upbringing. Reporting information to the Court regarding diagnoses and treatment that a parent has received may be very helpful to the Court in making a determination of parental fitness.

If there are allegations that a parent is unfit, or there are allegations that a parent has mental health issues that create an obstacle to parenting, a GAL may be wise to ask for an independent psychological evaluation or parenting capacity evaluation of the parent. If DHS is involved, funding may be available, or there may be prior evaluations available for review and submission to the Court. If DHS is not involved, funding may be an issue if the parents do not have adequate resources.

B. Substance Abuse Issues - As with a mental health diagnosis (many times, untreated mental health issues and substance abuse are comorbid conditions), a substance abuse problem may not be an absolute bar to parenting, but a parent who continually abuses substances, engages in illegal/dangerous behavior, or has unresolved legal issues as a result of pending charges, or outstanding warrants may not be judged to be fit either temporarily or on a permanent basis if the condition is not addressed in a meaningful way.

A GAL can be instrumental in reviewing records, requesting that the Court order the parties to submit to drug testing to determine compliance with treatment, or asking the parties to do so voluntarily can be important tools at the GAL's disposal. As a cautionary note: it is important for a GAL not to overstep his or her professional qualifications by offering opinions that are not clearly indicated in medical or mental health records or to offer his or her "lay diagnosis" based on personal observations or the GAL's interpretation of therapy notes. If funding is available, having a qualified expert review the records would be optimal.

Probation officers and service or treatment providers are often excellent resources for a GAL who is attempting to ascertain a parent's commitment to treatment and rehabilitation. Providing information gathered from these sources may aid a Court in making a determination of fitness and to assess the likelihood that the parent will be able to create a fit, safe, and appropriate environment for the child.

Even with problematic past issues (mental health/substance abuse/criminal convictions), past abuse of the child, or prior failure to exercise parenting time, many cases support the concept that parents may still be presumed fit if there are circumstances that show that the parent has remedied or addressed the past issues. Employment, current involvement in the child's life, a stable residence, and participation in services or therapy can sway a court in determining that a parent is fit despite a history of problematic behavior<sup>2</sup>.

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<sup>2</sup> In *Bonds v. Anderson*, the Court of Appeals held that the trial court did not err in finding that, despite grandmother's testimony that father had violent tendencies, had personally and

C. Domestic Violence - The recurrence of domestic violence can be a major factor in a determination of the fitness of the parents and the home environment. When making a determination of fitness and/or deciding whether a third party has overcome a presumption afforded to a parent, the court may weigh the occurrence of violent acts and the parent's ability or inability to remedy the situation<sup>3</sup>.

D. Incarceration/Unavailability - Although abandonment is a factor in determining whether the parental presumption may be overcome, it is unclear whether incarceration or unavailability due to incarceration renders a parent unfit. Case law is clear that some parents who are incarcerated are not necessarily unfit if the child has regular, positive contact with the parent, and the parent has a reasonable chance to resume contact with the child in an appropriate way once he or she is released.

As a GAL, many cases arise in which it is necessary to make a recommendation regarding contact with an incarcerated parent. In most cases, if the custodial parent or other guardian is willing to take the child to visit the incarcerated parent, it is possible to make a recommendation to allow the contact, however, if the person who has custody of the child objects or opines that the contact is harmful, a GAL should usually not recommend forcing this contact.

E. Poor Judgment/Loyalty to Abuser - Finding a parent unfit based on poor judgment is even more of a grey area than the other issues discussed here. It is difficult to delineate when poor judgment crosses over into being so poor that it is a bar to parenting. For example, a neglectful, overly permissive parent who exhibits repeated "lapses in judgment" will not necessarily be found to be unfit<sup>4</sup>, but a parent who

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financially neglected the child since he and the child's mother stopped dating, and was cohabiting with a woman to whom he was not yet married, grandmother did not provide sufficient evidence to overcome the natural parent-presumption of father. Father's evidence showed that he had obtained employment in another state, was pursuing an education, and had been regularly involved in the child's care and support since the death of the child's mother. *Bonds v. Anderson*, Va. Ct. of Appeals, Unpublished, No. 2445-95-1 (1996)

<sup>3</sup> In *Switzer* (supra), the Court noted that the father and grandparents engaged in violent altercations in the home and that although the father had attended anger management, he had also engaged in violent acts against his parents (the petitioners) during and after his participation in the anger management classes. The court found that father "has deep-seated and complex mental and emotional problems which cannot be resolved by a mere anger management course." The court further stated that father "lacks the ability to control his conduct" and "to care for a three-year-old child."

<sup>4</sup> In *Gibson v. Kappel*, an Appeal from a trial court's award of custody to grandparents over the objection of the biological parents, the Court of Appeals affirmed the trial court's conclusion that the mother was not unfit despite the fact that the court "concluded that mother demonstrated significant lapses in judgment, abdicated day-to-day child rearing responsibilities to the grandparents, failed to address the child's physical and emotional needs over the years, and that placing the child with mother would cause further harm ..."

continues to show poor judgment, remains loyal to an abusive partner, and who fails to comply with court orders or avail him or herself of services may be found to be unfit.<sup>5</sup>

## 2. Legitimate Interests - Relative/Non-Relative/Fictive Kin

As discussed above, the Court does not favor relatives over non-relatives in non-DHS cases involving custody. A “legitimate interest” is a legitimate interest regardless of biological relationships. Many times, however, particularly in removal cases, the family relationships are so convoluted that it is not possible to ascertain whether the party seeking custody is related to the child or not. Many families consider people to be “aunts” or “cousins” based on having known or lived with or in close proximity to the person for a long period of time. As a GAL, particularly when dealing with a DHS matter, it is important to ascertain if the person is a relative or is “fictive kin.”

In a civil matter, this distinction is not as important as the relationship between the party seeking custody and the child. In many cases, the child will consider a person to be a relative and will be bonded with the person even if there is no blood relation. Separating the child from a fictive “aunt” or “granny” may cause actual harm as discussed herein just as readily as separating the child from a blood relative if the party has cared for the child or provided nurturing and stability in a way that the family members cannot.

## 3. **Actual Harm Standard**

### A. Facts to Explore

A GAL in a civil case is in a unique position to assess actual harm to a child. Because the GAL is able to interview the child, obtain the child’s mental health, counseling, or medical records, and because the GAL is able to access information that the other parties’ counsel may not be able to access, it is particularly important for the GAL to examine whether the child will be harmed if the child is denied contact with a third party

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The Court in Gibson also stated that the father was not unfit despite the evidence presented that he had left the child in the care of his girlfriend “Crystal,” after he became aware that Crystal was a regular user of crack cocaine. The Court did not find these parents to be unfit but noted that their lapses in judgment and abdication of parental responsibilities were special circumstances. *Va. Ct. of Appeals, Unpublished, No. 0180-11-4*

<sup>5</sup> In *Nicklaus v. Strong*, the Court of Appeals held that the trial court did not err in finding that mother’s abuse of the child, evidence suggesting that mother’s current husband had sexually and physically abused the child, mother and current husband’s failure to abide by court orders to obtain counseling, and mother’s voluntarily relinquishing of custody to her sister-in-law for one year constituted unfitness and special facts and circumstances sufficient to overcome the natural parent presumption otherwise available to the child’s mother. *Va. Ct. of Appeals, Unpublished, No. 0076-95-2*

petitioner or, in the alternative, if the child is placed with a neglectful or otherwise inappropriate parent who may not be found to be unfit.

B. Witnesses to Interview

1. Therapist/Counselor

If the child has a counselor, information about the child's emotional functioning when the child is with the third party versus when the child is with the parent may be critical. In many cases, a child will be developmentally or emotionally hindered by his or her custodial situation. If a child shows signs of failure to develop age-appropriate skills or fails to meet milestones when he or she is with one caregiver, but development speeds up and becomes age-appropriate when the child is placed elsewhere or spends time with the third party, a GAL may be able to gather this crucial information from the child's therapist or counselor and provide it to the court when the actual harm standard is discussed.

2. School Personnel

As with the child's mental healthcare providers, school personnel may be able to gauge whether a child's intellectual or social development has changed when he or she is in the consistent care of one party or the other. Many children are evaluated for services and thought to have intellectual disabilities only to find that when they are removed from a neglectful or hindering environment and placed in an environment that is more supportive of development, they are able to perform tasks at or above grade-level. This information can be gathered by the GAL and provided to the Court and is invaluable in determining an actual harm standard.

3. Medical Care providers/Pediatrician/Dental Records

As discussed above, a GAL is able to access medical records that can show if a child has received appropriate care, immunizations, regular preventative care, and whether any notations have been made regarding concerns of the pediatrician that may not have risen to the level of suspected abuse or neglect.

If a child is not gaining weight or growing at an age-appropriate rate, is gaining too much weight, is found to have conditions unusual in a child of his/her age (high cholesterol etc), or is found to have any other alarming medical conditions that would cause concern for potential harm if not remedied, pediatrician's records can indicate if one party may be exposing the child to harmful conditions.

Likewise, if the records note that a grandparent or other non-parent is always the person taking the child to the doctor, or attending follow-up appointments for conditions, the

Court may find that actual harm would result from the cessation of that party's contact with the child, even in if the parent objects.

Dental records can be a strong indicator of harmful conditions, and a GAL can access these records without parental consent. If DHS is not involved, and there is concern that the child is being medically neglected, sometimes the GAL can unearth information that can indicate to the court particular facts that can lead to a finding of unfitness, or can show that one party is consistently attentive to a health concern that could be critical if left untreated.

Notes:

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## The View From the Bench: Q & A with the Judges

Notes:

VBBA GDC Committee

BENCH BAR CONFERENCE JUNE 22, 2017

BREAK-OUT SECTION

1:05 to 2:05 PM

“Immigration and the General District Court”

Panel Discussion– Featuring Chief Judge Gene Woolard and “Rob” Robertson with Kathryn Byler as moderator

Judge Woolard, Chief Judge of the Virginia Beach General District Court

- obtaining interpreters and translators; and
- specific dealing with immigrants before the GDC.

Rob Robertson, Esq.

- Presenting and addressing- recent changes under the current administration regarding dealing with immigration issues within the courts;
- Focusing on duties owed to clients; and
- Traffic and misdemeanors triggering immigration issues as it pertains to current times.

Q & A- from participant attorneys directed towards Judge Woolard and Rob Robertson, Esq.

## Immigration Consequences and The General District Courts

By

Alfred L. "Rob" Robertson

In order for a conviction to affect immigration status it must fall into one of five, broadly defined, categories. Those are: 1.) aggravated felonies, as defined by 8 U.S.C. §1101 (a)(43), 2.) crimes involving moral turpitude, 3.) A drug possession crime (except for simple possession of less than 30 grams of marijuana), 4.) Domestic crimes, like child abuse, child neglect, and stalking, and 5.) gun crimes (like brandishing, illegal possession.)

A typical traffic offense does not have immigration consequences. However, whenever you are dealing with immigration law, the rule is defined by the exceptions. Further, when dealing with the Virginia Code there can be consequences from the more serious cases.

Whenever you are dealing with a client who is an immigrant, whether a legally present one or not, it is vital to determine, as best you can, what the individual's status actually is. I have found that the best practice is to ask every client, regardless of name or ethnicity, what their immigration status is. Often, I find that folks don't exactly know their status.

One of the common answers I get when asking about immigration status, especially when dealing with folks from the Central American countries is a simple statement: "I have a work permit." Usually that means the person has "Temporary Protected Status" a status that is very fragile. TPS basically means that things are so bad in a particular country, the U.S. won't send people back there. The US Government has to designate the country: Syria and Haiti are recent examples, but several Central American countries have the designation. TPS holders have to re-register from time to time, are granted work permits (known as Employment Authorization Documents or "EAD"s), and can lose that status upon conviction of any two misdemeanors or one felony. The traditional analysis (is it a crime involving moral turpitude, etc) does not apply: any two misdemeanors.

Another piece of important information to get from an immigrant client are the date and manner of entry.



Bringing this around to traffic and misdemeanor offenses, it is important to keep in mind the effect on a particular person's status. Essentially, avoid misdemeanor offenses. When that is compounded by the fact that proof of legal presence is required to get a driver's license, it is readily apparent the issues that arise.

Specific statutes that can cause immigration problems include: DUI, reckless driving, eluding, driving while revoked for a DUI, and leaving the scene of an accident.

Leaving the scene of an accident where there is bodily injury, eluding, and driving while revoked for a DUI are crimes involving moral turpitude (CMTs) and can be the basis for removal. CMTs have always had an elusive definition. Essentially, with some exceptions, you should assume that if there is an element of specific intent in the statute, it is probably a CMT (though driving on a suspended license usually is not a CMT.)

DUI itself is more tricky. While is not a CMT or an aggravated felony, it can fit into a special category of conviction that will devastate an immigration case.

#### Particularly Serious Crimes ("PSCs")

Before there were aggravated felonies, there was the PSC. In the Immigration and Nationality Act, PSCs are defined as convictions for which the alien received a sentence of five years or more<sup>1</sup>: BUT the Attorney General is not limited to convictions with a 5 year sentence to call something a PSC. In the attachments you will find *Matter of Y-L-* a case where the AG made blanket policy and held that all drug trafficking crimes are PSCs, with some minor exceptions.

A PSC holding really only hurts the immigration case where the individual is applying for asylum type forms of relief, but in those cases the effect is drastic-leaving the alien with having to prove that he/she will be tortured in the country of removal by the government of that country (or groups the government can't or won't control) instead of having to prove a lower standard of the likelihood of persecution.

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<sup>1</sup> From the INA §241: For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.



Attached to this outline are several cases (and one brief) that can help you in determining what is a PSC. There have been recent attempts by DHS to show that DUI is a PSC.

DUI is not an aggravated felony: see *Leocal v. Ashcroft*, attached.

Practically, an alien who comes into ICE custody after a DUI will have a hard time getting bond. He/she is not likely to be released from ICE custody without getting bond by an immigration judge. Bond motions in immigration court take about 2-3 weeks to get on the docket, and in DUI case, the bonds are high (one judge has a practice of requiring \$10K in bond for each alcohol related offense on an alien's record.) This is the result of several high-profile cases in the area.

## CONVICTIONS

Some quick shorthand for the Virginia Lawyer when thinking about the definition of conviction for purposes of the Immigration law: If you can't expunge it under Virginia Law, it's going to be a conviction for immigration purposes.

For the more inquisitive mind, this passage from *The Immigration Resource Guide for Judges* in Washington State is a helpful summary:

### "6.1 CONVICTIONS DEFINED UNDER IMMIGRATION LAW

#### A. The State's Definition of a Conviction Is Irrelevant for Immigration Purposes.

The Immigration and Nationality Act has had its own, statutory definition of a conviction for immigration purposes since 1997. That definition is as follows: The term conviction means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. 2

Regardless how Washington law treats the case or defines a conviction, it is this definition that will control in any subsequent immigration proceeding.

#### B. Convictions Exist in Perpetuity for Immigration Purposes

Unless vacated for cause, any resolution that meets this definition will be a conviction permanently and in perpetuity for immigration purposes, even where the convicting jurisdiction holds that no conviction exists. A resolution that matches the above definition becomes a conviction for immigration purposes at the time that it is entered and will remain a conviction in perpetuity for immigration purposes



regardless of subsequent state court action (unless vacated for cause). For example, a noncitizen defendant enters a plea of guilty for possession of a controlled substance under R.C.W. 69.50.4013 and is granted a 24 month deferred sentence with conditions. This resolution will be a permanent conviction under immigration law even if the defendant complies with conditions and the court subsequently permits a withdrawal and dismissal under state law.<sup>3</sup>

#### C. Nolo Contendere and Alford Pleas Constitute Convictions Under Immigration Law

The statutory definition of conviction for immigration purposes includes a “plea of nolo contendere”.<sup>4</sup> Therefore, such a plea does not insulate a defendant from having a conviction for immigration purposes.

Courts have long, and consistently, held that Alford pleas are analogous to nolo contendere pleas and that they are convictions under state and federal criminal law.<sup>5</sup>

They are also clearly convictions under the immigration statute’s definition.<sup>6</sup> As outlined in Chapter 5, the factual basis for a defendant’s plea is often the critical determining factor as to whether removal grounds are triggered.

#### D. Infractions Are Not Convictions Under Immigration Law

Infractions are certain minor offenses handled in non-conventional criminal proceedings that do not require the usual constitutional protections such as access to counsel and right to jury trial.<sup>7</sup> The Board of Immigration Appeals (BIA) has held that this type of disposition will not be considered a conviction for immigration purposes.<sup>8</sup> The BIA held that the phrase “judgment of guilt,” appearing in the immigration statute’s definition of conviction, is “a judgment in a criminal proceeding, that is, a trial or other proceeding whose purpose is to determine whether the accused committed a crime and which provides the constitutional safeguards normally attendant upon a criminal adjudication.”<sup>9</sup>

#### E. No Finality Requirement to Trigger Immigration Consequences

Recently, the Ninth Circuit overturned decades of precedent to eliminate the requirement that a conviction will only be classified as such under immigration law where it is deemed final under state law. In *Planes v. Holder*, a Ninth Circuit panel held that that under the immigration statute’s definition the term “conviction” means a formal judgment of guilt against a noncitizen entered by a court, regardless whether appeals have been exhausted or waived. Consequently, the government will now proceed with removal proceedings and deport noncitizens even where a timely appeal of right is pending.<sup>10</sup>

2 8 U.S.C. § 1101(a)(48)(A).

3 *Matter of Roldan*, 22 I&N Dec. 512, 523 (BIA 1999) vacated on other grounds by *Lujan-Armendariz v. I.N.S.*, 222 F.3d 728 (9th Cir. 2000); *Murrillo-Espinoza v. I.N.S.*, 261 F.3d 771, 774 (9th Cir. 2001).

4 8 U.S.C. § 101(a)(948)(A)(i).



5 *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *U.S. v. Buonocore*, 416 F.3d 1124, 1128 (10th Cir. 2005); *Abimbola v. Ashcroft*, 378 F.3d 173, 181 (2d Cir. 2004); *State v. Heath*, 168 Wn.App. 894, 279 P.3d 458, 459 (2012).

6 *United States v. Guerro-Velasquez*, 434 F.3d 1193, 1197-98 (9th Cir. 2006).

7 See RCW 7.84.020 and IRLJ 1.1(a).

8 *Matter of Eslamizar*, 23 I&N Dec. 684, 687-88 (BIA 2004).

9 *Id.* at 687.

10 *Planes v. Holder*, 652 F.3d 991, 996 (9th Cir. 2011) rehearing en banc denied, 2012 WL 1994862 (9th Cir. 2012); *contra Paredes v. Attorney General of U.S.*, 528 F.3d 196, 198 (3d Cir. 2008).

Of course, things are different here. The Fourth Circuit has weighed into what constitutes a conviction for immigration purposes in *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011.) This case provides a useful roadmap for avoiding a conviction but still allowing a defendant the benefit of many rehabilitation programs.

#### ASSAULT AND BATTERY

Assault and Battery is not, usually, a crime involving moral turpitude. There is a long line of cases that hold simple assault and battery is not a crime involving moral turpitude. *Carr v. INS*, 86 F.3d 949 (9th Cir. 1996); *Griffo v. McCandless*, 28 F.2d 287 (E.D. Pa. 1928); *Ciambelli v. Johnson*, 12 F.2d 465 (D. Mass. 1926); *Matter of Perez-Contreras*, 20 I. & N. Dec. 615 (BIA 1992); *Matter of Short*, 20 I. & N. Dec. 136 (BIA 1989); *Matter of B-*, 5 I. & N. Dec. 538 (BIA 1953); see also *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006); *Matter of Sanudo*, 23 I. & N. Dec. 968 (BIA 2006)); *Partyka v. Att'y Gen.*, 417 F.3d 408 (3d Cir. 2005); *Matter of Sejas*, 24 I. & N. Dec. 236 (BIA 2007) but see *Medina v. United States*, 259 F.3d 220 (4th Cir. 2001) (misdemeanor of simple assault and battery can be a crime involving moral turpitude when committed upon victims that have a "special relationship," e.g., fiance, with the assaulter). *United States ex rel. Valenti v. Karnuth*, 1 F. Supp. 370, 375 (N.D.N.Y. 1932); *Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1996); *Matter of J-*, 4 I. & N. Dec. 26 (BIA 1950); *Matter of B-*, 1 I. & N. Dec. 52 (Att'y Gen. 1941.)

However, A&B on a Law Enforcement Officer is a crime involving moral turpitude. *In Re Danesh* 19 I&N Dec. 669 (BIA 1988). That decision involves a Texas statute that requires a showing of bodily injury for a conviction, so it is an open question if that would still be the case for Virginia's statute. The Seventh Circuit Court of Appeals in *Garcia-Meza v. Mukasey*, 516 F.3d 535 (7th Cir. 2008) found the lack of bodily injury requirement in the Illinois statute took that statute out of being a crime involving moral turpitude for immigration purposes.

#### DRUG OFFENSES

Only a single offense for possession of marijuana does not make an alien removable, 8 U.S.C. §1227(a)(2)(B)(i) (a single offense of simple possession of less than 30 grams of marijuana is excluded as a grounds of removal.) However, it still makes an alien ineligible for re-entry into the U.S.

## LARCENY

Because the Immigration law directs courts to look at convictions using the categorical approach, Virginia's larceny statutes are not "theft crimes" for aggravated felony purposes. They are still crimes involving moral turpitude, however. See *Omargharib v. Holder*, 775 F.3d 192 (4th Circuit, 2014.)

Finally, don't hesitate to call an immigration attorney before you go to court with your immigrant client if you are wondering what is going to happen to your client.



**In re Y-L-**  
**In re A-G-**  
**In re R-S-R-**

*Decided March 5, 2002*

U.S. Department of Justice  
Office of the Attorney General

- (1) Aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute “particularly serious crimes” within the meaning of section 241(b)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B) (2000), and only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible. *Matter of S-S-*, Interim Decision 3374 (BIA 1999), overruled.
- (2) The respondents are not eligible for deferral of removal under Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment where each failed to establish that the torture feared would be inflicted by or with the acquiescence of a public official or other person acting in an official capacity. *Matter of S-V-*, Interim Decision 3430 (BIA 2000), followed.

IN REMOVAL PROCEEDINGS

By previous Order, I directed the Board of Immigration Appeals (“BIA”) to refer the above-captioned cases to me for review pursuant to 8 C.F.R. § 3.1(h)(1)(i) (2001). In three separate opinions, the BIA ordered that the respondents’ removal from the United States be withheld under the provisions of section 241 of the Immigration and Nationality Act (“INA”). For the reasons set forth below, I now reverse the decisions of the BIA and hold that the respondents, having each been convicted of a “particularly serious crime” within the meaning of the INA, pose a danger to the community of the United States and are thus ineligible for withholding of removal.<sup>1</sup> See INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii) (2000). I further conclude that the purported threats of torture claimed by the respondents if removed to

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<sup>1</sup> My review of these BIA decisions is *de novo*. See *Deportation Proceedings of Joseph Patrick Thomas Doherty*, 12 Op. O.L.C. 1, 4 (1988) (“[W]hen the Attorney General reviews a case pursuant to 8 C.F.R. § 3.1(h), he retains full authority to receive additional evidence and to make *de novo* factual determinations.”).

their countries of origin do not satisfy the criteria for granting them deferral of removal.<sup>2</sup> See 8 C.F.R. § 208.17.

### I.

The three respondents in this consolidated matter are foreign nationals who bear final judgments of conviction for felony drug trafficking offenses in the United States. Specifically, Y-L- was convicted in the Martin County, Florida Circuit Court of trafficking in cocaine and resisting an officer with violence, in violation of Fla. Stat. Ann. §§ 893.135, 843.01 (West 2000 & Supp. 2002). Although he was sentenced to just 25 months of incarceration, his drug offense was a first-degree felony under Florida law, punishable by up to 30 years' imprisonment. A-G- was convicted in the United States District Court for the District of Delaware on three felony counts involving large quantities of cocaine: two counts of distribution of cocaine, and one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. §§ 841, 846. He received concurrent sentences of one year and a day on each count. R-S-R- pled guilty in federal court in the District of Puerto Rico to one felony count of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846. The court sentenced him to 24 months of incarceration.

As a result of the respondents' aggravated felony convictions,<sup>3</sup> the Immigration and Naturalization Service ("INS") commenced removal proceedings against them. See INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (any alien convicted of an aggravated felony is deportable); INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (any alien convicted of a controlled substance offense, other than minimal possession of marijuana for personal use, is deportable). The respondents, claiming that their lives and/or freedom would be severely imperiled upon deportation to their countries of origin, petitioned for withholding of removal under both INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), and Article 3 of the Convention Against Torture And Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Convention Against Torture"),<sup>4</sup> 8 C.F.R. § 208.16 *et seq.* The INS opposed

<sup>2</sup> This published decision is binding on the BIA and is intended to overrule any BIA decisions with which it is inconsistent. See *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) (administrative judges "are entirely subject to the agency on matters of law"). See also 8 C.F.R. § 3.1(g).

<sup>3</sup> The drug trafficking crimes for which respondents were convicted all fall within the INA's definition of "aggravated felony." See INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (2000).

<sup>4</sup> The Convention Against Torture, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 23 (continued...)



these requests, arguing that the respondents were statutorily ineligible for such withholding by virtue of their convictions for “particularly serious crimes.” See INA § 241(b)(3)(B)(ii); 8 C.F.R. § 208.16(d)(2).

Although two of the three respondents were denied all relief by immigration judges,<sup>5</sup> the BIA on appeal held that all three were entitled to withholding of removal under section 241 of the INA. Invoking its decision in *In re S-S-*, Interim Decision 3374, 1999 WL 38822 (BIA Jan. 21, 1999), the BIA in each case held that the aggravated drug trafficking felonies committed by respondents did not constitute “particularly serious crimes” for purposes of INA § 241(b)(3)(B)(ii). In reaching this conclusion, the BIA emphasized such factors as the respondents’ cooperation with federal authorities in collateral investigations, their limited criminal history records, and the fact that they were sentenced at the low-end of the applicable sentencing guideline ranges. The BIA also determined that the respondents had each demonstrated a probability of persecution or torture if returned to their countries of origin.

## II.

Section 241(b)(3)(A) of the INA dictates that “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” This restriction does not apply, however, if “the Attorney General decides that . . . the alien, *having been convicted by a final judgment of a particularly serious crime*, is a danger to the community of the United States.” INA § 241(b)(3)(B)(ii) (emphasis added).<sup>6</sup> The resolution of these cases turns on whether each of the respondents was convicted of a “particularly serious crime” within the meaning of section 241(b)(3)(B)(ii).

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(...continued)

I.L.M. 1027 (1984), was approved by the United States Senate on Oct. 28, 1990. See 136 Cong. Rec. 36625 (1990). Regulations implementing the Convention were adopted pursuant to a congressional directive in the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-761, 2681-822. See 64 Fed. Reg. 8478, 8488 (Feb. 19, 1999).

<sup>5</sup>In the cases of Y-L- and R-S-R-, the presiding immigration judges denied all requested relief from removal. A-G-, however, was granted withholding of removal in immigration court.

<sup>6</sup>The regulations implementing the Convention Against Torture contain an identical exception. See 8 C.F.R. § 208.16(d)(2) (2001) (“[I]n application for withholding of removal under . . . the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the [INA].”).



## A.

Although the INA itself does not define the term “particularly serious crime,” pertinent textual guidance is found in the final clause of section 241(b)(3), which provides, in relevant part:

For purposes of [section 241(b)(3)(B)(ii)], an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

This provision establishes that aliens convicted of aggravated felonies and sentenced to at least five years of imprisonment are *automatically* deemed to have committed a “particularly serious crime.” With respect to aggravated felony convictions for which a lesser sentence has been imposed, however, Congress explicitly empowered the Attorney General to make the relevant determination. Prior to today, the Attorney General has had no occasion to consider which aggravated felonies might amount to “particularly serious crimes” where the prison sentence imposed upon conviction is less than five years. Operating in this void, the BIA has seen fit to employ a case-by-case approach, applying an individualized, and often haphazard, assessment as to the “seriousness” of an alien defendant’s crime. *See In re S-S-, supra*. Not surprisingly, this methodology has led to results that are both inconsistent and, as plainly evident here, illogical.

According to the BIA, the 1996 INA amendments in the Antiterrorism and Effective Death Penalty Act (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), Pub. L. No. 104-208, 110 Stat. 3009-546 – which eliminated a provision declaring that *all* aggravated felonies are “particularly serious crimes”<sup>7</sup> – reflected Congress’ desire to replace classifications based on the “category or type of crime that resulted in the conviction” with classifications “based on the length of sentence imposed.” *See In re S-S-, supra*. I do not concur. The BIA’s interpretation of these amendments places far too much weight on the first sentence of section 241(b)(3)’s final clause (the mandatory designation) and far too little weight on the final clause’s second sentence (the grant of discretionary authority to the Attorney General). The fact that Congress designated as *per se* “particularly serious” every aggravated felony

<sup>7</sup> Prior to 1996, the INA mandated that “an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.” INA § 243(h)(2), 8 U.S.C. § 1253(h)(2) (1994).

resulting in a term of incarceration of at least five years hardly reflects an intent to subordinate the nefarious or harmful *character* of a crime to mere secondary consideration, let alone remove it from the equation. While the imposition of certain harsh sentences may obviate the need to probe the underlying circumstances of a particular crime, the discretionary authority reserved to the Attorney General with respect to offenses from which less severe sentences flow is clearly intended to enable him to emphasize factors *other than* length of sentence.<sup>8</sup>

Exercising that authority under the INA, it is my considered judgment that aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute “particularly serious crimes” within the meaning of section 241(b)(3)(B)(ii). Only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible.<sup>9</sup>

Both the courts and the BIA have long recognized that drug trafficking felonies equate to “particularly serious crimes” in this context. In *Mahini v. INS*, 779 F.2d 1419 (9th Cir. 1986), for example, the Ninth Circuit upheld the BIA’s determination that an alien’s conviction for possession of heroin with intent to distribute, and aiding and abetting the distribution of heroin,

<sup>8</sup> This understanding is confirmed by the IIRIRA’s legislative history. In the Conference Report explaining the current provisions of INA § 241(b)(3), Congress emphasized that “the Attorney General retains the authority to determine other circumstances in which an alien has been convicted of a particularly serious crime, *regardless* of the length of sentence.” H.R. Conf. Rep. No. 104-828, at 216 (1996) (emphasis added).

<sup>9</sup> Some legal commentators and the BIA itself have intimated that Article 33 of the United Nations Convention Relating to the Status of Refugees (“Convention”), July 28, 1951, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176, to which the United States is bound by its 1968 accession to the United Nations Protocol Relating to the Status of Refugees (“Protocol”), Jan. 31, 1967, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268, limits my authority to determine that certain categories of crimes are “particularly serious” under INA § 241(b)(3)(B)(ii). See *In re S-S-*, *supra*. Because both the Convention and the Protocol are silent as to the meaning of a “particularly serious crime,” proponents of this view have relied upon various restrictive statements in the Handbook on Procedures and Criteria for Determining Refugee Status, a document issued by the Office of the United Nations High Commissioner for Refugees (“UNHCR”). The Supreme Court has made clear, however, that the comments contained in the Handbook are in no way binding upon me in my determinations under INA § 241. See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427-28 (1999) (holding that the precatory comments contained in the Handbook are not binding on the Attorney General, the BIA, or United States courts); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (same).



constituted a “particularly serious crime” within the meaning of the INA. The court reached that conclusion notwithstanding the fact that the alien had been sentenced to only thirteen months’ imprisonment for the crime in question. In so holding, the court noted that from the time the BIA first confronted the contours of “particularly serious crimes” in 1982, “*the Board has continually found convictions for drug possession and trafficking to be particularly serious, and the offenders a danger to the community.*” *Id.* at 1421 (emphasis added) (citations omitted). Similarly, in *Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991), the BIA observed:

We find that the crime of trafficking in drugs is *inherently* a particularly serious crime. The harmful effect to society from drug offenses has consistently been recognized by Congress in the clear distinctions and disparate statutory treatment it has drawn between drug offenses and other crimes. [citation omitted] Illicit narcotic drugs sold in the United States ruin or destroy the lives of many American citizens each year. Apart from the considerable number of people in this country who die of overdoses of narcotics or who become the victims of homicides related to the unlawful traffic of drugs, many others become disabled by addiction to heroin, cocaine, and other drugs. There are also many in this country who suffer crimes against their persons and property at the hands of drug addicts and criminals who use the proceeds of their crimes to support their drug needs. Additionally, a considerable amount of money is drained from the economy of the United States annually because of the unlawful trafficking in drugs. This unfortunate situation has reached epidemic proportions and it tears the very fabric of American society. *As we find trafficking in drugs to inherently be a particularly serious crime, no further inquiry is required into the nature and circumstances of the respondent’s convictions for sale or transportation of marihuana and sale of LSD.*

*Id.* at 330-31 (emphasis added); accord *Matter of Gonzalez*, 19 I&N Dec. 682, 684 (BIA 1988).

The propriety of the “particularly serious crime” presumption adopted in this opinion is further supported by the long-standing *congressional* recognition that drug trafficking felonies justify the harshest of legal consequences. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(B) (deportation for controlled-substance violations); 8 U.S.C. § 1252(a)(2)(C) (no judicial review where alien’s removal is predicated on a drug trafficking felony); 8 U.S.C. § 1228 (expedited removal for aggravated felonies, including drug trafficking felonies); 18 U.S.C. § 3592(c)(12) (conviction for serious federal drug offenses constitutes aggravating factor for purposes of weighing imposition of federal death penalty); 21 U.S.C. § 862 (convicted drug traffickers subject to order of ineligibility for federal benefits). The fact that Congress, as part of the IIRIRA legislation in 1996, chose to jettison a prior INA rule treating *all* aggravated felonies – of which drug trafficking felonies are a subset – as *per se* “particularly serious crimes,” should not be confused with an



indication that Congress no longer considered *drug trafficking crimes in particular*, to be as serious and pernicious as it had previously viewed them.

The severity of this legislative treatment has a solid foundation. The devastating effects of drug trafficking offenses on the health and general welfare, not to mention national security, of this country are well documented.<sup>10</sup> Because the illegal drug market in the United States is one of the most profitable in the world, it attracts the most ruthless, sophisticated, and aggressive traffickers. Substantial violence is present at all levels of the distribution chain. Indeed, international terrorists increasingly employ drug trafficking as one of their primary sources of funding.<sup>11</sup>

Based on the preceding discussion, I might be well within my discretion to conclude that all drug trafficking offenses are *per se* “particularly serious crimes” under the INA.<sup>12</sup> I do not consider it necessary, however, to exclude entirely the possibility of the very rare case where an alien may be able to demonstrate extraordinary and compelling circumstances that justify treating a particular drug trafficking crime as falling short of that standard. While this opinion does not afford the occasion to define the precise boundaries of what those unusual circumstances would be, they would need to include, at a *minimum*: (1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the alien in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence

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<sup>10</sup> See, e.g., Office of National Drug Control Policy, Executive Office of the President, *Drug-Related Crime* (Fact Sheets, March 2000); Bureau of Justice Statistics, U.S. Dep’t of Justice, *A National Report: Drugs, Crime, and the Justice System* (Dec. 1992).

<sup>11</sup> See, e.g., Drug Enforcement Administration, U.S. Dep’t of Justice, *Target America: Traffickers, Terrorists & Your Kids – A National Symposium on Narco-Terrorism* (Dec. 4, 2001), available at <http://www.usdoj.gov:80/dea/deamuseum/transcript.doc>; *Drug Trade and the Terror Network: Hearing Before the Subcommittee on Criminal Justice, Drug Policy, and Human Resources of the House Committee on Government Reform*, 107<sup>th</sup> Cong. (Oct. 3, 2001) (statement of Asa Hutchinson, Administrator of Drug Enforcement Administration), available at <http://www.usdoj.gov:80/dea/pubs/cngrest/ct100301.html>.

<sup>12</sup> Some federal courts have held that certain crimes may properly be treated as *per se* “particularly serious,” regardless of the circumstances of the individual case. See, e.g., *Gjonaj v. INS*, 47 F.3d 824, 825-26 (6th Cir. 1995) (assault with a firearm with intent to murder); *Hamama v. INS*, 78 F.3d 233, 240 (6th Cir. 1996) (felonious assault, possession of a firearm during a felony, and carrying a weapon in a vehicle); *Ahmetovic v. INS*, 62 F.3d 48 (2d Cir. 1995) (first degree manslaughter). Other courts have indicated that the application of “*per se*” determinations is legally questionable. See, e.g., *Chong v. INS*, 264 F.3d 378, 387-89 (3d Cir. 2001).

of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles. Only if *all* of these criteria were demonstrated by an alien would it be appropriate to consider whether other, more unusual circumstances (*e.g.*, the prospective distribution was solely for social purposes, rather than for profit) might justify departure from the default interpretation that drug trafficking felonies are “particularly serious crimes.” I emphasize here that such commonplace circumstances as cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence do not justify such a deviation.<sup>13</sup>

#### B.

On review of the records in the cases now before me, it is apparent that none presents the kind of extraordinary and compelling circumstances that might warrant treating the respondents’ aggravated drug trafficking felonies as anything other than “particularly serious crimes.” Not only have all three respondents failed to demonstrate that the volume or value of controlled substances involved in their offenses was *de minimis* or inconsequential, but each was a direct actor or perpetrator – not merely a peripheral figure – in their respective criminal activities.

Y-L- was convicted of a first-degree drug trafficking felony involving 84 grams of cocaine and, in connection with that offense, was further convicted of resisting a police officer with violence when apprehended. Y-L-BIA Decision at 2; Hr’g Tr. at 30. The BIA declared that these crimes were not “particularly serious” because Y-L- had no criminal history, could have received a much stiffer sentence, and did not use a weapon or inflict personal injuries during the commission of the offenses. *Id.* at 5. The Board’s decision has no merit. As noted above, the fact that an alien has no prior convictions is irrelevant to the “particularly serious crime” calculus. The same is true of a trial judge’s decision to mete out a sentence at the low-end

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<sup>13</sup> Although an alien’s decision to provide critical information to law enforcement officials has no bearing on whether his offense is characterized as a “particularly serious crime,” he may be granted legal status in the United States notwithstanding his criminal acts through the issuance of an “S visa.” *See* INA § 101(a)(15)(S), 8 U.S.C. § 1101(a)(15)(S). Indeed, A-G- has sought such a visa, and his application is currently pending before the INS. In the event that the application is ultimately granted, any order of removal against him will be vitiated. However, the discussion in this opinion of the relief erroneously granted him by the immigration judge and BIA will remain unaffected.



of the guidelines. Furthermore, even assuming the BIA had some basis for believing that no weapons or physical injuries were involved in Y-L-'s crimes – a dubious assumption considering both that the record is entirely silent on this matter, and one of the counts of conviction had physical violence as a core element – the absence of such aggravating factors would not minimize the inherent dangers associated with Y-L-'s direct role in the drug trafficking offense.

A-G- was convicted of three federal drug felony counts, and stipulated that the amount of cocaine attributable to him for sentencing purposes was *1,330 grams*. A-G- Hr'g Exh. 13, at 3. That is enough cocaine to supply over 100,000 doses of the drug. *See United States v. Denmark*, 124 F.3d 200 (6th Cir. 1997) (Table), 1997 WL 468302. Yet the BIA ruled that the offenses did not rise to the level of "particularly serious crimes" inasmuch as A-G- "placed himself at great risk to obtain information on behalf of the FBI" and "received a substantially lower sentence because of his efforts." A-G- BIA Decision at 2-3. One does not follow from the other. While A-G-'s post-charge cooperation understandably secured a more lenient sentence, it did not retroactively alter the nature of the underlying offenses. The insidious quality of the crime remained the same.

Finally, R-S-R- pled guilty to participation in a conspiracy to produce cocaine in Puerto Rico and transport it in *multi-kilogram* quantities for subsequent distribution in New York. R-S-R- IJ Oral Decision at 7; Hr'g Tr. at 88-89. Nevertheless, the BIA adjudged his conviction not to be "particularly serious" under INA § 241(b)(3)(B)(ii) because "[h]e provided considerable information to the government," "spoke out at great physical risk to himself and his family," did not "directly or indirectly cause[] physical harm to any individual," and qualified for a "minor participant" sentencing adjustment based on his role as a courier in the conspiracy. R-S-R- BIA Decision at 6; United States' Motion Requesting Downward Departure Pursuant to [U.S.S.G. §] 5K1.1, at 2, *United States v. R-S-R-*, (D.P.R.), Crim. No. 97-290. The Board's reasoning does not survive scrutiny. Not only is R-S-R-'s cooperation with federal authorities irrelevant in the "particularly serious crime" evaluation, but any scheme designed to transport cocaine in such large quantities necessarily exposed numerous individuals to physical harm. As for the sentencing adjustment, I find that a drug "courier" plays more than a sufficiently active part in a distribution conspiracy to render his conviction a "particularly serious crime."

## III.

Although the respondents are statutorily ineligible for *withholding* of removal by virtue of their convictions for “particularly serious crimes,” the regulations implementing the Convention Against Torture allow them to obtain a *deferral* of removal notwithstanding the prior criminal offenses if they can establish that they are “entitled to protection” under the Convention. See 8 C.F.R. § 208.17(a). To secure such relief, the respondents must demonstrate that, if removed to their country of origin, *it is more likely than not* they would be tortured by, or with the acquiescence of, government officials acting under color of law. *Id.* §§ 208.16(c)(2), 208.17(a), 208.18(a)(1). None of the respondents has come close to making such a showing.

## A. Y-L-

Y-L-, who was paroled into the United States in 1979, maintains that he will be killed if sent back to his native Haiti.<sup>14</sup> He testified at his removal hearing that two months prior to his arrival in America, members of the Ton Ton Macoutes – a private army of Haitian death squads organized by former president François Duvalier and nurtured by his successor, Jean Claude Duvalier – murdered his father and aunt, and broke his cousin’s leg as retribution for his father’s unspecified criticism of the Duvalier government. Y-L- IJ Oral Decision at 3. Y-L- further insisted that the same group of people responsible for the death of his father killed his cousin in 1998, approximately twenty years after Y-L- initially left the country. *Id.* at 3-4, 8; Y-L- Hr’g Tr. at 11-15.

Y-L-’s claim for relief under the Convention Against Torture fails on at least two different levels. First, as the immigration judge correctly found, Y-L- produced no reliable evidence that he would likely be subjected to torture if returned to Haiti. Y-L- IJ Oral Decision at 8. While voluntarily visiting Haiti on two prior occasions, he was never personally harmed or threatened. *Id.* at 2-3. Although he suggested that his cousin was murdered by the same faction that purportedly killed his father nearly twenty years earlier, the immigration judge found this testimony speculative and

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<sup>14</sup>The BIA did not address Y-L-’s claim for relief under the Convention Against Torture, deeming the issue moot in light of its decision to grant him withholding of removal pursuant to section 241(b)(3) of the INA. See Y-L- BIA Decision at 6. Having vacated the Board’s ruling on Y-L-’s entitlement to withholding of removal, I must take up the deferral question. In so doing, I ultimately affirm the immigration judge’s conclusion that Y-L- has no right to any relief under the Convention.



unconvincing.<sup>15</sup> *Id.* at 8. Meanwhile, the Department of State's authoritative asylum profile on Haiti, which was introduced at the removal hearing, reveals that the political climate has improved substantially in recent years, and that charges of politically-motivated persecution against individuals who fled during the Duvalier reign have proven to be frequently untrue or grossly exaggerated. *See* Office of Asylum Affairs, Dep't of State, *Profile of Asylum Claims and Country Conditions – Haiti* 18, 21-22 (Mar. 31, 1998) ("Asylum Profile"); *see also* *Gonahasa v. INS*, 181 F.3d 538, 542 (4th Cir. 1999) (noting that State Department reports are the best resource for gleanig information on the political situations in foreign nations).

Second, even assuming Y-L-'s various allegations have some basis in fact, and even if his own alleged fears of torture are genuine, he is not entitled to deferral of removal under the Convention Against Torture because he has not established that *current government officials acting in an official capacity* would be responsible for such abuse. The regulations implementing the Convention allow for relief only if torture would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1) (emphasis added). Violence committed by individuals over whom the government has no reasonable control does not implicate the treaty. *See In re S-V-*, Interim Decision 3430, at 9, 2000 WL 562836 (BIA 2000) ("To demonstrate 'acquiescence' by [foreign] Government officials, the respondent must do more than show that the officials are aware of the activity constituting torture but are powerless to stop it. He must demonstrate that [the foreign] officials are willfully accepting of the . . . tortuous activities."). The State Department's asylum profile on Haiti underscores that the Ton Ton Macoutes have effectively disbanded and neither play a role in, nor enjoy the tacit support of, the current Haitian government. Asylum Profile at 23. Both Y-L-

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<sup>15</sup> Y-L-'s claims are strikingly similar to those made by another Haitian national whose application for protection under the Convention Against Torture was also denied. *See Merisier v. INS*, No. 00-CIV-0393, 2000 WL 1281243 (S.D.N.Y. Sept. 12, 2000). The alien in that case, Orentz Merisier, alleged that his father (who had worked for the prior Haitian government) had been persecuted, and that his uncle had been assassinated. Because, he contended, "some of the opposition forces are still in hiding in Haiti . . . , [he] ha[d] a genuine fear for his life upon his return." *Id.* at \*3. Like Y-L-, Merisier did not contend that he personally had been subjected to any past persecution or torture in Haiti. The BIA denied relief, as did a federal district court in a subsequent habeas proceeding. The court stressed that Merisier had "failed to suggest a coherent theory of who might want to torture him or why," and that "Haiti's violent past, and even Merisier's relatives' alleged participation in it, is not, without more, substantial grounds for believing that removing Mersier to Haiti would likely result in his being tortured." *Id.* at \*12. *Accord Miguel v. Reno*, Civ. No. 00-3291, 2000 WL 1209375 (E.D. Pa. Aug. 25, 2000).



and his counsel conceded this point. Y-L- Hr'g Tr. at 15, 33. If, by some chance – which has certainly not been proven to be more likely than not – former Ton Ton Macoute elements seek revenge on Y-L- because of his relationship to his father, there is no competent evidence in the record indicating that the current Haitian administration would either participate in, or turn a blind eye to, such violence. In short, Y-L- has failed to sustain his burden of establishing entitlement to deferral of removal.

*B. A-G-*

The evidence advanced by A-G- similarly falls far short of what is required to obtain relief under the Convention Against Torture. At some point following his entry into the United States, A-G- decided to supplement his income as a maintenance worker by trafficking in illegal narcotics. His supplier was his long-time friend and roommate, K-C-, who had a drug-dealing base in Jamaica. A-G- Hr'g Tr. at 77-88. As so often happens to those in the drug trade, A-G- was ultimately arrested by the FBI, charged with unlawful distribution of cocaine, and convicted on multiple counts of cocaine trafficking. To minimize his exposure to prison, he agreed to assist federal law enforcement officials by participating in a number of controlled drug purchases designed to implicate K-C-.

During a period in which both K-C- and A-G- were temporarily incarcerated at the same facility, K-C- allegedly delivered a message to A-G- that he would be killed if he returned to Jamaica. In addition, according to A-G-'s brothers and sisters, two or three men came to the family residence in Jamaica in either 1998, 1999, or 2000 – the dates and other key particulars diverged sharply among these witnesses – and inquired as to A-G-'s whereabouts. At least one sibling claimed that these men were armed and made threats that A-G- would be murdered by K-C- or others if he returned to Jamaica. *Id.* at 154, 251.

Citing these apparent threats to his life, A-G- seeks to avoid removal pursuant to the Convention Against Torture. The main problem with his claim is that the record is devoid of credible evidence suggesting that the Jamaican government would bear any responsibility – either direct or through passive acquiescence – for physical harm visited upon A-G-. In fact, several of the witnesses candidly acknowledged at the hearing that no one in the family even reported the alleged threats to Jamaican authorities. *Id.* at 154, 174, 195, 245.

In finding some government role in the alleged torture, the presiding immigration judge speculated that the Jamaican “government cannot or will not control those who wish to persecute the respondent.” A-G- IJ Oral Decision at 15. The judge’s reasoning proceeded as follows: (i) there are major problems with corruption in Jamaica, (ii) local police routinely beat detainees, (iii) major drug traffickers operate in Jamaica with impunity and are cozy with corrupt law enforcement officials, and (iv) as a result of (i)-(iii), drug trade associates of K-C- may well either attack A-G- themselves or arrange for A-G- to be arrested on bogus charges and then encourage the corrupt local police to beat him. *Id.* at 10-17, 21-23.<sup>16</sup> Incredibly, the BIA found this reasoning both “thorough” and correct. I do not agree. To the contrary, the immigration judge’s factual findings are clearly erroneous.

Although there are indications that corruption and brutality affect some elements of Jamaican law enforcement, the national government has undertaken substantial efforts at reform. *See* Office of Asylum Affairs, Dep’t of State, *Country Reports on Human Rights Practices – Jamaica 1* (Feb. 2001) (“Country Report”). For example, the Jamaican Parliament passed a major anti-corruption bill in December 2000, and recently ratified the Inter-American Convention Against Corruption. *See* Bureau for International Narcotics and Law Enforcement Affairs, Dep’t of State, *Fact Sheet, Country Program: Jamaica* at 1 (Apr. 16, 2001). It also bolstered the national anti-money laundering laws. *Id.* Notwithstanding the allegations of A-G- and his family to the contrary, the U.S. State Department has found that the policy of the Jamaican government is to investigate all credible reports of police corruption. Bureau for International Narcotics and Law Enforcement Affairs, Dep’t of State, *International Narcotics Control Strategy Report* (March 2000). The State Department has further reported that the Jamaican government does not encourage or facilitate the illicit production or distribution of narcotics. *Id.* at 4. While acknowledging that abuses by some members of the security forces occasionally occur, the State Department’s 2000 Country Report for Jamaica makes clear that “[c]ivilian authorities generally maintain effective control of the security forces,” and “[t]he Government generally respect[s] the human rights of its citizens.” Country Report at 1. To be sure, there is room for improvement. But the record does

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<sup>16</sup> The immigration judge explained his determination by stating: “[I]t seems that we have a situation where the drug lords may act on their own and simply pay the police to look the other way or the drug lords may actually get the police involved . . . so that they do the dirty work for them on the basis of a trumped up case. . . . We do not know which it is but one of the two is more likely than not.” A-G- IJ Oral Decision at 23.



not support the extreme, uncorroborated claims made on behalf of A-G- with respect to knowing government acquiescence in prospective acts of torture.

Ultimately, of course, it is impossible to say with certainty whether A-G- will be exposed to torture by particular individuals upon his return to Jamaica. Those who engage in the illegal drug trade quite commonly expose themselves to the risk of violence; it is an occupational hazard. The relevant inquiry under the Convention Against Torture, however, is whether governmental authorities would approve or “willfully accept” atrocities committed against persons in the respondent’s position. See *In re S-V-*, *supra*. To suggest that this standard can be met by evidence of isolated rogue agents engaging in extrajudicial acts of brutality, which are not only in contravention of the jurisdiction’s laws and policies, but are committed despite authorities’ best efforts to root out such misconduct, is to empty the Convention’s volitional requirement of all rational meaning. As the courts have clearly recognized, relief is available only if the torture would “occur[] in the context of governmental authority,” not “as a wholly private act.” *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001). There being no such credible evidence in the case at bar, A-G-’s request for deferral must be denied.

### C. R-S-R-

Turning to R-S-R-, a foreign national from the Dominican Republic who has resided in Puerto Rico continuously since his arrival there in 1985, it is clear that his application for relief under the Convention Against Torture suffers from largely the same maladies as those of the other two respondents.

Beginning no later than March 1997, R-S-R- entered into an elaborate “conspiracy to produce multi-kilogram quantities of cocaine in Puerto Rico which would then be transported to New York, where the cocaine would be sold.” Plea and Cooperation Agreement at 13, *United States v. R-S-R-*, (D.P.R.), Crim. No. 97-290. “[M]ultikilo quantities of cocaine” were also sold in Puerto Rico, thereby ensuring substantial profits from the conspiracy. *Id.*; R-S-R- Hr’g Tr. at 88-89. Subsequently, R-S-R- was arrested on federal drug charges. In an effort to reduce his prison sentence, he pled guilty and cooperated with federal authorities by testifying against several of his confederates in this “major cocaine trafficking organization.” United States’ Motion Requesting Downward Departure Pursuant to [U.S.S.G. §] 5K1.1 at 1-2, *United States v. R-S-R-*, (D.P.R.), Crim. No. 97-290.

Invoking the Convention Against Torture, R-S-R- now seeks deferral of removal on the grounds that he will be subjected to physical cruelties by

individuals in the Dominican Republic – including two of his co-defendants who he maintains are corrupt law enforcement agents – angered by his decision to cooperate with authorities. He claimed at his removal hearing that these individuals were key members of the conspiracy and were the initial source for the drugs that ultimately flowed into Puerto Rico. He further testified that these individuals called his common-law wife in Puerto Rico and told her they were “waiting for [him].” R-S-R- Hr’g Tr. at 105. He alleged that they also arranged to have a note delivered to him in prison, which was unsigned, stating that they would “be waiting for [him] in Santo Domingo,” and that he was “going to pay with [his] life.” *Id.* at 108.

The record indicates that R-S-R-’s testimony is highly suspect. To begin with, as the immigration judge correctly observed in questioning R-S-R-’s credibility, R-S-R- produced no documentation to corroborate his claim that the drug conspiracy originated in the Dominican Republic. R-S-R- IJ Oral Decision at 7-8. Nor do any of the documents suggest even implicitly that Dominican citizens were involved in the operation. *Id.* at 8. To the contrary, the materials introduced at the hearing, including those offered by the respondent himself, reflect that the conspiracy operated exclusively in Puerto Rico and New York. Although the immigration judge, at various pre-trial hearings, pointedly invited R-S-R- to subpoena (or secure affidavits from) the federal agents and prosecutors to whom he directed his cooperation so as to substantiate his claims, the respondent declined the invitation. *Id.* at 6-7; R-S-R- BIA Decision at 4 n.5.

Corroborative evidence, of course, is not a threshold prerequisite to relief under the Convention Against Torture. INS regulations provide that an applicant’s testimony, “*if credible*, may be sufficient to sustain the burden of proof without corroboration.” 8 C.F.R. § 208.16(c)(2) (emphasis added). But where, as here, “the trier of fact either does not believe the applicant or does not know what to believe, the applicant’s failure to corroborate his testimony can be fatal” to his claim.<sup>17</sup> *Sidhu v. INS*, 220 F.3d 1085, 1090 (9th Cir. 2000). And “the weaker [the] alien’s testimony, the greater the need

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<sup>17</sup> In the case at bar, the immigration judge stated that he was “unable to really separate what is true from what is an exaggeration. The Court cannot really say what is true and what is not true.” R-S-R- IJ Oral Decision at 15. The BIA, evaluating only the cold record, apparently disagreed and found that R-S-R-’s “testimony was credible in that it was internally consistent, consistent with his written applications, . . . and sufficiently detailed.” R-S-R- BIA Decision at 5. Taking into account the immigration judge’s ability to observe the testimony first-hand, and the detailed nature of his observations in this regard, I concur in the substantial reservations he memorialized in his opinion.



for corroborative evidence.” *In re Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998).

In any event, even assuming that the tentacles of this drug conspiracy reached into the Dominican Republic, R-S-R-’s allegation that he will be exposed to torture there is wholly unpersuasive. Despite testifying that it is easy to travel between Puerto Rico and the Dominican Republic, he stated emphatically that he felt safe from his former drug-dealing collaborators in Puerto Rico. R-S-R- Hr’g Tr. at 64-68. When the immigration judge asked him why, if travel between the two countries was so simple, the Dominican individuals he fears could not simply smuggle agents into Puerto Rico to seek their retribution against him, he was non-responsive. *See* R-S-R- IJ Oral Decision at 9-10, 16.

Furthermore, even if all of R-S-R-’s testimony was credited as true, he still would not be eligible for deferral of removal because he has not established the requisite governmental involvement in the prospective torture he portrayed. The scope of the Convention is confined to torture that is inflicted under color of law. It extends to neither wholly private acts nor acts inflicted or approved in other than “an official capacity.” *Ali*, 237 F.3d at 597; 8 C.F.R. § 208.18(a)(1). While R-S-R- offered colorful testimony describing forms of torture that he “think[s] would happen to cooperating witnesses when they are deported,” his testimony and evidence failed to provide a plausible basis for concluding that such practices would be inflicted upon *him* with the consent or approval of *authoritative government officials* acting in an *official capacity*. R-S-R- Hr’g Tr. at 108-09. If anything, his testimony indicates merely that two corrupt, low-level agents may seek to exact personal vengeance on him for personal reasons. Such private conduct falls far short of what is required to demonstrate the probability of government-sanctioned atrocities under the Convention Against Torture. Accordingly, R-S-R- is not entitled to relief.

#### IV.

For all the foregoing reasons, the decisions of the BIA in each of these cases are reversed. The cases are remanded to the BIA for proceedings not inconsistent with this opinion.

## Leocal v. Ashcroft

Supreme Court of the United States

October 12, 2004, Argued ; November 9, 2004, Decided

No. 03-583

### Reporter

543 U.S. 1 \*; 125 S. Ct. 377 \*\*; 160 L. Ed. 2d 271 \*\*\*; 2004 U.S. LEXIS 7511 \*\*\*\*; 73 U.S.L.W. 4001; 18 Fla. L. Weekly Fed. S 9

JOSUE LEOCAL, Petitioner v. JOHN D. ASHCROFT,  
ATTORNEY GENERAL, et al.

**Prior History:** [\*\*\*\*1] ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT.

*Leocal v. Ashcroft*, 540 U.S. 1176, 158 L. Ed. 2d 76,  
124 S. Ct. 1405, 2004 U.S. LEXIS 1030 (U.S., 2004)

**Disposition:** Reversed and remanded.

### Core Terms

violent crime, offenses, physical force, Immigration,  
aggravated felony, substantial risk, use force, removal,  
commission of a crime, deportable, sentence, driving,  
felony, rea, commission of the offense, use of physical  
force, bodily injury, involves, reckless, violence, alien

### Case Summary

#### Procedural Posture

Petitioner permanent resident alien sued respondent  
United States Attorney General, seeking review of a  
deportation order following his conviction for driving  
under the influence of alcohol (DUI) and causing serious  
bodily injury in an accident, in violation of Florida law.  
The United States Court of Appeals for the Eleventh  
Circuit dismissed the petition. Certiorari was granted to  
resolve a conflict among the United States Courts of  
Appeals.

#### Overview

Certiorari was granted to determine whether state DUI  
offenses similar to *Fla. Stat. ch. 316.193(3)(c)(2)*, which

either did not have a mens rea component or required  
only a showing of negligence in the operation of a  
vehicle, qualified as a crime of violence under 8  
*U.S.C.S. § 1101(a)(43)* and 18 *U.S.C.S. § 16*. The  
alien's DUI offense was not a crime of violence under 18  
*U.S.C.S. § 16(a)* as the statute's key phrase, the use of  
physical force against the person or property of another,  
suggested a higher degree of intent than negligent or  
merely accidental conduct. The DUI conviction was not  
a crime of violence under 18 *U.S.C.S. § 16(b)* for similar  
reasons; it required a higher mens rea than the merely  
accidental or negligent conduct involved in a DUI  
offense. The ordinary meaning of the term "crime of  
violence," combined with 18 *U.S.C.S. § 16*'s emphasis  
on the use of physical force against another person (or  
the risk of having to use such force in committing a  
crime), suggested a category of violent, active crimes  
that did not include DUI offenses. Thus, 18 *U.S.C.S. § 16*  
could not be read to include the alien's conviction for  
DUI causing serious bodily injury under Florida law.

#### Outcome

The judgment was reversed and the case was  
remanded for further proceedings.

### LexisNexis® Headnotes

Criminal Law & Procedure > Criminal  
Offenses > Classification of Offenses > Felonies

Criminal Law & Procedure > Sentencing > Deportation &  
Removal

Immigration Law > ... > Grounds for Deportation &  
Removal > Criminal Activity > General Overview

Immigration Law > ... > Grounds for Deportation &  
Removal > Criminal Activity > Aggravated Felonies

Immigration Law > ... > Grounds for Deportation &



Removal > National Security Risk > General Overview

[HN1](#) Under § 237(a), [8 U.S.C.S. § 1227\(a\)](#), of the Immigration and Nationality Act (INA), any alien who is convicted of an aggravated felony is deportable and may be removed upon an order of the United States Attorney General. [8 U.S.C.S. § 1227\(a\)\(2\)\(A\)\(iii\)](#). Section 101(a)(43), [8 U.S.C.S. § 1101\(a\)\(43\)](#), of the INA defines aggravated felony to include, inter alia, a crime of violence (as defined in [18 U.S.C.S. § 16](#), but not including a purely political offense) for which the term of imprisonment is at least one year. [8 U.S.C.S. § 1101\(a\)\(43\)\(F\)](#).

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

[HN2](#) See [18 U.S.C.S. § 16](#).

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

Criminal Law & Procedure > Sentencing > Deportation & Removal

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

[HN3](#) In determining whether a petitioner's conviction falls within the ambit of [18 U.S.C.S. § 16](#) for purposes of [8 U.S.C.S. § 1227\(a\)](#), the statute directs the court's focus to the offense of conviction. [18 U.S.C.S. § 16\(a\) & \(b\)](#). This language requires the court to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime.

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > General Overview

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > Elements

[HN4](#) [Fla. Stat. ch. 316.193\(3\)\(c\)\(2\)](#) makes it a third-degree felony for a person to operate a vehicle while under the influence and, by reason of such operation, cause serious bodily injury to another. The Florida

statute, while it requires proof of causation of injury, does not require proof of any particular mental state.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Governments > Legislation > Interpretation

[HN5](#) Particularly when interpreting a statute that features as elastic a word as "use," the court construes language in its context and in light of the terms surrounding it.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

[HN6](#) The critical aspect of [18 U.S.C.S. § 16\(a\)](#) is that a crime of violence is one involving the use of physical force against the person or property of another. "Use" requires active employment. While one may, in theory, actively employ something in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident. Thus, a person would use physical force against another when pushing him; however, we would not ordinarily say a person uses physical force against another by stumbling and falling into him.

Governments > Legislation > Interpretation

[HN7](#) When interpreting a statute, the court must give words their ordinary or natural meaning.

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Negligence

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

[HN8](#) The key phrase in [18 U.S.C.S. § 16\(a\)](#), i.e., the use of physical force against the person or property of another, most naturally suggests a higher degree of intent than negligent or merely accidental conduct.



Criminal Law & Procedure > Criminal Offenses > Theft & Related Offenses > General Overview

Criminal Law & Procedure > ... > Theft & Related Offenses > Burglary & Criminal Trespass > General Overview

Criminal Law & Procedure > ... > Burglary & Criminal Trespass > Burglary > General Overview

Criminal Law & Procedure > ... > Burglary & Criminal Trespass > Burglary > Elements

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > General Overview

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Recklessness

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

**HNS** [🔍] *18 U.S.C.S. § 16(b)* sweeps more broadly than *18 U.S.C.S. § 16(a)*, defining a crime of violence as including any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. But *18 U.S.C.S. § 16(b)* does not thereby encompass all negligent misconduct, such as the negligent operation of a vehicle. It simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. The reckless disregard in *18 U.S.C.S. § 16* relates not to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime. The classic example is burglary. A burglary would be covered under *18 U.S.C.S. § 16(b)* not because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Three Strikes

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

**HNTC** [🔍] *18 U.S.C.S. § 16(b)* plainly does not encompass all offenses which create a substantial risk that injury will result from a person's conduct. The

substantial risk in *§ 16(b)* relates to the use of force, not to the possible effect of a person's conduct.

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > General Overview

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Negligence

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

**HNTT** [🔍] While *18 U.S.C.S. § 16(b)* is broader than *18 U.S.C.S. § 16(a)* in the sense that physical force need not actually be applied, it contains the same formulation found to be determinative in *§ 16(a)*: the use of physical force against the person or property of another. Accordingly, the court must give the language in *18 U.S.C.S. § 16(b)* an identical construction, requiring a higher mens rea than the merely accidental or negligent conduct involved in a driving under the influence of alcohol offense. This is particularly true in light of *§ 16(b)*'s requirement that the substantial risk be a risk of using physical force against another person in the course of committing the offense. In no ordinary or natural sense can it be said that a person risks having to use physical force against another person in the course of operating a vehicle while intoxicated and causing injury.

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Negligence

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

**HNT2** [🔍] For purposes of *8 U.S.C.S. § 1227(a)*, the ordinary meaning of the term "crime of violence," combined with *18 U.S.C.S. § 16*'s emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot



be said naturally to include driving under the influence of alcohol offenses.

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

Immigration Law > Inadmissibility > Grounds for Inadmissibility > Criminal Activity

International Law > Foreign & International Immunity > General Overview

International Law > Foreign & International Immunity > Consuls & Diplomats

[HN13](#) [ ] Section 212(a)(2)(E), 8 U.S.C.S. § 1182(a)(2)(E), of the Immigration and Nationality Act renders inadmissible any alien who has previously exercised diplomatic immunity from criminal jurisdiction in the United States after committing a serious criminal offense.

Immigration Law > Inadmissibility > Grounds for Inadmissibility > Criminal Activity

[HN14](#) [ ] See 8 U.S.C.S. § 1101(h).

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

Governments > Legislation > Interpretation

[HN15](#) [ ] The court must give effect to every word of a statute wherever possible.

## Lawyers' Edition Display

### Decision

[\*\*271] Alien's conviction of Florida driving-while-under-influence-of-alcohol offense not requiring proof of any mental state held not to be crime of violence, under 18 U.S.C.S. § 16, authorizing deportation pursuant to 8 U.S.C.S. § 1227(a).

### Summary

While an alien--a Haitian citizen who was a lawful permanent resident of the United States--was serving a

2 1/2-year prison sentence for driving under the influence of alcohol (DUI) and causing serious bodily harm, in violation of a Florida statute that required no proof of any mental state for conviction, the United States Immigration and Naturalization Service (INS) initiated removal proceedings against the alien pursuant to § 237(a) of the Immigration and Nationality Act (INA) (8 U.S.C.S. § 1227(a)), which, in 8 U.S.C.S. § 1227(a)(2)(A)(iii), permitted deportation, upon an order of the United States Attorney General, of any alien who had been convicted of an "aggravated felony," which was defined in INA § 101(a)(43)(F) (8 U.S.C.S. § 1101(a)(43)(F)) to include "a crime of violence" (as defined in 18 U.S.C.S. § 16) for which the term of imprisonment was at least 1 year.

Moreover, "crime of violence" was defined in 18 U.S.C.S. § 16 as "an offense that has as an element the use . . . of physical force against the person or property of another," (18 U.S.C.S. § 16(a)), or (2) "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (18 U.S.C.S. § 16(b)).

An Immigration Judge found the alien removable, and the Board of Immigration Appeals (BIA) affirmed the Immigration Judge's decision. After the alien had completed his sentence and had been deported to Haiti, the United States Court of Appeals for the Eleventh Circuit dismissed the alien's petition for review.

[\*\*272] On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Rehnquist, Ch. J., expressing the unanimous view of the court, it was held that the alien's DUI conviction was not a valid basis for deportation under 8 U.S.C.S. § 1227(a), because his conviction was not a crime of violence under (1) 18 U.S.C.S. § 16(a), as the phrase in that subsection referring to the use of physical force against the person or property of another most naturally suggested a higher degree of intent than merely negligent or accidental conduct; or (2) 18 U.S.C.S. § 16(b), as § 16(b) did not cover the negligent operation of a motor vehicle.

## Headnotes

ALIENS §25.5 > -- deportation -- crime of violence -- driving under influence of alcohol > Headnote:



[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D]

The deportation, pursuant to § 237(a) of the Immigration and Nationality Act (INA) (*8 U.S.C.S. § 1227(a)*)--which, in *8 U.S.C.S. § 1227(a)(2)(A)(ii)*, permitted deportation, upon an order of the United States Attorney General, of any alien who had been convicted of an "aggravated felony," which was defined in INA § 101(a)(43)(F) (*8 U.S.C.S. § 1101(a)(43)(F)*) to include "a crime of violence" (as defined in *18 U.S.C.S. § 16*) for which the term of imprisonment was at least 1 year--of an alien, who was a Haitian citizen and a lawful permanent resident of the United States, after the alien had served a 2 1/2-year prison sentence for a state-law conviction of driving under the influence of alcohol (DUI) and causing serious bodily harm, was invalid, as the United States Supreme Court determined that the DUI offense was not a crime of violence under *18 U.S.C.S. § 16*.

CRIMINAL LAW §6 > -- crime of violence -- intent -- driving under influence of alcohol > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [LEdHN\[2C\]](#) [2C] [LEdHN\[2D\]](#) [2D] [LEdHN\[2E\]](#) [2E] [LEdHN\[2F\]](#) [2F] [LEdHN\[2G\]](#) [2G] [LEdHN\[2H\]](#) [2H] [LEdHN\[2I\]](#) [2I]

State driving-under-the-influence-of-alcohol (DUI) offenses (such as the "driving under the influence of alcohol and causing serious bodily harm" offense of which an alien had been convicted in the instant case, and on the basis of which conviction the alien had been deported) which either did not have a mens rea component or required only a showing of negligence in the operation of a motor vehicle did not qualify as a crime of violence under *18 U.S.C.S. § 16*--which defined "crime of violence" as (1) "an offense that has as an element the use . . . of physical force against the person or property of another," (*18 U.S.C.S. § 16(a)*); or (2) "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (*18 U.S.C.S. § 16(b)*)--as:

(1) The alien's DUI offense was not a crime of violence under § 16(a), for:

(a) "Use" required active employment.

(b) The key phrase in § 16(a), concerning the use of physical force against the person or property of another,

most naturally suggested a higher degree of intent than negligent or merely accidental conduct.

(2) The alien's DUI offense was not a crime of violence under § 16(b), for in no ordinary or natural sense could it be said that a person risked having to "use" physical force against another person in the course of operating a motor vehicle while intoxicated and causing injury.

(3) Particularly in the context of the instant case, the fact that Congress had distinguished between a crime of violence and DUI-causing-injury offenses--and had included both--in § 101(h) of the Immigration and Nationality Act (*8 U.S.C.S. § 1101(h)*), which concerned the admissibility of aliens into the United States, but had not done so shortly thereafter in making only a crime of violence an aggravated felony under § 101(a)(43)(F) of the INA (*8 U.S.C.S. § 1101(a)(43)(F)*), strongly supported the United States Supreme Court's construction of *18 U.S.C.S. § 16*.

STATUTES §164.2 > -- language > Headnote:

[LEdHN\[3\]](#) [3]

For purposes of determining whether a state-law crime of driving under the influence of alcohol and causing serious bodily harm--the conviction of which required no proof of any mental state--was a crime of violence under *18 USCS § 16*, the United States Supreme Court began its analysis with the language of § 16.

STATUTES §178 > -- "use" -- context > Headnote:

[LEdHN\[4\]](#) [4]

For purposes of determining whether a state-law crime of driving under the influence of alcohol and causing serious bodily harm (the conviction of which required no proof of any mental state) was a crime of violence under *18 U.S.C.S. § 16(a)*--which defined a crime of violence as "an offense that has as an element the use . . . of physical force against the person or property of another,"--regardless of whether the word "use" alone supplied a mens rea element, a primary focus on that word was too narrow. Particularly when interpreting a statute that featured as elastic a word as "use," the United States Supreme Court construed language in its context and in light of the terms surrounding it.



543 U.S. 1, \*1; 125 S. Ct. 377, \*\*377; 160 L. Ed. 2d 271, \*\*\*272; 2004 U.S. LEXIS 7511, \*\*\*\*1

STATUTES §165 > -- natural meaning > Headnote:  
[LEdHN\[5\]](#) [5]

When interpreting a statute, the United States Supreme Court must give words their ordinary or natural meaning.

CRIMINAL LAW §6 > -- crime of violence -- intent  
 > Headnote:  
[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B]

The definition of a "crime of violence" in *18 U.S.C.S. § 16(b)* as an "offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" did not encompass all offenses that created a "substantial risk" that injury would result from a person's conduct. The "substantial risk" in *§ 16(b)* related to the use of force, not to the possible effect of a person's conduct. *Section 16(b)* did not encompass all negligent misconduct, such as the negligent operation of a motor vehicle. Instead, *§ 16(b)* covered offenses that naturally involved a person acting in disregard of the risk that physical force might be used against another in committing an offense. The reckless disregard in *§ 16(b)* related not to the general conduct or to the possibility that harm would result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime.

BURGLARY §1 > -- crime of violence > Headnote:  
[LEdHN\[7\]](#) [7]

The classic example of a crime of violence under *18 U.S.C.S. § 16(b)*--which defined "crime of violence" as an "offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"--was burglary, which would be covered under *§ 16(b)* (1) not because the offense could be committed in a generally reckless way or because someone might be injured; but (2) because burglary, by its nature, involved a substantial risk that the burglar would use force against a victim in completing the crime.

STATUTES §188 > -- crime of violence -- lenity > Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B]

For purposes of determining whether a state-law crime of driving while under the influence of alcohol (DUI) was a crime of violence under *18 U.S.C.S. § 16*--thus, authorizing deportation, under *8 U.S.C.S. § 1227(a)*, of an alien convicted of the DUI offense--the rule of lenity, providing that ambiguous criminal statutes were to be construed in favor of the accused, applied, because the United States Supreme Court had to interpret *§ 16* (which was a criminal statute with both criminal and noncriminal applications) consistently, regardless of whether the court encountered application of *§ 16* in a criminal or noncriminal context.

STATUTES §110 > -- words > Headnote:  
[LEdHN\[9\]](#) [9]

The United States Supreme Court must give effect to every word of a statute wherever possible.

## Syllabus

Petitioner, a lawful permanent resident of the United States, pleaded guilty to two counts of driving under the influence of alcohol (DUI) and causing serious bodily injury in an accident, in violation of Florida law. While he was serving his prison sentence, the Immigration and Naturalization Service initiated removal proceedings pursuant to *§ 237(a) of the Immigration and Nationality Act (INA)*, which permits deportation of an alien convicted of "an aggravated felony." *INA § 101(a)(43)(F)* defines "aggravated felony" to include, *inter alia*, "a crime of violence [as defined in *18 U.S.C. § 16*] for which the term of imprisonment [is] at [\*\*\*\*2] least one year." Title *18 U.S.C. § 16(a)*, in turn, defines "crime of violence" as "an offense that has as an element the use . . . of physical force against the person or property of another," and *§ 16(b)* defines it as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." An Immigration Judge and the Board of Immigration Appeals ordered petitioner's deportation, and the Eleventh Circuit dismissed his petition for review, relying on its precedent that a conviction under Florida's DUI statute is a crime of violence under *18 U.S.C. § 16*.

*Held:*



State DUI offenses such as Florida's, which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle, are not crimes of violence under 18 U.S.C. § 16.

(a) Section 16 requires this Court to look to the elements and nature of the offense of conviction in determining whether petitioner's conviction falls within its ambit. Florida's DUI statute, like [\*\*\*\*3] similar statutes in many States, requires proof of causation but not of any mental state; and some other States appear to require only proof that a person acted negligently in operating the vehicle. This Court's analysis begins with § 16's language. See *Bailey v. United States*, 516 U.S. 137, 144, 133 L. Ed. 2d 472, 116 S. Ct. 501. Particularly when interpreting a statute featuring as elastic a word as "use," the Court construes language in its context and in light of the terms surrounding it. See *Smith v. United States*, 508 U.S. 223, 229, 124 L. Ed. 2d 138, 113 S. Ct. 2050. Section 16(a)'s critical aspect is that a crime of violence involves the "use . . . of physical force against" another's person or property. [\*\*\*276] That requires active employment. See *Bailey*, *supra*, 516 U.S. 137, at 145, 133 L. Ed. 472, 116 S. Ct. 501. While one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another by accident. When interpreting a statute, words must be given their "ordinary or natural" meaning, *Smith*, *supra*, 508 U.S. 223 at 228, 124 L. Ed. 2d 138, 113 S. Ct. 2050, and § 16(a)'s key phrase most naturally suggests a higher degree of intent than negligent or merely accidental conduct. [\*\*\*\*4] Petitioner's DUI offense therefore is not a crime of violence under § 16(a).

(b) Nor is it a crime of violence under § 16(b), which sweeps more broadly than § 16(a), but does not thereby encompass all negligent conduct, such as negligent operation of a vehicle. It simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. The classic example is burglary, which, by nature, involves a substantial risk that the burglar will use force against a victim in completing the crime. Thus, § 16(b) contains the same formulation found to be determinative in § 16(a): the use of physical force against another's person or property. Accordingly, § 16(b)'s language must be given an identical construction, requiring a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense.

(c) The ordinary meaning of the term "crime of violence," which is what this Court is ultimately determining, combined with § 16's emphasis on the use of physical force against another (or the risk of having to use such force in committing a crime), suggests [\*\*\*\*5] a category of violent, active crimes that cannot be said naturally to include DUI offenses. This construction is reinforced by INA § 101(h), which includes as alternative definitions of "serious criminal offense" a "crime of violence, as defined in [§ 16]," § 101(h)(2), and a DUI-causing-injury offense, § 101(h)(3). Interpreting § 16 to include DUI offenses would leave § 101(h)(3) practically void of significance, in contravention of the rule that effect should be given to every word of a statute whenever possible, see *Duncan v. Walker*, 533 U.S. 167, 174, 150 L. Ed. 2d 251, 121 S. Ct. 2120.

(d) This case does not present the question whether an offense requiring proof of the *reckless* use of force against another's person or property qualifies as a crime of violence under § 16.

Reversed and remanded.

**Counsel:** Joseph S. Sollers, III argued the cause for petitioner.

**Dan Himmelfarb** argued the cause for respondents.

**Judges:** Rehnquist, C. J., delivered the opinion for a unanimous Court.

**Opinion by:** REHNQUIST

## Opinion

[\*3] [\*\*379] Chief Justice **Rehnquist** delivered the opinion of the Court.

[LEdHN\[1A\]](#)<sup>[↑]</sup> [1A] [LEdHN\[2A\]](#)<sup>[↑]</sup> [2A] Petitioner Josue Leocal, a Haitian citizen who is a lawful permanent resident of the United States, was convicted in 2000 of driving under the influence of alcohol (DUI) and causing serious bodily injury, in violation [\*\*\*\*6] of Florida law. See *Fla. Stat. § 316.193(3)(c)(2)* (2003). Classifying this conviction as a "crime of violence" under 18 U.S.C. § 16 [18 USCS § 16], and therefore an "aggravated felony" under the *Immigration and Nationality Act* (INA), an Immigration Judge and the Board [\*\*\*277] of Immigration Appeals (BIA) ordered that petitioner be deported pursuant to § 237(a) of the INA. The Court of Appeals [\*4] for the Eleventh Circuit



agreed, dismissing petitioner's petition for review. We disagree and hold that petitioner's DUI conviction is not a crime of violence under 18 U.S.C. § 16 [18 USCS § 16].

LEdHN1B[↑] [1B] Petitioner immigrated to the United States in 1980 and became a lawful permanent resident in 1987. In January 2000, he was charged with two counts of DUI causing serious bodily injury under Fla. Stat. § 318.193(3)(c)(2), after he caused an accident resulting in injury to two people. He pleaded guilty to both counts and was sentenced to 2 1/2 years in prison.

LEdHN1C[↑] [1C] LEdHN2B[↑] [2B] In November 2000, while he was serving his sentence, the Immigration and Naturalization Service (INS) initiated removal proceedings against him pursuant to § 237(a) of the INA. HN1[↑] Under that provision, "[a]ny alien who is convicted [\*\*\*\*7] of an aggravated felony . . . is deportable" and may be removed upon an order of the Attorney General. 66 Stat 201, 8 U.S.C. § 1227(a)(2)(A)(iii) [8 USCS § 1227(a)(2)(A)(iii)]. Section 101(a)(43) of the INA defines "aggravated felony" to include, *inter alia*, "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 1 8 U.S.C. § 1101(a)(43)(F) [8 USCS § 1101(a)(43)(F)] (footnote omitted). Title 18 U.S.C. § 16 [18 USCS § 16], in turn, defines the term "crime of violence" to mean:

[\*\*\*\*8]

[\*\*380] HN2[↑] [\*5] "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or  
 "(b) any other offense that is a felony and that, by

<sup>1</sup> Congress first made commission of an aggravated felony grounds for an alien's removal in 1988, and it defined the term to include offenses such as murder, drug trafficking crimes, and firearm trafficking offenses. See Anti-Drug Abuse Act of 1988, §§ 7342, 7344, 102 Stat. 4469, 4470. Since then, Congress has frequently amended the definition of aggravated felony, broadening the scope of offenses which render an alien deportable. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, § 440(e), 110 Stat. 1277 (adding a number of offenses to § 101(a)(43) of the INA); *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA), § 321, 110 Stat. 3009-627 (same). The inclusion of any "crime of violence" as an aggravated felony came in 1990. See Immigration Act of 1990, § 501, 104 Stat 5048.

its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Here, the INS claimed that petitioner's DUI conviction was a "crime of violence" under § 16, and therefore an "aggravated felony" under the INA.

LEdHN1D[↑] [1D] LEdHN2C[↑] [2C] In October 2001, an Immigration Judge found petitioner removable, relying upon the Eleventh Circuit's decision in Le v. United States Attorney General, 196 F.3d 1352 (1999) *per curiam*), which held that a conviction under the Florida DUI statute qualified as a crime of violence. The BIA affirmed. <sup>2</sup>[\*\*\*\*10] Petitioner completed his sentence and [\*\*\*278] was removed to Haiti in November 2002. In June 2003, the Court of Appeals for the Eleventh Circuit dismissed petitioner's petition for review, relying on its previous ruling in Le, supra.<sup>3</sup> App. to [\*6] Pet. for Cert. 5a-7a. We granted certiorari, 540 U.S. 1176, 158 L. Ed. 2d 76, 124 S. Ct. 1405 (2004), to resolve a conflict among the [\*\*\*\*9] Courts of Appeals on the question whether state DUI offenses similar to the one in Florida, which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle, qualify as a crime of violence. Compare Le, supra, at 1354; and Omar v. INS, 298 F.3d 710, 715-718 (CA8 2002), with United States v.

<sup>2</sup> When petitioner first appealed, the BIA's position was that a violation of DUI statutes similar to Florida's counted as a crime of violence under 18 U.S.C. § 16 [18 USCS § 16]. See, e.g., Matter of Puente-Salazar, 22 I. & N. Dec. 1006, 1012-1013 (BIA 1999) (en banc). Before petitioner received a decision from his appeal (due to a clerical error not relevant here), the BIA in another case reversed its position from Puente-Salazar and held that DUI offenses that do not have a *mens rea* of at least recklessness are not crimes of violence within the meaning of § 16. See Matter of Ramos, 23 I. & N. Dec. 336, 316 (BIA 2002) (en banc). However, because the BIA held in Ramos that it would "follow the law of the circuit in those circuits that have addressed the question whether driving under the influence is a crime of violence," *id.*, at 346-347, and because it found the Eleventh Circuit's ruling in Le controlling, it affirmed the Immigration Judge's removal order. See App. to Pet. for Cert. 1a-4a.

<sup>3</sup> Pursuant to the IIRIRA, the Eleventh Circuit was without jurisdiction to review the BIA's removal order in this case if petitioner was "removable by reason of having committed" certain criminal offenses, including those covered as an "aggravated felony." See 8 U.S.C. § 1252(a)(2)(C) [8 USCS § 1252(a)(2)(C)]. Because the Eleventh Circuit held that petitioner's conviction was such an offense, it concluded that it had no jurisdiction to consider the removal order.



*Trinidad-Aquino*, 259 F.3d 1140, 1145-1146 (CA9 2001); *Dalton v. Ashcroft*, 257 F.3d 200, 205-206 (CA2 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 609-611 (CA7 2001); and *United States v. Chapa-Garza*, 243 F.3d 921, 926-927 (CA5), amended, 262 F.3d 479 (CA5 2001) (*per curiam*); see also *Ursu v. INS*, 20 Fed. Appx. 702 (CA9 2001) (following *Trinidad-Aquino*, *supra*, and ruling that a violation of the Florida DUI statute at issue here and in *Le* does not count as a "crime of violence"). We now reverse the Eleventh Circuit.

\*\*\*

Title 18 U.S.C. § 16 [18 USCS § 16] was enacted as part of the Comprehensive Crime Control Act [\*\*381] of 1984, which broadly reformed the federal criminal code in such areas as sentencing, bail, and drug enforcement, and which added a variety of new violent and nonviolent offenses. § 1001(a), 98 Stat 2136. Congress employed the term "crime of violence" in numerous places in the Act, such as for defining the elements of particular offenses, see, e.g., 18 U.S.C. § 1959 [18 USCS § 1959] (prohibiting threats to commit crimes of violence in aid of racketeering activity), or for directing when a hearing is required before [\*\*\*\*11] a charged individual can be released on bail, see § 3142(b) (requiring a pretrial detention hearing for those alleged to have committed a crime of violence). Congress therefore provided in § 16 a general definition of the term "crime of violence" to be used throughout the Act. See § 1001(a), [\*7] 98 Stat 2136. Section 16 has since been incorporated into a variety of statutory provisions, both criminal and noncriminal. <sup>4</sup> [\*\*\*\*279]

[\*\*\*\*12] Here, pursuant to § 237(a) of the INA, the Court of Appeals applied § 16 to find that petitioner's DUI

<sup>4</sup>For instance, a number of statutes criminalize conduct that has as an element the commission of a crime of violence under § 16. See, e.g., 18 U.S.C. § 842(p) [18 USCS § 842(p)] (prohibiting the distribution of information relating to explosives, destructive devices, and weapons of mass destruction in relation to a crime of violence). Other statutory provisions make classification of an offense as a crime of violence consequential for purposes of, *inter alia*, extradition and restitution. See §§ 3101(b), 3663A(c). And the term "crime of violence" under § 16 has been incorporated into a number of noncriminal enactments. See, e.g., 8 U.S.C. § 1227(a)(2)(A)(iii) [8 USCS § 1227(a)(2)(A)(iii)] (rendering an alien deportable for committing a crime of violence, as petitioner is charged here).

conviction rendered him deportable. HNS [↑] In determining whether petitioner's conviction falls within the ambit of § 16, the statute directs our focus to the "offense" of conviction. See § 16(a) (defining a crime of violence as "an offense that has as an element the use . . . of physical force against the person or property of another" (emphasis added)); § 16(b) (defining the term as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (emphasis added)). This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime.

LEdHNN[2D][↑] [2D]Florida Stat. § 316.193(3)(c)[2]HNN4[↑] makes it a third-degree felony for a person to operate a vehicle while under the influence and, "by reason of such operation, caus[e] . . . [s]erious bodily injury to another." The Florida statute, while it requires proof of causation of injury, does not require proof of any particular [\*\*\*\*13] mental state. See *State v. Hubbard*, 751 So. 2d 552, 562-564 (Fla. 1999) (holding, in the context of a DUI manslaughter conviction under § 316.193, that the statute [\*8] does not contain a *mens rea* requirement). Many States have enacted similar statutes, criminalizing DUI causing serious bodily injury or death without requiring proof of any mental state, <sup>5</sup> [\*\*\*\*14] or, in some States, appearing to [\*\*382] require only proof that the person

<sup>5</sup>See, e.g., Ala. Code § 13A-6-20(a)(5) (West 1994); Colo. Rev. Stat. § 16-3-205(1)(b)(i) (Lexis 2003); Conn. Gen. Stat. § 53a-60d(a) (2003); Ga. Code Ann. § 40-6-394 (Lexis 2004); Idaho Code § 18-6006(1) (Lexis 2004); Ill. Comp. Stat. Ann., ch. 625, § 5/11-601(d)(1)(C) (West 2002); Ind. Code § 9-30-5-1 (1993); Iowa Code § 707.6A(4) (2003); Ky. Rev. Stat. Ann. §§ 189A.010(1) and (11)(c) (Lexis Supp. 2004); Me. Rev. Stat. Ann., Tit. 29-A, § 2411(1-A)(D)(1) (West Supp. 2003); Mich. Comp. Laws § 267.025(5) (West Supp. 2004); Neb. Rev. Stat. § 60-6,186(1) (2002 Cum. Supp.); N. H. Rev. Stat. Ann. §§ 285.02-a(1)(b) and (1)(b) (West 2004); N. J. Stat. Ann. § 2C:12-1(c) (West Supp. 2003); N. M. Stat. Ann. §§ 66-9-101(B) and (C) (2004); N. D. Cent. Code § 39-09-01 2(1)(c) (Lexis 1997); Ohio Rev. Code Ann. § 2903.08(A)(1)(a) (Lexis 2003); Okla. Stat. Ann., Tit. 47, § 11-904(B)(1) (West 2001); 75 Pa. Cons. Stat. § 3804(b) (Supp. 2003); R. I. Gen. Laws § 31-27-2 a(a) (Lexis 2002); Tex. Penal Code Ann. § 49.07(a)(1) (West 2003); Va. Stat. Ann., Tit. 23, § 1210(f) (Lexis Supp. 2004); Wash. Rev. Code § 46.61.522(1)(b) (1994); Wis. Stat. § 940.25(1) (1999-2000); Wyo. Stat. § 31-5-233(h) (Lexis 2003).



acted negligently in operating the vehicle.<sup>6</sup> The question here is whether § 16 can be interpreted to include such offenses.

[LEdHN\[3\]](#) [3] Our analysis begins with the language of the statute. See *Bailey v. United States*, 516 U.S. 137, 144, 133 L. Ed. 2d 472, 116 S. Ct. 501 (1995). The plain text of § 16(a) states that [\*\*\*280] an offense, to qualify as a crime of violence, must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." We do not deal here with an *attempted* [9] or *threatened* use of force. Petitioner contends that his conviction did not require the "use" of force against [\*\*\*\*15] another person because the most common employment of the word "use" connotes the *intentional* availment of force, which is not required under the Florida DUI statute. The Government counters that the "use" of force does not incorporate any *mens rea* component, and that petitioner's DUI conviction necessarily includes the use of force. To support its position, the Government dissects the meaning of the word "use," employing dictionaries, legislation, and our own case law in contending that a use of force may be negligent or even inadvertent.

[LEdHN\[2E\]](#) [2E] [LEdHN\[4\]](#) [4] [LEdHN\[5\]](#) [5] Whether or not the word "use" alone supplies a *mens rea* element, the parties' primary focus on that word is too narrow. [HN5](#) [5] Particularly when interpreting a statute that features as elastic a word as "use," we construe language in its context and in light of the terms surrounding it. See *Smith v. United States*, 508 U.S. 223, 228, 124 L. Ed. 2d 138, 113 S. Ct. 2050 (1993); *Bailey supra*, at 145, 133 L. Ed. 472, 116 S. Ct. 501. [HN6](#) [6] The critical aspect of § 16(a) is that a crime of violence is one involving the "use . . . of physical force against the person or property of another." (Emphasis added.) As we said in a similar context in *Bailey*, "use" requires active employment. [\*\*\*\*16] 516 U.S., at 145, 133 L. Ed. 2d 138, 113 S. Ct. 501. While one may, in

theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident. Thus, a person would "use . . . physical force against" another when pushing him; however, we would not ordinarily say a person "use[s] . . . physical force against" another by stumbling and falling into him. [HN7](#) [7] When interpreting a statute, we must give words their "ordinary or natural" meaning. *Smith, supra*, at 228, 124 L. Ed. 2d 138, 113 S. Ct. 2050. [HN8](#) [8] The key phrase in § 16(a) --the "use . . . of physical force against the person or property of another"--most naturally suggests a higher degree of intent than negligent or merely accidental conduct. See *United States v. Trinidad-Aquino*, 259 F.3d, at 1145; *Bazan-Reyes v. INS* 256 F.3d, at 609. [\*10] Petitioner's DUI offense therefore is not a crime of violence under § 16(a).

[LEdHN\[6A\]](#) [6A] [LEdHN\[7\]](#) [7] Neither is petitioner's DUI conviction a crime of violence under § 16(b). [HN9](#) [9] Section 16(b) sweeps more broadly than § 16(a), [\*\*\*383] defining a crime of violence as including "any other offense that is a felony and that, by its nature, [\*\*\*\*17] involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." But § 16(b) does not thereby encompass all negligent misconduct, such as the negligent operation of a vehicle. It simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. The reckless disregard in § 16 relates *not* to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk [\*\*\*\*281] that the use of physical force against another might be required in committing a crime.<sup>7</sup> The classic example is

<sup>7</sup> [LEdHN\[9\]](#) [9] Thus, [HN10](#) [10] § 16(b) plainly does not encompass all offenses which create a "substantial risk" that injury will result from a person's conduct. The "substantial risk" in § 16(b) relates to the use of force, not to the possible effect of a person's conduct. Compare § 16(b) (requiring a "substantial risk that physical force against the person or property of another may be used") with United States Sentencing Commission, Guidelines Manual § 4B1.2(a)(2) (Nov. 2003) (in the context of a career-offender sentencing enhancement, defining "crime of violence" as meaning, *inter alia*, "conduct that presents a serious potential risk of physical injury to another"). The risk that an accident may occur when an individual drives while intoxicated is simply not the same thing as the risk that the individual may "use" physical force against another in committing the DUI offense. See, e.g.,

<sup>6</sup> See, e.g., *Cal. Veh. Code* § 23153 (West 2000); *Del. Code Ann., Tit. 11, §§ 628(2), 629* (Lexis 1995); *La. Stat. Ann. §§ 14:39 (A), 14:39.2(A)* (West 1997 and Supp. 2004); *Md. Crim. Law Code Ann., §§ 3-211(c) and (d)* (Lexis 2004); *Miss. Code Ann. § 63-11-30(5)* (Lexis 2004); *Mo. Ann. Stat. § 565.050 (4)* (West 2000); *Mont. Code Ann. § 45-5-205(1)* (2003); *Nev. Rev. Stat. § 484.3295(1)* (2003); *S. C. Code Ann. § 56-5-2940(A)(1)* (2003); *S. D. Codified Laws § 22-18-42* (West Supp. 2003); *Utah Code Ann. §§ 41-6-44(3)(a)(ii)(A) and (3)(b)* (Lexis Supp. 2004); *W. Va. Code § 17C-5-2(c)* (Lexis 2004).



burglary. A burglary would be covered under § 16(b) not because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.

[\*\*\*\*18] LEdHN[2F] [2F] [\*11] Thus, HN11 while § 16(b) is broader than § 16(a) in the sense that physical force need not actually be applied, it contains the same formulation we found to be determinative in § 16(a): the use of physical force against the person or property of another. Accordingly, we must give the language in § 16(b) an identical construction, requiring a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense. This is particularly true in light of § 16(b)'s requirement that the "substantial risk" be a risk of using physical force against another person "in the course of committing the offense." In no "ordinary or natural" sense can it be said that a person risks having to "use" physical force against another person in the course of operating a vehicle while intoxicated and causing injury.

In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term "crime of violence." HN12 The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot [\*\*\*\*19] be said naturally to include DUI offenses. Cf. United States v. Doe, 960 F.2d 221, 225 (CA1 1992) (Breyer, C. J.) (observing that the term "violent felony" in 18 U.S.C. § 924(e) (2000 ed. and Supp. II) [18 USCS § 924(e)] "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence"). Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the "violent" crimes Congress sought to distinguish for heightened punishment and other crimes. See United States v. Lucio-Lucio, 347 F.3d 1202, 1205-1206 (CA10 2003).

LEdHN[2G] [2G] LEdHN[8A] [8A] LEdHN[9] [9] Section 16 therefore cannot be read to include petitioner's conviction for DUI [\*\*384] causing serious bodily injury under Florida law. <sup>8</sup> This construction is

United States v. Lucio-Lucio, 347 F.3d 1202, 1205-1206 (CA10 2003); Bazan-Reyes v. INS, 255 F.3d 600, 609-610 (CA7 2001).

reinforced by Congress' use [\*12] of the [\*\*\*282] term "crime of violence" in § 101(h) of the INA, which was enacted in 1990. See Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, § 131, 104 Stat. 31 (hereinafter FRAA). HN13 Section 212(a)(2)(E) of the INA renders inadmissible any alien who has previously exercised diplomatic immunity from criminal jurisdiction in the United States after committing a "serious [\*\*\*\*20] criminal offense." 8 U.S.C. § 1182(a)(2)(E) [8 USCS § 1182(a)(2)(E)]. Section 101(h) defines the term "serious criminal offense" to mean:

HN14 "(1) any felony;

"(2) any crime of violence, as defined in section 16 of title 18; or

"(3) any crime of reckless driving or of driving [\*\*\*\*21] while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another." 8 U.S.C. § 1101(h) [8 USCS § 1101(h)] (emphasis added).

Congress' separate listing of the DUI-causing-injury offense from the definition of "crime of violence" in § 16 is revealing. Interpreting § 16 to include DUI offenses, as the Government urges, would leave § 101(h)(3) practically devoid of significance. As HN15 we must give effect to every word of a statute wherever possible, see Duncan v. Walker, 533 U.S. 167, 174, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001), the distinct provision for these offenses under § 101(h) bolsters our conclusion that § 16 does not itself encompass DUI offenses. <sup>9</sup>

<sup>8</sup> LEdHN Even if § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor. Although here we deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies. Cf. United States v. Thompson/Center Arms Co., 501 U.S. 505, 517-518, 119 L. Ed. 2d 308, 112 S. Ct. 2102 (1992) (plurality opinion) (applying the rule of lenity to a tax statute, in a civil setting, because the statute had criminal applications and thus had to be interpreted consistently with its criminal applications).

<sup>9</sup> LEdHN This point carries significant weight in the particular context of this case. Congress incorporated § 16 as an aggravated felony under § 101(a)(43)(F) of the INA in



[\*\*\*\*22] [LEdHN\[2H\]](#) [2H] [\*13] This case does not present us with the question whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence under *18 U.S.C. § 16* [*18 USCS § 16*]. DUI statutes such as Florida's do not require any mental state with respect to the use of force against another person, thus reaching individuals who were negligent or less. Drunk driving is a nationwide problem, as evidenced by the efforts of legislatures to prohibit such conduct and impose appropriate penalties. But this fact does not warrant our shoehorning it into statutory sections where it does not fit. The judgment of the United States Court of Appeals for the Eleventh Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

## References

*3B Am Jur 2d, Aliens and Citizens § 1844*

[\*\*\*\*23] [8 USCS § 1227\(a\)](#); [18 USCS § 16](#)

L Ed Digest, Aliens § 25.5; Criminal Law § 6

L Ed Index, Deportation or Exclusion of Aliens; Intent or Motive

## Annotation References

Supreme Court's views as to the "rule of lenity" in the construction of criminal statutes. [62 L Ed 2d 827](#).

What constitutes "aggravated felony" for which alien can be deported or removed under § 237(a)(2)(A)(iii) of Immigration and Nationality Act ([8 U.S.C.A. § 1227\(a\)\(2\)\(A\)\(iii\)](#) [[8 USCS § 1227\(a\)\(2\)\(A\)\(iii\)](#)]). [168 ALR Fed 575](#).

What constitutes "convicted" within meaning of §

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**1990.** See Immigration Act of 1990, § 501, 104 Stat. 5048 (Nov. 29, 1990). Congress enacted [§ 101\(h\)](#), with its incorporation of [§ 16](#) and a separate provision covering DUI-causing-injury offenses, just nine months earlier. See FRAA, § 131, 104 Stat. 31 (Feb. 16, 1990). That Congress distinguished between a crime of violence and DUI-causing-injury offenses (and included both) in [§ 101\(h\)](#), but did not do so shortly thereafter in making only a crime of violence an aggravated felony under [§ 101\(a\)\(43\)\(F\)](#), strongly supports our construction of [§ 16](#).

241(a)(4, 11, 14-16, 18) of Immigration and Nationality Act ([8 U.S.C.A. § 1251\(a\)\(4, 11, 14-16, 18\)](#) [[8 USCS § 1251\(a\)\(4, 11, 14-16, 18\)](#)]) providing that alien shall be deported who has been convicted of certain offenses. [26 ALR Fed 709](#).

Construction and application of § 245 of the Immigration and Nationality Act of 1952 ([8 U.S.C.A. § 1255](#) [[8 USCS § 1255](#)]) authorizing adjustment [\*\*\*\*24] of status of alien to that of permanent resident. [4 ALR Fed 557](#).

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DETAINED

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE OF IMMIGRATION REVIEW  
IMMIGRATION COURT  
Arlington, Virginia

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In The Matter of: )  
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YYYYYYYYY ZZZZZZZZZZZ )  
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In Removal Proceedings )  
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 )

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File Number: A 111-111-111

DETAINED

Immigration Judge: Hon. Rodger C. Harris

Next Hearing: February 5, 2013  
at 1:00 p.m.

**BRIEF ON ELIGIBILITY FOR ASYLUM**

This matter is currently set for an Individual Hearing on February 5, 2013. That date was re-scheduled from January 15, 2013 for the Court to receive briefs on the issue of the Respondent's eligibility for asylum in light of the Respondent's two convictions for Obtaining or Attempting to Obtain a Controlled Drug by Fraud, Deceit, Misrepresentation, Embezzlement, or Subterfuge in violation of Va. Code Ann. § 18.2-258.1.

#### Facts of Case

Respondent was admitted to the United States in 2007 as a student. In March of 2008, he was granted asylum. It appears that this grant was as a derivative of his wife's application for asylum. In June of 2008, his status was adjusted under INA §209(b) to that of a Lawful Permanent Resident.

In May of 2011, he entered a guilty plea to two counts of Va. Code Ann. § 18.2-258.1 (please see Exhibit "A", the statute at issue. The records of the case itself are already part of the record in this matter.) The two offenses occurred a few days apart in November of 2010. On July 15, 2011, the Fairfax County Circuit Court, pursuant to the statute, placed the Respondent on active probation until July 19, 2013, ordering him to pay court costs, enter into and complete a substance abuse assessment, complete any recommended treatment as a result of the assessment, pay the costs of any such program, be fingerprinted, remain drug free, and complete 50 hours of community service. Should the Respondent complete these conditions successfully, the Court can convict the



Respondent of a Class 1 Misdemeanor, even though the statute is a Class 6 Felony (please see Exhibit "B", for the Va. Code Sections defining the classes of misdemeanors and felonies. A Class 1 misdemeanor is the most serious misdemeanor under Virginia Law. A Class 6 felony is the least serious felony under Virginia Law.) As of the date of the Individual Hearing in this case, the Respondent has not been convicted in State Court of the violation of law he has been charged with. Of course, pursuant to INA §101(a)(48), because the Respondent has entered guilty pleas to the offense, and has been placed on probation by the State Court, therefore he meets the INA's definition of "convicted." It should be noted, for this analysis, that any State Law convictions he would receive in this matter will be misdemeanors.

Respondent has completed his community service and treatment programs as recommended, in accordance with the State Court's Order. (Please see Exhibit "C" for a letter from Habitat for Humanity reflecting his completion of 57 hours of community service.)

Even though he was never incarcerated as result of his plea in State Court, DHS issued a Notice to Appear on November 25, 2011, which was served upon the Respondent on March 24, 2012. He was taken into DHS custody at that time and pursuant to INA § 236(c) has been denied bond.

Respondent asserts that he has not been convicted of a particularly serious crime, and that he is eligible for asylum. Further, Respondent asserts that he has been the victim of past persecution in his home country based upon his national origin, race, and religion.

Statement of Issue

Has the Respondent been convicted of a particularly serious crime (hereinafter a “PSC”), as defined by INA § 208 (b)(2)(A)(ii)?

#### The Standard of Review

The determination of what is a PSC is left to the Attorney General to define. As stated in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002) : “Establishing “refugee” status is not the only hurdle an alien seeking asylum must clear in order to be considered eligible for such relief. Indeed, there are a series of exceptions outlined in INA § 208(b)(2) under which all aliens – including “refugees” – are statutorily barred from asylum. As relevant here, an alien convicted of a “particularly serious crime,” defined for these purposes as any “aggravated felony,” may not be granted asylum under any circumstances. *See* INA § 208(b)(2)(A)(ii), (B)(i). Furthermore, even if asylum eligibility is established, the decision whether to grant an application is committed to the Attorney General’s discretion. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999).” Respondent has not been convicted of an aggravated felony, therefore, the per se rule in INA §208(b)(B)(i) does not apply in this matter.

In *Matter of B-*, 20 I&N Dec. 427 (BIA 1991) the Board stated: “In *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982), modified on other grounds, *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988), we stated that in judging the seriousness of a crime, the Board will consider such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community. We went on to state in *Matter of Frentescu*, *supra*,

that crimes against persons are more likely to be categorized as "particularly serious crimes.""

The Board further defined a particularly serious crime in *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007.) In that case, the Board held that a conviction need not be an aggravated felony to be a particularly serious crime and further authorized Immigration Courts to review "all reliable information" to make a determination.

In the most recent case concerning particularly serious crime determinations, the BIA looked to the nature of the offense and the specific facts and circumstances of the crime in making a determination. In *Matter of R-A-M-*, 25 I&N Dec. 657 (BIA 2012) the Board stated that in making a determination of particularly serious crime it will "examine the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction." *Id.* at 659. Citing *Matter of N-A-M-*, 24 I. & N. Dec. 336, 342 (BIA 2007), *aff'd*, and *N-A-M- v. Holder*, 587 F.3d 1052 (10th Cir. 2009), *cert. denied*, 131 S. Ct. 898, 178 L. Ed. 2d 758 (2011)."

As such this Court has the authority to determine whether or not Mr. ZZZZZZZZZZZZ has been convicted of a PSC.

#### Argument

Mr. ZZZZZZZZZZZZ has not been convicted of a particularly serious crime. The nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of his conviction do not indicate that he has been convicted of a particularly serious crime.



Applying the case law, as defined *supra*, Mr. ZZZZZZZZZZZ's convictions are not particularly serious crimes. He did not receive a sentence of five years or more, rather he received a sentence that will not result in conviction for a felony. His sentence reflected the need for rehabilitation, recognized by the Virginia statute at issue. It is clear that the Commonwealth of Virginia's approach to such cases indicates that the community does not view this offense as a "particularly serious crime." If it did, the punishment would be more severe, and there would not be a rehabilitative statutory scheme in place.

Further, Mr. ZZZZZZZZZZZ's crime was not against a person. *Nethagani v. Mukasey* 532 F.3d 150, 155 (2d Cir. 2008) ("[C]rimes against persons are more likely to be particularly serious than are crimes against property.") His obtaining prescription medication harmed no one but himself. It was not crime that involved drug trafficking, but did involve his obtaining drugs for his own use. *Matter of Y-L-, A-G-, R-S-R-* 23 I&N Dec. 270, 274 (AG 2002) (finding that aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute "particularly serious crimes" within the meaning of INA § 241(b)(3)(B)(ii)).

No one was physically injured by his crimes, and he has completed the requirements of the Court's Order and he remains drug free. He is anticipating that his plea will result in misdemeanor convictions.

The Department has not alleged that his convictions are particularly serious crimes, nor has it alleged that the Respondent is an aggravated felon. He has no other criminal record.

In his affidavit in support of his I-589, the Respondent details the facts and circumstances of his crime. He hurt his back in 2010 moving luggage. He went to a doctor for treatment, and received a prescription for Oxycodone. That drug relieved his pain, but the pain would return when he wasn't using it. His financial problems and the pain drove him to copy his prescriptions, and fill them. He was apprehended by the police, and admitted to the police his actions at the time of his arrest. He took responsibility for his actions by entering the plea, and completed the requirements of the Court's sentencing Order. He did not obtain the drugs to further distribute them, he did not use violence in obtaining the drugs, and he did not forge prescriptions, only photocopied them. He did not steal the drugs, but paid for them. Nothing in the circumstances of his case indicate that anyone else was harmed; nor was anyone damaged financially because of his crimes, except for himself.

Mr. ZZZZZZZZZZZ's lack of criminal record indicates that he is not a danger to the community. Further, his history of completing the requirements imposed upon him as a result of his plea indicate that he comports his behavior to that which society expects of him.

#### Conclusion

Mr. ZZZZZZZZZZZ has not been convicted of a particularly serious crime. The nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of his conviction do not indicate that he has been convicted of a particularly serious crime. He is eligible for asylum.



Respectfully Submitted,

YYYYYYYYY ZZZZZZZZZZZ

By Counsel

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Certificate of Service

I hereby certify that on \_\_\_\_\_, a true copy of the foregoing Brief on Eligibility for Asylum and any attached pages was hand delivered to:

Office of the Chief Counsel  
Immigration and Customs Enforcement  
Department of Homeland Security  
1901 South Bell St., # 200  
Arlington, VA 22202

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Alfred L. Robertson, Jr.  
Date: \_\_\_\_\_

## Crespo v. Holder

United States Court of Appeals for the Fourth Circuit  
October 28, 2010, Argued; January 11, 2011, Decided  
No. 09-2214

### Reporter

631 F.3d 130 \*; 2011 U.S. App. LEXIS 502 \*\*

FRANKLIN EDUARDO CRESPO, Petitioner, v. ERIC H. HOLDER, JR., Attorney General, Respondent.

**Prior History:** [\*\*1] On Petition for Review of an Order of the Board of Immigration Appeals.

**Disposition:** PETITION FOR REVIEW GRANTED.

### Core Terms

alien, guilt, finding of guilt, deferred, immigration, situations, petition for review, guilty plea, sufficient finding, facts sufficient, plain language, unambiguous, encompass

### Case Summary

#### Procedural Posture

Petitioner alien, a citizen and native of Peru, petitioned for review of the denial of his 8 U.S.C.S. § 1182(h) waiver. The alien contended that the Board of Immigration Appeals (BIA) erred in determining that a 1997 adjudication under *Va. Code Ann. § 18.2-251* for possession of marijuana qualified as a "conviction" under 8 U.S.C.S. § 1101(a)(48)(A).

#### Overview

The alien entered the United States with a tourist visa. He married a United States citizen, but the marriage dissolved. He later married another United States citizen. An immigration judge determined that the alien was ineligible for 8 U.S.C.S. § 1182(h) relief because he had two convictions for marijuana possession including a 1997 prosecution, which occurred pursuant to *Va. Code Ann. § 18.2-251*, even though it was a deferred

adjudication. In the 1997 case, the alien pled not guilty to the offense and the judge found facts justifying a finding of guilt and deferred adjudication over the Commonwealth's objection. The alien was sentenced to one year of probation, which he served without incident. None of the requirements of 8 U.S.C.S. § 1101(a)(48)(A)(i) was met; neither a judge nor a jury found him guilty after a trial and he did not plead guilty or no contest or admit to any facts, let alone facts sufficient to warrant a finding of guilt.

#### Outcome

The petition for review was granted and the case was remanded to the BIA for further proceedings consistent with the opinion.

### LexisNexis® Headnotes

Immigration Law > Deportation & Removal > Relief From Deportation & Removal > Deportation & Removal Waivers

Immigration Law > Inadmissibility > Waiver of Grounds for Inadmissibility

**HNT** [↓] A 8 U.S.C.S. § 1182(h) waiver is available for someone who is otherwise inadmissible to the United States because of a previous conviction, as long as the conviction was for, inter alia, a single offense of simple possession of 30 grams or less of marijuana. 8 U.S.C.S. § 1182(h). The petitioning alien must also show that his removal would result in extreme hardship for a United States citizen or lawfully resident spouse, child, or parent. 8 U.S.C.S. § 1182(h)(1)(B).

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation



Immigration Law > ... > Judicial Review > Standards of Review > General Overview

[HN2](#) Purely legal questions regarding the Board of Immigration Appeals's (BIA's) interpretation of an immigration statute and are reviewed under the familiar standard of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Under this standard, the court initially examines the statutory language, and if Congress has spoken clearly on the precise question at issue, the statutory language controls; however, if the statute is silent or ambiguous, the court defers to the BIA's interpretation if it is reasonable.

Governments > Legislation > Interpretation

[HN3](#) When interpreting statutes courts start with the plain language. It is well established that when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms. In interpreting the plain language of a statute, courts give the terms their ordinary, contemporary, common meaning, absent an indication Congress intended it to bear some different import.

Immigration Law > Inadmissibility > Grounds for Inadmissibility > Criminal Activity

[HN4](#) See 8 U.S.C.S. § 1101(a)(48)(A).

Immigration Law > Inadmissibility > Grounds for Inadmissibility > Criminal Activity

[HN5](#) 8 U.S.C.S. § 1101(a)(48)(A) leaves nothing to the imagination. That is, the statute unambiguously encompasses within the definition of "conviction" situations in which adjudications of guilt have been withheld, as long as the defendant's guilt has been established by a trial, plea, or admission, and a judicial officer orders some form of punishment, penalty, or restraint on the defendant's liberty.

Criminal Law & Procedure > ... > Possession > Simple Possession > General Overview

Criminal Law & Procedure > Commencement of Criminal

Proceedings > Pretrial Diversion > Eligibility

[HN6](#) Va. Code Ann. § 18.2-251 applies to a first offender who pleads guilty to or enters a plea of not guilty to possession of marijuana. Va. Code Ann. § 18.2-251. After such a plea, if the facts found by the court would justify a finding of guilt, the court may, without entering a judgment of guilt, instead defer further proceedings and place the offender on probation.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Pretrial Diversion > General Overview

Immigration Law > Inadmissibility > Grounds for Inadmissibility > Criminal Activity

[HN7](#) 8 U.S.C.S. § 1101(a)(48)(A) creates two prongs for finding a conviction. The first prong covers situations in which there has been a formal judgment of guilt. The second prong covers deferred adjudications and requires the presence of additional elements. The language of the statute as to the second prong requires two elements--(i) a sufficient finding of support for a conclusion of guilt, and (ii) the imposition of some form of punishment.

Immigration Law > Inadmissibility > Grounds for Inadmissibility > Criminal Activity

[HN8](#) 8 U.S.C.S. § 1101(a)(48)(A)(i) specifies five sufficient findings: a finding of guilt by a judge or jury (i.e., a trial), a plea of guilt, a plea of no contest, or an admission by the alien of facts sufficient to find guilt.

Governments > Legislation > Interpretation

[HN9](#) Statutes must be interpreted to give each word some operative effect.

Immigration Law > Inadmissibility > Grounds for Inadmissibility > Criminal Activity

[HN10](#) 8 U.S.C.S. § 1101(a)(48)(A)(i) is most naturally read to unambiguously encompass situations in which the defendant's guilt has been established by a trial, plea, or admission.



Evidence > Inferences & Presumptions > Presumptions

Governments > Legislation > Interpretation

**HN1** [ ] Courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.

**Counsel:** ARGUED: Dree Kristin Collopy, MAGGIO & KATTAR, Washington, D.C., for Petitioner.

James Eugene Grimes, Jr., UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

ON BRIEF: Tony West, Assistant Attorney General, Civil Division, Linda S. Wernery, Assistant Director, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

**Judges:** Before SHEDD and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge. Judge Shedd wrote the opinion, in which Judge Duncan and Senior Judge Hamilton joined.

**Opinion by:** SHEDD

## Opinion

[\*132] SHEDD, Circuit Judge:

Franklin Eduardo Crespo, a citizen and native of Peru, petitions for review of the denial of his 8 U.S.C. § 1182(h) waiver. Crespo contends that the Board of Immigration Appeals (BIA) erred in determining that a 1997 adjudication under *Virginia Code § 18.2-251* for possession of marijuana qualified as a "conviction" under 8 U.S.C. § 1101(a)(48)(A). Because the plain language of § 1101(a)(48)(A) [\*2] does not encompass Crespo's 1997 adjudication, we grant the petition for review and remand the case to the BIA for further proceedings.

I.

Crespo entered the United States with a B-2 tourist visa in 1997. He overstayed this visa and remained in the United States, where he eventually married Diane Marie Duran, a United States citizen. Duran filed an I-130

Petition for Alien Relative on Crespo's behalf but, at some point, the marriage dissolved and the Immigration and Naturalization Service (INS) denied the petition.

In response, the INS issued Crespo a "notice to appear" on October 24, 2000, and later detained him in 2006 after Crespo pled guilty to assault and battery in Fairfax, Virginia. In 2001, prior to his detention, Crespo fathered a child with Rachel Crawford, a United States citizen. Following his release from detention in September 2006, he and Crawford married.

In January 2007, Crawford filed an I-130 Petition for Alien Relative on behalf of Crespo, and Crespo filed an I-485 Application to Adjust Status. After the I-130 petition was approved, Crespo sought a § 212(h) waiver<sup>1</sup>. Crespo's case was assigned [\*133] to an Immigration Judge (IJ), who heard testimony regarding Crespo's good [\*3] character from Crawford, Crespo's criminal defense attorney, and Crespo's sister. In a written decision, the IJ determined that Crespo was ineligible for § 212(h) relief because he had two convictions for marijuana possession: October 24, 1997 in Virginia and January 31, 2005 in Washington, D.C. Relevant here, the IJ determined that Crespo's 1997 prosecution, which occurred pursuant to *Virginia Code § 18.2-251*, counted as a "conviction" for immigration purposes under 8 U.S.C. § 1101(a)(48)(A) even though it was a deferred adjudication. In the alternative, the IJ concluded that Crespo did not warrant a waiver under § 212(h) because he failed to satisfy the extreme hardship standard.

Crespo filed a timely appeal with the BIA. The BIA dismissed [\*4] Crespo's appeal, agreeing with the IJ that the 1997 adjudication counted as a "conviction" and that Crespo was thus ineligible for a § 212(h) waiver. The BIA further concluded that it "need not address" whether Crespo satisfied the extreme hardship standard in § 212(h) or otherwise merited discretionary relief. (J.A. at 4). This petition for review followed.

II.

<sup>1</sup> **HN1** [ ] A § 212(h) waiver is available for someone who is otherwise inadmissible to the United States because of a previous conviction, as long as the conviction was for, *inter alia*, a "single offense of simple possession of 30 grams or less of marijuana." 8 U.S.C. § 1182(h). The petitioning alien must also show that his removal would result in extreme hardship for a United States citizen or lawfully resident spouse, child, or parent. 8 U.S.C. § 1182(h)(1)(B).



In his petition, Crespo challenges the BIA's determination that his 1997 adjudication under *Virginia Code § 18.2-251* constitutes a conviction under § 1101(a)(48)(A). This challenge raises a [HN2](#) purely legal question regarding the BIA's interpretation of an immigration statute and our review is thus subject to the familiar standard of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). "Under this standard, we initially examine the statutory language, and if Congress has spoken clearly on the precise question at issue, the statutory language controls; however, if the statute is silent or ambiguous, we defer to the BIA's interpretation if it is reasonable." *Ramirez v. Holder*, 609 F.3d 331, 334 (4th Cir. 2010).

A.

Crespo argues that the plain language of § 1101(a)(48)(A) supports his argument that his [\\*\\*5](#) adjudication does not constitute a "conviction." In contrast, the Government contends that the unambiguous language supports the BIA's conclusion and that, to the extent the statute is ambiguous, the BIA's interpretation is reasonable given Congressional intent.

[HN3](#) "When interpreting statutes we start with the plain language." *United States DOL v. N.C. Growers Ass'n*, 377 F.3d 345, 350 (4th Cir. 2004). "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (internal quotation marks omitted). In interpreting the plain language of a statute, we give the terms their "ordinary, contemporary, common meaning, absent an indication Congress intended [it] to bear some different import." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 515 F.3d 344, 351 (4th Cir. 2008) (internal quotation marks omitted).

We thus start with the language of the relevant statute, which provides:

[HN4](#) (48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court [\\*\\*6](#) or, if adjudication of guilt has been withheld, where—

[\\*134](#) (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to

warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. § 1101(a)(48)(A).

[HN5](#) Section 1101(a)(48)(A) "leaves nothing to the imagination." *Henera-Inirio v. I.N.S.*, 208 F.3d 299, 304 (1st Cir. 2000). That is, the statute "unambiguously encompasses within the definition of 'conviction' situations in which adjudications of guilt have been withheld, as long as the defendant's guilt has been established by a trial, plea, or admission, and a judicial officer orders some form of punishment, penalty, or restraint on the defendant's liberty." *Id.*<sup>2</sup>

Crespo's [\\*\\*7](#) 1997 adjudication was pursuant to [HN6](#) *Virginia Code § 18.2-251*, which applies to a first offender who "pleads guilty to or enters a plea of not guilty to possession of . . . marijuana." *Va. Code Ann. § 18.2-251*. After such a plea, "if the facts found by the court would justify a finding of guilt," the court may, "without entering a judgment of guilt," instead "defer further proceedings and place" the offender on probation. *Id.* In his case, Crespo pled *not* guilty to the offense and the judge found facts justifying a finding of guilt and deferred adjudication over the Commonwealth's objection. Crespo was sentenced to one year of probation, which he served without incident.

B.

In his petition for review, Crespo and the Government agree that [HN7](#) § 1101(a)(48)(A) creates two prongs for finding a conviction. See also *Griffiths v. I.N.S.*, 243 F.3d 45, 52 (1st Cir. 2001). The first prong covers situations in which there has been a "formal judgment of guilt," a circumstance the parties agree did not occur in this case. *Id.* The second prong covers deferred adjudications "and requires the presence of additional elements." *Id.* "The language of the statute as to the second prong requires two elements—(i) [\\*\\*8](#) [a]

<sup>2</sup>The legislative history also supports this reading of § 1101(a)(48)(A):

This new provision . . . clarifies Congressional intent that even in cases where adjudication is "deferred," the original finding or confession of guilt is sufficient to establish a "conviction" for purposes of the immigration laws.

H.R. Conf. Rep. No. 104-828, at 224 (1996), quoted in *Moosa v. I.N.S.*, 171 F.3d 991, 1002 (5th Cir. 1999).



sufficient finding of support for a conclusion of guilt, and (ii) the imposition of some form of punishment." *id.* at 53.

Our review in this case focuses only on the first requirement—whether there was some sufficient finding of guilt to satisfy § 1101(a)(48)(A)(i). A plain reading of the statute confirms that there was not. **HN10** Subsection (i) specifies five sufficient findings: a finding of guilt by a judge or jury (i.e., a trial), a plea of guilt, a plea of no contest, or an admission by the alien of facts sufficient to find guilt. As Crespo correctly notes, none of these five possibilities occurred in his case because neither a judge nor a jury found him guilty after a trial and he did not plead guilty or no contest or admit to any facts, let alone facts sufficient to warrant a finding of guilt.

For its part, the Government suggests that the judicial finding of facts sufficient to justify a finding of guilt made by the judge under § 18.2-251 is the functional equivalent of a judge finding the alien **[\*135]** "guilty" as required under § 1101(a)(48)(A)(i). One difficulty with the Government's argument is that, if the judge finding the alien "guilty" was intended to encompass Crespo's situation **[\*\*9]** then the phrase "or has admitted sufficient facts to warrant a finding of guilt" would be rendered superfluous since an alien's plea of guilty would likewise encompass such an admission. We are loathe to contradict the established principle that **HN9** "[s]tatutes must be interpreted . . . to give each word some operative effect." See *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 209, 117 S. Ct. 660, 135 L. Ed. 2d 644 (1997). Instead, **HN10** § 1101(a)(48)(A)(i) is most naturally read to "unambiguously encompass[ ] . . . situations in which . . . the defendant's guilt has been established by a trial, plea, or admission." *Herrera-Inirio*, 208 F.3d at 304 (emphasis added). None of those situations occurred in Crespo's case.

Indeed, the language and design of § 1101(a)(48)(A), in its entirety, makes clear that Congress intended a judge's finding of guilt to be a far different scenario than a judge finding facts sufficient to find guilt. By listing five specific situations which constitute a sufficient finding of guilt, Congress drew a line. The Government may be right that Congress would have drawn the line differently if it had been aware of a case like Crespo's, but Congress did not do so and "the fact the line might have been drawn **[\*\*10]** differently at some points is a matter for legislative, rather than judicial, consideration." *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980).

C.

In an effort to contradict this plain language, the Government first points us to *United States v. Campbell*, 980 F.2d 245 (4th Cir. 1992), in which we held that an adjudication under § 18.2-251 counted as a "prior conviction" under 21 U.S.C. § 841. There are at least two critical distinctions that render *Campbell* unpersuasive. First, the phrase "final conviction" did not have a specific statutory definition like the one provided by § 1101(a)(48)(A). Second, it is unclear from *Campbell* whether the defendant in that case entered a plea of guilty or a plea of not guilty under § 18.2-251.<sup>3</sup> This distinction is important because even Crespo concedes that, if he had pled guilty under § 18.2-251 and had his sentence deferred, the adjudication would qualify as a conviction under § 1101(a)(48)(A) and he would not be eligible for the § 212(h) waiver.

In addition,<sup>4</sup> the Government suggests that its reading of the statute best satisfies the Congressional purpose in enacting § 1101(a)(48)(A) **[\*136]** —to promote uniformity by ensuring "the definition of the term 'conviction' . . . not be dependent on the vagaries of State law," *Matter of Punu*, 22 I. & N. Dec. 224, 229 (BIA 1998), and to make it "easier to remove criminal aliens, regardless of specific procedures in States for deferred adjudications," *id.* (quoting H.R. Rep. No. 104-879 (1997)). According to the Government, the

<sup>3</sup> It seems more likely that the defendant in *Campbell* had pled guilty under § 18.2-251 because the court equated Virginia's deferral statute to that of Michigan, which required either a plea or **[\*\*11]** a finding of guilty for its operation. See *Campbell*, 980 F.2d at 250 n.8.

<sup>4</sup> In its brief, contrary to its position at oral argument, the Government also argued **[\*\*12]** that the statute was ambiguous and, accordingly, that we should defer to the BIA's interpretation of the statute. Because we believe the language of § 1101(a)(48)(A) is plain, we do not reach this argument. We do note, however, that it is far from clear that the BIA actually rendered an interpretation in this case. The IJ's analysis of Crespo's argument consisted of a single sentence in which it concluded, without further explanation, that "[a]ny distinction that may exist between 'facts sufficient to find' guilt and a finding of guilt by a judge or jury" was "not material under the INA." (J.A. at 98). The BIA "agreed" with the IJ and attached a string citation to three cases, *Matter of Salazar*, 23 I. & N. Dec. 223 (BIA 2002), *Matter of Foidan*, 22 I. & N. Dec. 512 (BIA 1999), and *Matter of Punu*, 22 I. & N. Dec. 224 (BIA 1998), none of which address the Virginia statute at issue in this case.



## PETITION FOR REVIEW GRANTED

Conference Report explained, "aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered 'convicted' have escaped the immigration consequences normally attendant upon a conviction" because of "a myriad of provisions [in state laws] for ameliorating the effects of a conviction." H.R. Conf. Rep. No. 104-828, at 224, *quoted in Moosa* 171 F.3d at 1002. See also *Herrera-Instituto*, 208 F.3d at 305 (noting Congress enacted § 1101(a)(48)(A) in part to "produce the desired uniformity").

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However, "[the Supreme Court] ha[s] stated time and again that *HNI1* [↑] courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Natl. Bank v. Germain*, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) [**\*\*13**] (quoting *Rubin v. United States* 449 U.S. 424, 430, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981)) (citations omitted). Even assuming the Government is correct that Congress would have intended situations like Crespo's to be covered by the statute, "if the literal text of the statute produces a result that is, arguably, somewhat anomalous—we are not simply free to ignore unambiguous language because we can imagine a preferable version." *Sigmon Coal Co., Inc. v. Aptel*, 226 F.3d 291, 308 (4th Cir. 2000), *aff'd sub. nom. Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 122 S. Ct. 941, 151 L. Ed. 2d 906 (2002). The Government is asking us to "improve the statute—to amend it, really," to include Crespo's situation. *Id.*

III.

In this case, performance of our judicial function leads to a simple result: Congress listed five situations in § 1101(a)(48)(A)(i) that constitute a sufficient finding of guilt to ensure that an alien engaged in criminal behavior. Crespo's adjudication under the Virginia deferral statute does not satisfy any of these conditions, and as a result our inquiry must cease. Accordingly, Crespo's petition for review is granted and his case is remanded to the BIA for further proceedings consistent with this opinion.<sup>5</sup>

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<sup>5</sup>We note that, on remand, Crespo still [**\*\*14**] has a high hurdle to overcome in receiving a § 212(h) waiver because the IJ also found that Crespo had not met the extreme hardship standard. Inexplicably, despite detailed factfinding and analysis from the IJ on this point, the BIA failed to address this additional ground for denying Crespo relief. We are reviewing only the BIA's decision and because the BIA did not address

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this argument we decline to do so in the first instance in this case.

## Omargharib v. Holder

United States Court of Appeals for the Fourth Circuit  
September 16, 2014, Argued; December 23, 2014, Decided  
No. 13-2229

### Reporter

775 F.3d 192 \*: 2014 U.S. App. LEXIS 24289 \*\*: 2014 WL 7272786

SAYED GAD OMARGHARIB, Petitioner, v. ERIC H. HOLDER, JR., Attorney General, Respondent.  
CAPITAL AREA IMMIGRANTS' RIGHTS COALITION;  
IMMIGRANT AND REFUGEE APPELLATE CENTER,  
LLC, Amici Supporting Petitioner.

Petition granted; BIA's ruling reversed; and matter remanded.

### LexisNexis® Headnotes

**Prior History:** [\*\*1] On Petition for Review of an Order of the Board of Immigration Appeals.

**Disposition:** PETITION FOR REVIEW GRANTED; REVERSED AND REMANDED WITH INSTRUCTIONS.

### Core Terms

larceny, categorical, theft, divisible, modified, aggravated felony, fraudulent, theft offense, generic, documents, removal, grand larceny, convicted, applies, larceny conviction, alternative means, qualifies, fraudulent taking, state law, disjunctive, burglary, offenses, courts, cases, jury instructions, crime of larceny, immigration, indivisible, clarified, sentence

### Case Summary

#### Overview

**HOLDINGS:** [1]-Because, under the applicable categorical approach, the alien's conviction under Virginia's grand larceny statute in *Va. Code Ann. § 18.2-95* did not constitute a "theft offense" as defined by 8 U.S.C.S. § 1101(a)(43)(G) of the Immigration and Nationality Act (INA), and thus an aggravated felony under the INA, the BIA erred as a matter of law in relying on that conviction as a basis to order the alien's removal under 8 U.S.C.S. § 1227(a)(2)(A)(iii).

#### Outcome

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

Immigration Law > ... > Evidence > Burdens of Proof > Burden of Government

Immigration Law > Deportation & Removal > Judicial Review

Immigration Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

**HNI** [ ] An appellate court reviews the determination of the Board of Immigration Appeals (BIA) on the issue of whether an alien's prior conviction constitutes an aggravated felony de novo. Although the appellate court generally defers to the BIA's interpretations of the Immigration and Nationality Act, where the BIA construes statutes and state law over which it has no particular expertise, its interpretations are not entitled to deference. In removal proceedings, the government has the burden of proving that the alien committed an aggravated felony by clear and convincing evidence.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

Criminal Law & Procedure > ... > Burglary & Criminal Trespass > Burglary > General Overview

**HNI** [ ] To qualify as an aggravated felony under 8



*U.S.C.S. § 1101(a)(43)(G)*, an alien's conviction must have been a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

[HNS](#) In order to determine whether a state law conviction qualifies as an aggravated felony for removal purposes, the appellate court uses the categorical approach. Under that approach, the appellate court considers only the elements of the statute of conviction rather than the defendant's conduct underlying the offense. If the state offense has the same elements as the generic Immigration and Nationality Act crime, then the prior conviction constitutes an aggravated felony. But, if the state law crime sweeps more broadly and criminalizes more conduct than the generic federal crime, the prior conviction cannot count as an aggravated felony. That is true even if the defendant actually committed the offense in its generic form.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

[HNA](#) In determining whether a state law conviction qualifies as an aggravated felony for removal purposes, the Virginia crime of larceny under *Va. Code Ann. § 18.2-95* does not categorically match the Immigration and Nationality Act's theft offense crime because Virginia larceny punishes a broader range of conduct than that federal offense. Specifically, Virginia law defines larceny to include both fraud and theft crimes.

Criminal Law & Procedure > Criminal Offenses > Fraud > General Overview

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

[HNS](#) In determining whether a state law conviction qualifies as an aggravated felony for removal purposes, the Immigration and Nationality Act (INA) expressly

distinguishes between theft and fraud offenses. Unlike the INA's theft offense, which is not tied to any dollar threshold, the INA's fraud offense only applies if the loss to the victim exceeds \$10,000. *8 U.S.C.S. §§ 1101(a)(43)(G), § 1101(a)(43)(M)(i)*. A conviction for credit card fraud for less than \$10,000 under Virginia law does not amount to a theft offense or fraud offense for purposes of the INA.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

Criminal Law & Procedure > Criminal Offenses > Fraud > General Overview

[HNG](#) In determining whether a state law conviction qualifies as an aggravated felony for removal purposes, Virginia law treats fraud and theft as the same for larceny purposes, but the Immigration and Nationality Act (INA) treats them differently. As such, Virginia larceny sweeps more broadly than the INA's theft offense.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

[HNT](#) In determining whether a state law conviction qualifies as an aggravated felony for removal purposes, the modified categorical approach applies only if a state crime consists of multiple, alternative elements creating several different crimes, some of which would match the generic federal offense and others that would not. Under that approach, courts may look beyond the statutory text and consult a limited set of documents in the record to determine which crime the defendant was convicted of committing. In that way, the modified approach is a tool for implementing the categorical approach.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

[HNS](#) In determining whether a state law conviction qualifies as an aggravated felony for removal purposes, an appellate court may apply the modified categorical approach only if the state crime at issue is divisible. A crime is divisible only if it is defined to include potential



offense elements in the alternative, thus rendering opaque which element played a part in the defendant's conviction. Stated differently, crimes are divisible only if they set out elements in the alternative and thus create multiple versions of the crime. An indivisible crime, by contrast, contains the same elements as the federal crime (or omits an element entirely), but construes those elements expansively to criminalize a broader swath of conduct than the relevant federal law.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

**HNS** [3] In determining whether a state law conviction qualifies as an aggravated felony for removal purposes, use of the word "or" in the definition of a crime does not automatically render the crime divisible. A crime is divisible only if it is defined to include multiple alternative elements (thus creating multiple versions of a crime), as opposed to multiple alternative means (of committing the same crime). Elements, as distinguished from means, are factual circumstances of the offense the jury must find unanimously and beyond a reasonable doubt.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

**HNTC** [3] In determining whether a state law conviction qualifies as an aggravated felony for removal purposes, under Virginia's grand larceny statute in *Va. Code Ann. § 18.2-95*, wrongful or fraudulent takings are alternative means of committing larceny, not alternative elements. Thus, larceny in Virginia law is indivisible as a matter of law.

**Counsel:** ARGUED: Steffanie Jones Lewis, INTERNATIONAL BUSINESS LAW FIRM, PC, Washington, D.C., for Petitioner.

Aimee J. Carmichael, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

ON BRIEF: Stuart F. Delery, Assistant Attorney General, Civil Division, John S. Hogan, Senior Litigation Counsel, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

Heidi Altman, Morgan Macdonald, CAPITAL AREA

IMMIGRANTS' RIGHTS COALITION, Washington, D.C.; Ben Winograd, IMMIGRANT & REFUGEE APPELLATE CENTER, LLC, Alexandria, Virginia, for Amici Supporting Petitioner.

**Judges:** Before NIEMEYER, WYNN, and FLOYD, Circuit Judges. Judge Floyd wrote the opinion, in which Judge Niemeyer and Judge Wynn joined. Judge Niemeyer wrote a separate concurring opinion.

**Opinion by:** FLOYD

## Opinion

[\*194] FLOYD, Circuit Judge:

In this appeal, we consider whether Sayed Gad Omargharib's conviction under Virginia's grand larceny statute, *Va. Code Ann. § 18.2-95*, constitutes an "aggravated felony" under the Immigration and Nationality Act (INA) § 101, *8 U.S.C. § 1101(a)(43)*. The Board of Immigration Appeals (BIA) answered [**\*\*2**] this question in the affirmative using the so-called modified categorical approach, as clarified by *Descamps v. United States*, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013). Under *Descamps*, the modified categorical approach applies only if Virginia's definition of "larceny" is "divisible" — that is, if it lists potential offense elements in the alternative, thus creating multiple versions of the crime. The BIA concluded that Virginia larceny is divisible because Virginia state courts have defined it to include either theft or fraud.

Consistent with our prior precedent on this issue, however, we conclude that mere use of the disjunctive "or" in the definition of a crime does not automatically render it divisible. We further hold that, under our recent decisions construing *Descamps*, the Virginia crime of larceny is indivisible as a matter of law. As such, we agree with Omargharib that the modified categorical approach has no role to play in this case. Instead, the categorical approach applies, and under that approach Omargharib's grand larceny conviction does not constitute an aggravated felony under the INA. We therefore grant Omargharib's petition for review, reverse the BIA's ruling, and remand with instructions to vacate the order of removal.

I.

Omargharib, [**\*\*3**] an Egyptian native and citizen, entered the United States in 1985 and became a lawful permanent resident in 1990. In 2011, he was convicted



in Virginia state court of grand larceny under *Va. Code Ann. § 18.2-95* for "tak[ing], steal[ing], and carry[ing] away" two pool cues valued in excess of \$200 following a dispute with his opponent in a local pool league. J.A. 452. Omargharib received a suspended sentence of twelve months.<sup>1</sup>

Following his conviction, the Department of Homeland Security sought Omargharib's removal, contending that his conviction constituted an "aggravated felony" under the INA — namely, "a theft offense . . . for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G); [\*195] see 8 U.S.C. § 1227(a)(2)(A)(iii) (rendering deportable an alien who is convicted of an aggravated felony). Before an immigration judge (IJ), Omargharib denied that his conviction made him removable. Omargharib argued that, under the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575, 119 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), the IJ could only compare the elements of larceny under Virginia law with the generic elements [\*\*4] of a "theft offense" in the INA and determine whether they match. According to Omargharib, the elements do not match because Virginia law broadly defines larceny to include both theft and fraud, whereas the INA's aggravated felony statute distinguishes between theft and fraud. Compare 8 U.S.C. § 1101(a)(43)(G) (theft) with *id.* § 1101(a)(43)(M)(i) (fraud).<sup>2</sup>

Under the categorical approach, it is thus possible that Omargharib's grand larceny conviction rested on facts amounting to fraud, not theft. It is undisputed that Omargharib's conviction does not constitute a fraud offense under the INA.<sup>3</sup> And under the categorical approach, the IJ was not free to review the record to determine whether Omargharib's grand larceny conviction was based on theft, not fraud.

<sup>1</sup> Omargharib later filed a motion to reconsider his sentence (which the trial court denied), but did not appeal his conviction. He also filed habeas motions in both state and federal court, all of which were likewise denied.

<sup>2</sup> The INA's theft offense is not tied to any dollar threshold — a theft of even one penny will suffice as long as the term of imprisonment is at least one year. In contrast, the INA's fraud offense only applies if the loss to the victim exceeds \$10,000.

<sup>3</sup> The record reflects that the two pool cues were together valued between \$525 and \$800 — well below the INA's \$10,000 fraud threshold. Accordingly, the government does not argue that Omargharib's conviction constitutes a fraud offense [\*\*5] under the INA.

The IJ agreed that Virginia's definition of larceny is broader than the INA's corresponding "theft offense" crime and thus that the two crimes are not a categorical match.<sup>4</sup> But the IJ proceeded to employ the modified categorical approach, which the IJ held permits consideration of the underlying facts surrounding Omargharib's conviction. Applying that approach, the IJ concluded that Omargharib's larceny conviction rested on facts amounting to theft, not fraud. As such, the IJ held that Omargharib's conviction constituted a theft offense under the INA, making Omargharib removable and ineligible for all forms of discretionary relief.<sup>5</sup>

Omargharib appealed the IJ's decision to the BIA. On September 6, 2013, the BIA dismissed Omargharib's appeal and affirmed the IJ's decision in all respects. Like the IJ, the BIA concluded that the modified categorical approach applied because Virginia law defines larceny in the disjunctive to include "wrongful or fraudulent" takings. J.A. 3. Omargharib then timely petitioned this Court for review. We have jurisdiction pursuant to 8 U.S.C. § 1252.

## II.

The central issue before us is whether Omargharib's 2011 grand larceny conviction [\*\*196] in Virginia constitutes a "theft offense" as defined by 8 U.S.C. § 1101(a)(43)(G), and thus an aggravated felony under the INA that is grounds for removal.

**HNI** [T] We review the BIA's determination on this issue de novo. *Karimi v. Holder*, 715 F.3d 561, 566 (4th Cir. 2013). "Although we generally defer to the BIA's interpretations of the INA, where, as here, the BIA construes statutes [and state law] over which it has no particular expertise, its interpretations are not entitled to deference." *Id.*; see also *Matter of Chairez-Castrejon*, 26 I. & N. Dec. 349, 353 (BIA 2014) (recognizing that the

<sup>4</sup> At the hearing, the IJ first issued an oral decision devoid of any legal analysis. Omargharib appealed the oral decision to the BIA, which remanded back to the IJ to explain his reasoning. The IJ issued a written order on December 26, 2012.

<sup>5</sup> If Omargharib's state law conviction had been classified as a crime under the INA other than an aggravated felony he could have sought certain discretionary relief from removal, such as asylum or cancellation of removal. See *Monciffa v. Holder*, 133 S. Ct. 1678, 1682, 185 L. Ed. 2d 727 (2013) (citing 8 U.S.C. §§ 1158, 1229b). Because the IJ found he committed an aggravated felony, however, he was [\*\*6] ineligible for these forms of discretionary relief. See *id.*



BIA is bound by this Court's "interpretation of divisibility under Descamps"). The government has the burden of proving that Omargharib committed an aggravated [\*7] felony by clear and convincing evidence. Karimi, 715 F.3d at 665.

HN2 To qualify as an aggravated felony, Omargharib's conviction must have been "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G). Because we conclude that his crime of conviction did not constitute a "theft offense" under the INA, we reverse without reaching Omargharib's alternative argument that his term of imprisonment was for less than one year.

A.

HN3 In order to determine whether a state law conviction qualifies as an aggravated felony for removal purposes, we use the categorical approach set forth in Taylor v. United States, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), and recently clarified in Descamps. See United States v. Aparicio-Soria, 740 F.3d 152, 160-61 (4th Cir. 2014) (en banc).<sup>6</sup> Under that approach, we consider only the elements of the statute of conviction rather than the defendant's conduct underlying the offense. Descamps, 133 S. Ct. at 2285 (stating that the categorical approach's "central feature" is "a focus on the elements, rather than the facts, of a crime"). If the state offense has the same elements as the generic INA crime, then the prior conviction constitutes an aggravated felony. See id., 133 S. Ct. at 2283. But, if the state law crime "sweeps more broadly" and criminalizes more conduct than the generic federal crime, [\*8] the prior conviction cannot count as an aggravated felony. Id. This is true "even if the defendant actually committed the offense in its generic form." Id.<sup>7</sup>

<sup>6</sup> Although Taylor discussed divisibility in the context of a sentence enhancement under the Armed Career Criminal Act (ACCA), we have held that it applies equally in the immigration context to determine whether an alien is removable under the INA as a result of a prior conviction. See Karimi, 715 F.3d at 667 n.6. Because Descamps only clarified Taylor's analysis, we hold it also applies here (as several other Circuits have done in the immigration context). Accord Avendano v. Holder, 770 F.3d 731, 734 (8th Cir. 2014); Aguilar-Turcios v. Holder, 740 F.3d 1294, 1299-1300 (9th Cir. 2014).

<sup>7</sup> The elements-based categorical approach thus avoids the "daunting . . . practical difficulties and potential unfairness" of a facts-based approach. Id. at 2289. Among other problems, a facts-based approach would require sentencing courts "to

[\*197] Like the BIA, we conclude that HN4 the Virginia crime of larceny does not categorically match the INA's theft offense crime because Virginia larceny punishes a broader range of conduct than that federal offense. Specifically, Virginia law defines larceny to include both fraud and theft crimes.<sup>8</sup> See Britt v. Commonwealth, 276 Va. 569, 667 S.E.2d 763, 765 (Va. 2008) (Keenan, J.) (defining larceny as "the wrongful or fraudulent taking of another's property without his permission and with the intent to permanently deprive the owner of that property" (emphasis added)); see also Stokes v. Commonwealth, 49 Va. App. 401, 641 S.E.2d 780, 782, 784 (Va. Ct. App. 2007) (upholding a conviction for grand larceny when the defendant was indicted for defrauding a bank). Indeed, the Supreme Court of Virginia has repeatedly sustained larceny convictions when the property at issue was obtained through fraudulently obtained consent.<sup>9</sup> See, e.g., Skeeter v. Commonwealth, 217 Va. 722, 232 S.E.2d 756, 766 (Va. 1977); Bourgeois v. Commonwealth, 217 Va. 268, 227 S.E.2d 714, 717 (Va. 1976).

expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense. The meaning of those documents will often be uncertain. And the statements of fact in them may be downright wrong. [\*9] A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense . . ."). Id. at 2289.

<sup>8</sup> Although Omargharib was convicted of grand larceny under Va. Code Ann. § 18.2-95, that statute does not define the elements of larceny in Virginia. Rather, it merely categorizes larceny of more than \$200 as "grand larceny" and defines the punishment for that crime. Id. The statute thus incorporates Virginia's common-law [\*10] recitation of the elements for larceny. And although Descamps addressed a state crime defined by statute, we have since held that the Descamps analysis applies to state crimes that, as here, are defined by common law rather than by statute. United States v. Hemingway, 734 F.3d 303, 331-33 (4th Cir. 2013).

<sup>9</sup> As these cases demonstrate, a "wrongful" taking means a taking without the victim's consent; a "fraudulent" taking means a taking with the victim's consent that has been obtained fraudulently. As set forth below, both wrongful and fraudulent takings satisfy the "without consent" element of larceny under Virginia law. In contrast, under the generic federal definition of "theft," fraudulent takings do not constitute takings "without consent." See Soliman v. Gonzales, 419 F.3d 276, 282-83 (4th Cir. 2005). The "without consent" element under Virginia law is thus significantly broader than the federal "without consent" element.



By contrast, HNS [↑] the INA expressly distinguishes between theft and fraud offenses. Unlike the INA's theft offense, which is not tied to any dollar threshold, the INA's fraud offense only applies if the loss to the victim exceeds \$10,000. Compare 8 U.S.C. § 1101(a)(43)(G) (theft) with *id.* § 1101(a)(43)(M)(i) (fraud). Consistent with this distinction, we have previously held that a conviction for credit card fraud for less than \$10,000 [\*\*11] under Virginia law does not amount to a "theft offense" or "fraud offense" for purposes of the INA. *Soliman*, 419 F.3d at 282-83 (noting that any other result would transform all fraud offenses into theft offenses, thus rendering the \$10,000 threshold for fraud offenses "superfluous").

In short, HNS [↑] Virginia law treats fraud and theft as the same for larceny purposes, but the INA treats them differently. As such, Virginia larceny "sweeps more broadly" than the INA's theft offense. *Descamps*, 133 S. Ct. at 2283. We therefore conclude that Omargharib's Virginia larceny conviction does not constitute an aggravated felony for purposes of the INA under the categorical approach.

B.

The government claims a different result is warranted under the modified categorical approach. As *Descamps* recently clarified, HNS [↑] the modified categorical approach applies only if a state crime consists of "multiple, alternative elements" creating "several different crimes," some of which would match the generic federal offense and others that would not. [198] S. Ct. at 2284-85. Under this approach, courts may look beyond the statutory text and consult a limited set of documents in the record — so-called *Shepard* documents<sup>10</sup> — to determine which crime the defendant was convicted of committing. *Id.* at 2283-84. In [\*\*12] this way, the modified approach is a tool for implementing the categorical approach. *Id.* at 2284.

According to the government, the BIA correctly applied the modified categorical approach and so properly examined the underlying facts of Omargharib's

conviction to determine that he was convicted of theft, not fraud.<sup>11</sup> For the following reasons, we disagree.

After *Descamps*, HNS [↑] we may apply the modified categorical approach only if the state crime at issue is divisible. *Id.* at 2283. A crime is divisible only if it is defined to include "potential offense elements in the alternative," thus rendering "opaque which element played a part in the defendant's conviction." [\*\*13] *Id.* Stated differently, crimes are divisible only if they "set out elements in the alternative and thus create multiple versions of the crime."<sup>12</sup> *United States v. Montes-Flores*, 736 F.3d 357, 365 (4th Cir. 2013).

The government asserts that the Virginia common-law crime of larceny is divisible because it purportedly lists the elements of theft and fraud in the alternative. See *Britt*, 667 S.E.2d at 765 (defining "larceny" as a "wrongful or fraudulent taking" (emphasis added)). In the government's view, the use of the word "or" creates two different versions of the crime of larceny: one involving wrongful takings (theft), and one involving fraudulent takings (fraud). In this view, the Virginia larceny would be divisible under *Descamps* and so the modified categorical approach would apply.

As we have previously held, however, HNS [↑] use of the word "or" in the definition of a crime does not automatically render the crime divisible. See *United States v. Royal*, 731 F.3d 333, 341-42 (4th Cir. 2013); see also *Rendon v. Holder*, 764 F.3d 1077, 1086-87 (9th Cir. 2014) (reasoning that when a state criminal law "is written in the disjunctive . . . , that fact alone cannot end the [\*\*14] divisibility inquiry"). As these cases recognize, a crime is divisible under *Descamps* only if it is defined to include multiple alternative elements (thus creating multiple versions of a crime), as opposed to multiple alternative means (of committing the same crime). *Royal*, 731 F.3d at 341; *United States v. Cabrera-Umanzor*, 728 F.3d 347, 353 (4th Cir. 2013); see also *Rendon*, 764 F.3d at 1086. Elements, as

<sup>10</sup> These documents derive their name from the Supreme Court's decision in *Shepard v. United States*, 544 U.S. 13, 18, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). Relevant *Shepard* documents include the "charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms." *Johnson v. United States*, 559 U.S. 133, 130 S. Ct. 1263, 1273, 176 L. Ed. 2d 1 (2010).

<sup>11</sup> Because we find that the modified categorical approach does not apply, we need not address Omargharib's alternative argument that he would also prevail under that approach because the *Shepard* documents purportedly do not demonstrate whether he was convicted of a "theft offense."

<sup>12</sup> An indivisible crime, by contrast, contains the same elements as the federal crime (or omits an element entirely), but construes those elements expansively to criminalize a "broader swath of conduct" than the relevant federal law. *Descamps*, 133 S. Ct. at 2281.



distinguished from means, are factual circumstances of the offense the jury must find "unanimously and beyond a reasonable doubt." *Royal*, 731 F.3d at 341 (quoting [\*199] *Descamps*, 133 S. Ct. at 2285). In analyzing this distinction, we must consider how Virginia courts generally instruct juries with respect to larceny. *See id.*

Our decision in *Royal* is particularly instructive. In that case we addressed a crime defined in the alternative — assault under Maryland law — and held that it was indivisible under *Descamps*. 731 F.3d at 340-341. Like here, the government argued that use of the disjunctive "or" in the definition of assault made the crime divisible, thus warranting application of the modified approach. *Id.* at 341. But we rejected that argument, holding that the requirements on either side of the "or" were "merely alternative means of satisfying a single element" of assault, rather than alternative elements. *Id.* at 341. This was true because "Maryland juries are not instructed that they must [\*15] agree 'unanimously and beyond a reasonable doubt' on whether the defendant caused either 'offensive physical contact' or 'physical harm' to the victim; rather, it is enough that each juror agree only that one of the two occurred, without settling on which." *Id.*

We likewise conclude here that Virginia juries are not instructed to agree "unanimously and beyond a reasonable doubt" on whether defendants charged with larceny took property "wrongfully" or "fraudulently." Rather, as in *Royal*, it is enough for a larceny conviction that each juror agrees only that either a "wrongful or fraudulent" taking occurred, without settling on which. By way of example, the Virginia model jury instruction for grand larceny requires only a finding that "the taking was against the will and without the consent of the owner." 2-36 *Virginia Model Jury Instructions — Criminal G36.100* (2014). The model instruction does not tell the jury to distinguish between wrongful and fraudulent takings — rather, it only requires a finding of a taking "without the consent of the owner." *Id.* Moreover, Virginia law has long used the "wrongful" versus "fraudulent" distinction as two different means of satisfying the "without [\*16] consent" element:

The common law had substantial difficulty with cases in which the thief, intending permanently to deprive the possessor of his chattel, obtained possession of it with the apparent consent of the possessor by use of some fraud. Such conduct, called larceny by trick, was assimilated into larceny on the theory that consent obtained by fraud was not true consent and hence that the taker had trespassed upon the chattel without consent of the

possessor. The Virginia definition [of larceny], by use of the word "fraudulent" has adopted this doctrine and often applied it. This is the theory upon which cashing a forged check becomes larceny.

Ronald J. Bacigal, *Larceny and Receiving*, in *Virginia Practice Series, Va. Prac. Criminal Offenses & Defenses L3* (2014); *see also* John Wesley Bartram, Note, *Pleading for Theft Consolidation in Virginia: Larceny, Embezzlement, False Pretenses and § 19.2-284*, 56 *Wash. & Lee L. Rev.* 249, 260-61 (1999) (noting that Virginia incorporates larceny by trick into its common law larceny definition through the use of the word "fraudulent"); *Skoeter*, 232 S.E.2d at 758 (holding that personal property acquired with fraudulently obtained consent will sustain a larceny conviction); *United States v. Argumedo-Perez*, 326 F. App'x 293, 295-98 (5th Cir. 2009) (per curiam) (holding that the "without consent" [\*17] element of Virginia larceny includes "fraudulently obtained consent" and so a Virginia larceny conviction does not constitute [\*200] a generic federal theft crime).<sup>13</sup> Put simply, *HN10* [☒] wrongful or fraudulent takings are alternative means of committing larceny, not alternative elements.

In summary, we conclude that larceny in Virginia law is indivisible as a matter of law. That means only the categorical approach applies. And as established above, Omargharib's larceny conviction is not categorically an INA theft offense. The government makes no meaningful argument to rebut this analysis other than pointing to the disjunctive "or" in Virginia's definition of larceny.<sup>14</sup> As such, it has not satisfied its

<sup>13</sup> Although Virginia law does distinguish certain types of fraud offenses from general larceny, *see Va. Code Ann.*, §§ 18.2-111 (proscribing embezzlement), 18.2-178 (proscribing obtaining money by false pretense), the above authorities clearly demonstrate that larceny by trick — a fraud-based offense — is included within Virginia's general definition of larceny.

<sup>14</sup> The government's policy argument that a ruling in Omargharib's favor will end deportations for theft and [\*18] fraud crimes in Virginia is not well-founded. Although Virginia larceny convictions will no longer support an "aggravated felony" finding under the INA, "escaping aggravated felony treatment does not mean escaping deportation . . . . It means only avoiding mandatory removal." *Moncielle*, 133 S. Ct. at 1692. A Virginia larceny conviction can still render a non-citizen deportable in some instances, though with the opportunity to seek discretionary relief. *See 8 U.S.C.* §§ 1227(a)(2)(A)(i), 1229b. Thus, "to the extent that our rejection of the Government's broad understanding of the scope of



burden to establish removability by clear and convincing evidence. See *Karimi*, 715 F.3d at 566.

III.

Because Omargharib's 2011 conviction for grand larceny, in violation of *Va. Code Ann. § 18.2-95*, was not a "theft offense" under the INA, the BIA erred as a matter of law in relying on that conviction as a basis to order his removal under *8 U.S.C. § 1227(a)(2)(A)(iii)*. Accordingly, we grant Omargharib's petition for review, reverse the BIA's decision, and remand the action with instructions to vacate Omargharib's order of removal.

**PETITION FOR REVIEW GRANTED; REVERSED AND REMANDED WITH INSTRUCTIONS**

Concur by: NIEMEYER

### Concur

NIEMEYER, Circuit Judge, concurring:

I am pleased to concur in Judge Floyd's well-crafted [**\*\*19**] opinion, especially in light of the existing state of the law regarding when to apply the modified categorical approach. Because of the ever-morphing analysis and the increasingly blurred articulation of applicable standards, we are being asked to decide, without clear and workable standards, whether disjunctive phrases in a criminal law define alternative elements of a crime or alternative means of committing it.

More particularly, in this case, we are called upon to decide whether a wrongful taking and a fraudulent taking are alternative elements defining two versions of the crime of larceny or alternative means of committing larceny. While Judge Floyd concludes that the applicable Virginia law defines alternative means, thereby precluding use of the modified categorical approach under current law, I find it especially difficult to comprehend the distinction. Virginia's law could just as easily be viewed as prescribing two crimes: (1) larceny by wrongful taking, and (2) larceny by fraudulent taking.

'aggravated felony' may have any practical effect on policing our Nation's borders, it is a limited one." *Moncrieffe*, 133 S. Ct. at 1690 (quoting *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581, 130 S. Ct. 2577, 177 L. Ed. 2d 68 (2010)).

\*The applicable statute prohibits "simple larceny not from the person of another of goods and chattels of the value of \$200

[**\*\*201**] The Supreme Court's recent decision in *Descamps v. United States*, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), which adopted the elements-versus-means distinction, is the source of much of the confusion. In *Descamps*, the Court held that it was error to apply the modified categorical approach to determine whether a defendant's prior burglary conviction was for generic burglary when the California statute under which he was convicted prohibited a person from entering specified locations with intent to commit grand or petit larceny or any felony. *Id.* at 2282. In its discussion, the Court recognized that a hypothetical statute defining burglary as the illegal "entry of an automobile as well as a building" would be divisible, thus justifying application of the modified categorical approach. *Id.* at 2284 (quoting *Taylor v. United States*, 495 U.S. 575, 602, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990)) (internal quotation marks omitted). It similarly noted that it had previously recognized such divisibility in *Nijhawan v. Holder*, 557 U.S. 29, 129 S. Ct. 2294, 174 L. Ed. 2d 22 (2009). To distinguish those cases and others, however, the *Descamps* Court explained that "[a]ll those decisions rested on the explicit premise that the laws [**\*\*21**] 'contain[ed] statutory phrases that cover several different . . . crimes,' not several different methods of committing one offense." 133 S. Ct. at 2285 n.2 (quoting *Johnson v. United States*, 559 U.S. 133, 144, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010)). While the Court acknowledged that the California statute left open the possibility that several means could be employed to commit burglary, some but not all of which would qualify as generic burglary, it dismissed the concern that "distinguishing between 'alternative elements' and 'alternative means' is difficult," telling us not "to worry." *Id.* The Court elaborated:

Whatever a statute lists (whether elements or means), the documents we approved in *Taylor* and *Shepard* . . . [will] reflect the crime's elements. So a court need not parse state law in the way the dissent suggests: When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.

*Id.* Respectfully, this purportedly comforting language

or more," *Va. Code Ann. § 18.2-95(ii)*, leaving "larceny" to be defined by common law. The [**\*\*20**] Virginia Supreme Court has defined larceny as "the wrongful or fraudulent taking of another's property without his permission and with the intent to permanently deprive the owner of that property." *Britt v. Commonwealth*, 276 Va. 569, 667 S.E.2d 763, 765 (Va. 2008) (emphasis added).



hardly clarifies. Indeed, in dissent, Justice Alito stated:

While producing very modest benefits at most, the Court's holding will create several serious problems. . . . To determine whether a statute contains alternative elements, as opposed to merely alternative [\*\*22] means of satisfying an element, a court . . . will be required to look beyond the text of the statute, which may be deceptive. . . . The only way to be sure whether particular items are alternative elements or simply alternative means of satisfying an element may be to find cases concerning the correctness of jury instructions that treat the items one way or the other. And such cases may not arise frequently.

*Id.* at 2301-02 (Alito, J., dissenting). In Justice Alito's view, a more practical approach is required.

Similarly, in his separate concurring opinion, Justice Kennedy agreed that "the dichotomy between divisible and indivisible state criminal statutes is not all that clear" and suggested that the Court's decision would require state legislatures to amend [\*\*202] their statutes to meet the Court's new divisibility requirement. *Descamps*, 133 S. Ct. at 2293-94 (Kennedy, J., concurring). He indicated that "[t]his is an intrusive demand on the States." *Id.* at 2294.

The relevant Virginia conviction for grand larceny in this case could have been obtained either by showing that the defendant wrongfully took property, which Judge Floyd notes would constitute a generic theft conviction, or by showing that the defendant fraudulently took property, which he [\*\*23] notes would not constitute generic theft. One would think that whether the defendant was convicted of a wrongful taking or a fraudulent taking could appropriately be resolved by looking at the documents identified in *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). And this seems to have been the approach taken for years before *Descamps*. Yet *Descamps* now applies a confusing layer to this analysis that renders this area of the law unsatisfactorily amorphous by limiting the use of *Shepard* documents to distinguish elements but not means. Judge Floyd's analysis in this case is thus as good as any.

Were the Supreme Court willing to take another look at this area of law, it might well be persuaded, when focusing on the goals of the categorical approach, to simply allow lower courts to consider *Shepard* documents in any case where they could assist in

determining whether the defendant was convicted of a generic qualifying crime. See, e.g., *United States v. Gomez*, 690 F.3d 194, 204 (4th Cir. 2012) (Niemeyer, J., dissenting) ("In determining what convictions qualify as a sentencing enhancement, courts [should be] authorized to use the modified categorical approach pragmatically whenever the approach yields an answer, in circumstances made ambivalent by an overbroad statute, to whether the prior [\*\*24] conviction qualifies as a predicate conviction, so long as the use of the approach avoids 'subsequent evidentiary inquiries in the factual basis for the earlier conviction' and 'collateral trials'" (quoting *Shepard*, 544 U.S. at 20, 23)). It is difficult to find any downside to such a pragmatic approach. Moreover, such an approach would yield the same result here because no *Shepard* documents were available to show that Omargharib was convicted of a crime that qualifies as generic theft.

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## Omargharib v. Holder

United States Court of Appeals for the Fourth Circuit  
September 16, 2014, Argued; December 23, 2014, Decided  
No. 13-2229

### Reporter

775 F.3d 192 \*; 2014 U.S. App. LEXIS 24289 \*\*; 2014 WL 7272786

SAYED GAD OMARGHARIB, Petitioner, v. ERIC H. HOLDER, JR., Attorney General, Respondent.  
CAPITAL AREA IMMIGRANTS' RIGHTS COALITION;  
IMMIGRANT AND REFUGEE APPELLATE CENTER,  
LLC, Amici Supporting Petitioner.

Petition granted; BIA's ruling reversed; and matter remanded.

**Prior History:** [\*\*1] On Petition for Review of an Order of the Board of Immigration Appeals.

**Disposition:** PETITION FOR REVIEW GRANTED; REVERSED AND REMANDED WITH INSTRUCTIONS.

### Core Terms

larceny, categorical, theft, divisible, modified, aggravated felony, fraudulent, theft offense, generic, documents, removal, grand larceny, convicted, applies, larceny conviction, alternative means, qualifies, fraudulent taking, state law, disjunctive, burglary, offenses, courts, cases, jury instructions, crime of larceny, immigration, indivisible, clarified, sentence

### Case Summary

#### Overview

**HOLDINGS:** [1]-Because, under the applicable categorical approach, the alien's conviction under Virginia's grand larceny statute in Va. Code Ann. § 18.2-95 did not constitute a "theft offense" as defined by 8 U.S.C.S. § 1101(a)(43)(G) of the Immigration and Nationality Act (INA), and thus an aggravated felony under the INA, the BIA erred as a matter of law in relying on that conviction as a basis to order the alien's removal under 8 U.S.C.S. § 1227(a)(2)(A)(iii).

#### Outcome

### LexisNexis® Headnotes

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

Immigration Law > ... > Evidence > Burdens of Proof > Burden of Government

Immigration Law > Deportation & Removal > Judicial Review

Immigration Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HNI [↓] An appellate court reviews the determination of the Board of Immigration Appeals (BIA) on the issue of whether an alien's prior conviction constitutes an aggravated felony de novo. Although the appellate court generally defers to the BIA's interpretations of the Immigration and Nationality Act, where the BIA construes statutes and state law over which it has no particular expertise, its interpretations are not entitled to deference. In removal proceedings, the government has the burden of proving that the alien committed an aggravated felony by clear and convincing evidence.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

Criminal Law & Procedure > ... > Burglary & Criminal Trespass > Burglary > General Overview

HNI [↓] To qualify as an aggravated felony under 8



*U.S.C.S. § 1101(a)(43)(G)*, an alien's conviction must have been a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

[HNS](#) In order to determine whether a state law conviction qualifies as an aggravated felony for removal purposes, the appellate court uses the categorical approach. Under that approach, the appellate court considers only the elements of the statute of conviction rather than the defendant's conduct underlying the offense. If the state offense has the same elements as the generic Immigration and Nationality Act crime, then the prior conviction constitutes an aggravated felony. But, if the state law crime sweeps more broadly and criminalizes more conduct than the generic federal crime, the prior conviction cannot count as an aggravated felony. That is true even if the defendant actually committed the offense in its generic form.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

[HNS](#) In determining whether a state law conviction qualifies as an aggravated felony for removal purposes, the Virginia crime of larceny under *Va. Code Ann. § 18.2-95* does not categorically match the Immigration and Nationality Act's theft offense crime because Virginia larceny punishes a broader range of conduct than that federal offense. Specifically, Virginia law defines larceny to include both fraud and theft crimes.

Criminal Law & Procedure > Criminal Offenses > Fraud > General Overview

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

[HNS](#) In determining whether a state law conviction qualifies as an aggravated felony for removal purposes, the Immigration and Nationality Act (INA) expressly

distinguishes between theft and fraud offenses. Unlike the INA's theft offense, which is not tied to any dollar threshold, the INA's fraud offense only applies if the loss to the victim exceeds \$10,000. *8 U.S.C.S. §§ 1101(a)(43)(G), § 1101(a)(43)(M)(i)*. A conviction for credit card fraud for less than \$10,000 under Virginia law does not amount to a theft offense or fraud offense for purposes of the INA.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

Criminal Law & Procedure > Criminal Offenses > Fraud > General Overview

[HNS](#) In determining whether a state law conviction qualifies as an aggravated felony for removal purposes, Virginia law treats fraud and theft as the same for larceny purposes, but the Immigration and Nationality Act (INA) treats them differently. As such, Virginia larceny sweeps more broadly than the INA's theft offense.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

[HNT](#) In determining whether a state law conviction qualifies as an aggravated felony for removal purposes, the modified categorical approach applies only if a state crime consists of multiple, alternative elements creating several different crimes, some of which would match the generic federal offense and others that would not. Under that approach, courts may look beyond the statutory text and consult a limited set of documents in the record to determine which crime the defendant was convicted of committing. In that way, the modified approach is a tool for implementing the categorical approach.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

[HNS](#) In determining whether a state law conviction qualifies as an aggravated felony for removal purposes, an appellate court may apply the modified categorical approach only if the state crime at issue is divisible. A crime is divisible only if it is defined to include potential



offense elements in the alternative, thus rendering opaque which element played a part in the defendant's conviction. Stated differently, crimes are divisible only if they set out elements in the alternative and thus create multiple versions of the crime. An indivisible crime, by contrast, contains the same elements as the federal crime (or omits an element entirely), but construes those elements expansively to criminalize a broader swath of conduct than the relevant federal law.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

**HN9** In determining whether a state law conviction qualifies as an aggravated felony for removal purposes, use of the word "or" in the definition of a crime does not automatically render the crime divisible. A crime is divisible only if it is defined to include multiple alternative elements (thus creating multiple versions of a crime), as opposed to multiple alternative means (of committing the same crime). Elements, as distinguished from means, are factual circumstances of the offense the jury must find unanimously and beyond a reasonable doubt.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

**HN10** In determining whether a state law conviction qualifies as an aggravated felony for removal purposes, under Virginia's grand larceny statute in *Va. Code Ann. § 18.2-95*, wrongful or fraudulent takings are alternative means of committing larceny, not alternative elements. Thus, larceny in Virginia law is indivisible as a matter of law.

**Counsel:** ARGUED: Steffanie Jones Lewis, INTERNATIONAL BUSINESS LAW FIRM, PC, Washington, D.C., for Petitioner.

Aimee J. Carmichael, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

ON BRIEF: Stuart F. Delery, Assistant Attorney General, Civil Division, John S. Hogan, Senior Litigation Counsel, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

Heidi Altman, Morgan Macdonald, CAPITAL AREA

IMMIGRANTS' RIGHTS COALITION, Washington, D.C.; Ben Winograd, IMMIGRANT & REFUGEE APPELLATE CENTER, LLC, Alexandria, Virginia, for Amici Supporting Petitioner.

**Judges:** Before NIEMEYER, WYNN, and FLOYD, Circuit Judges. Judge Floyd wrote the opinion, in which Judge Niemeyer and Judge Wynn joined. Judge Niemeyer wrote a separate concurring opinion.

**Opinion by:** FLOYD

## Opinion

[\*194] FLOYD, Circuit Judge:

In this appeal, we consider whether Sayed Gad Omargharib's conviction under Virginia's grand larceny statute, *Va. Code Ann. § 18.2-95*, constitutes an "aggravated felony" under the Immigration and Nationality Act (INA) § 101, *8 U.S.C. § 1101(a)(43)*. The Board of Immigration Appeals (BIA) answered [\*2] this question in the affirmative using the so-called modified categorical approach, as clarified by *Descamps v. United States*, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013). Under *Descamps*, the modified categorical approach applies only if Virginia's definition of "larceny" is "divisible" — that is, if it lists potential offense elements in the alternative, thus creating multiple versions of the crime. The BIA concluded that Virginia larceny is divisible because Virginia state courts have defined it to include either theft or fraud.

Consistent with our prior precedent on this issue, however, we conclude that mere use of the disjunctive "or" in the definition of a crime does not automatically render it divisible. We further hold that, under our recent decisions construing *Descamps*, the Virginia crime of larceny is indivisible as a matter of law. As such, we agree with Omargharib that the modified categorical approach has no role to play in this case. Instead, the categorical approach applies, and under that approach Omargharib's grand larceny conviction does not constitute an aggravated felony under the INA. We therefore grant Omargharib's petition for review, reverse the BIA's ruling, and remand with instructions to vacate the order of removal.

I.

Omargharib, [\*3] an Egyptian native and citizen, entered the United States in 1985 and became a lawful permanent resident in 1990. In 2011, he was convicted



in Virginia state court of grand larceny under *Va. Code Ann. § 18.2-95* for "tak[ing], steal[ing], and carry[ing] away" two pool cues valued in excess of \$200 following a dispute with his opponent in a local pool league. J.A. 452. Omargharib received a suspended sentence of twelve months.<sup>1</sup>

Following his conviction, the Department of Homeland Security sought Omargharib's removal, contending that his conviction constituted an "aggravated felony" under the INA — namely, "a theft offense . . . for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G); [\*195] see 8 U.S.C. § 1227(a)(2)(A)(iii) (rendering deportable an alien who is convicted of an aggravated felony). Before an immigration judge (IJ), Omargharib denied that his conviction made him removable. Omargharib argued that, under the categorical approach set forth in *Taylor v. United States*, 495 U.S. 576, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), the IJ could only compare the elements of larceny under Virginia law with the generic elements [\*4] of a "theft offense" in the INA and determine whether they match. According to Omargharib, the elements do not match because Virginia law broadly defines larceny to include both theft and fraud, whereas the INA's aggravated felony statute distinguishes between theft and fraud. Compare 8 U.S.C. § 1101(a)(43)(G) (theft) with *id.* § 1101(a)(43)(M)(i) (fraud).<sup>2</sup>

Under the categorical approach, it is thus possible that Omargharib's grand larceny conviction rested on facts amounting to fraud, not theft. It is undisputed that Omargharib's conviction does not constitute a fraud offense under the INA.<sup>3</sup> And under the categorical approach, the IJ was not free to review the record to determine whether Omargharib's grand larceny conviction was based on theft, not fraud.

<sup>1</sup> Omargharib later filed a motion to reconsider his sentence (which the trial court denied), but did not appeal his conviction. He also filed habeas motions in both state and federal court, all of which were likewise denied.

<sup>2</sup> The INA's theft offense is not tied to any dollar threshold — a theft of even one penny will suffice as long as the term of imprisonment is at least one year. In contrast, the INA's fraud offense only applies if the loss to the victim exceeds \$10,000.

<sup>3</sup> The record reflects that the two pool cues were together valued between \$525 and \$800 — well below the INA's \$10,000 fraud threshold. Accordingly, the government does not argue that Omargharib's conviction constitutes a fraud offense [\*5] under the INA.

The IJ agreed that Virginia's definition of larceny is broader than the INA's corresponding "theft offense" crime and thus that the two crimes are not a categorical match.<sup>4</sup> But the IJ proceeded to employ the modified categorical approach, which the IJ held permits consideration of the underlying facts surrounding Omargharib's conviction. Applying that approach, the IJ concluded that Omargharib's larceny conviction rested on facts amounting to theft, not fraud. As such, the IJ held that Omargharib's conviction constituted a theft offense under the INA, making Omargharib removable and ineligible for all forms of discretionary relief.<sup>5</sup>

Omargharib appealed the IJ's decision to the BIA. On September 6, 2013, the BIA dismissed Omargharib's appeal and affirmed the IJ's decision in all respects. Like the IJ, the BIA concluded that the modified categorical approach applied because Virginia law defines larceny in the disjunctive to include "wrongful or fraudulent" takings. J.A. 3. Omargharib then timely petitioned this Court for review. We have jurisdiction pursuant to 8 U.S.C. § 1252.

## II.

The central issue before us is whether Omargharib's 2011 grand larceny conviction [\*196] in Virginia constitutes a "theft offense" as defined by 8 U.S.C. § 1101(a)(43)(G), and thus an aggravated felony under the INA that is grounds for removal.

HN1 [†] We review the BIA's determination on this issue de novo. *Karimi v. Holder*, 715 F.3d 561, 566 (4th Cir. 2013). "Although we generally defer to the BIA's interpretations of the INA, where, as here, the BIA construes statutes [and state law] over which it has no particular expertise, its interpretations are not entitled to deference." *Id.*; see also *Matter of Chairez-Castro*, 26 I. & N. Dec. 349, 353 (BIA 2014) (recognizing that the

<sup>4</sup> At the hearing, the IJ first issued an oral decision devoid of any legal analysis. Omargharib appealed the oral decision to the BIA, which remanded back to the IJ to explain his reasoning. The IJ issued a written order on December 26, 2012.

<sup>5</sup> If Omargharib's state law conviction had been classified as a crime under the INA other than an aggravated felony he could have sought certain discretionary relief from removal, such as asylum or cancellation of removal. See *Monchieffe v. Holder*, 133 S. Ct. 1678, 1682, 185 L. Ed. 2d 727 (2013) (citing 8 U.S.C. §§ 1158, 1229b). Because the IJ found he committed an aggravated felony, however, he was [\*6] ineligible for these forms of discretionary relief. See *id.*



BIA is bound by this Court's "interpretation of divisibility under *Descamps*"). The government has the burden of proving that Omargharib committed an aggravated [\*\*7] felony by clear and convincing evidence. *Karimi*, 715 F.3d at 566.

*HN2*[†] To qualify as an aggravated felony, Omargharib's conviction must have been "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G). Because we conclude that his crime of conviction did not constitute a "theft offense" under the INA, we reverse without reaching Omargharib's alternative argument that his term of imprisonment was for less than one year.

A.

*HN3*[†] In order to determine whether a state law conviction qualifies as an aggravated felony for removal purposes, we use the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), and recently clarified in *Descamps*. See *United States v. Aparicio-Soria*, 740 F.3d 152, 160-61 (4th Cir. 2014) (en banc).<sup>6</sup> Under that approach, we consider only the elements of the statute of conviction rather than the defendant's conduct underlying the offense. *Descamps*, 133 S. Ct. at 2285 (stating that the categorical approach's "central feature" is "a focus on the elements, rather than the facts, of a crime"). If the state offense has the same elements as the generic INA crime, then the prior conviction constitutes an aggravated felony. See *id.*, 133 S. Ct. at 2283. But, if the state law crime "sweeps more broadly" and criminalizes more conduct than the generic federal crime, [\*\*8] the prior conviction cannot count as an aggravated felony. *Id.* This is true "even if the defendant actually committed the offense in its generic form." *Id.*<sup>7</sup>

<sup>6</sup> Although *Taylor* discussed divisibility in the context of a sentence enhancement under the Armed Career Criminal Act (ACCA), we have held that it applies equally in the immigration context to determine whether an alien is removable under the INA as a result of a prior conviction. See *Karimi*, 715 F.3d at 567 n.6. Because *Descamps* only clarified *Taylor*'s analysis, we hold it also applies here (as several other Circuits have done in the immigration context). *Accord Avendano v. Holder*, 776 F.3d 731, 734 (8th Cir. 2014); *Aguilar-Turcios v. Holder*, 710 F.3d 1294, 1299-1300 (9th Cir. 2014).

<sup>7</sup> The elements-based categorical approach thus avoids the "daunting . . . practical difficulties and potential unfairness" of a facts-based approach. *Id.* at 2289. Among other problems, a facts-based approach would require sentencing courts "to

[\*197] Like the BIA, we conclude that *HN4*[†] the Virginia crime of larceny does not categorically match the INA's theft offense crime because Virginia larceny punishes a broader range of conduct than that federal offense. Specifically, Virginia law defines larceny to include both fraud and theft crimes.<sup>8</sup> See *Britt v. Commonwealth*, 276 Va. 569, 667 S.E.2d 763, 765 (Va. 2009) (Keenan, J.) (defining larceny as "the wrongful or fraudulent taking of another's property without his permission and with the intent to permanently deprive the owner of that property" (emphasis added)); see also *Stokes v. Commonwealth*, 49 Va. App. 401, 641 S.E.2d 780, 782, 784 (Va. Ct. App. 2007) (upholding a conviction for grand larceny when the defendant was indicted for defrauding a bank). Indeed, the Supreme Court of Virginia has repeatedly sustained larceny convictions when the property at issue was obtained through fraudulently obtained consent.<sup>9</sup> See, e.g., *Skeeter v. Commonwealth*, 217 Va. 722, 232 S.E.2d 756, 758 (Va. 1977); *Bourgeois v. Commonwealth*, 217 Va. 268, 227 S.E.2d 714, 717 (Va. 1976).

expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense. The meaning of those documents will often be uncertain. And the statements of fact in them may be downright wrong. [\*\*9] A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense . . ."). *Id.* at 2289.

<sup>8</sup> Although Omargharib was convicted of grand larceny under Va. Code Ann. § 18.2-95, that statute does not define the elements of larceny in Virginia. Rather, it merely categorizes larceny of more than \$200 as "grand larceny" and defines the punishment for that crime. *Id.* The statute thus incorporates Virginia's common-law [\*\*10] recitation of the elements for larceny. And although *Descamps* addressed a state crime defined by statute, we have since held that the *Descamps* analysis applies to state crimes that, as here, are defined by common law rather than by statute. *United States v. Hemingway*, 734 F.3d 323, 331-33 (4th Cir. 2013).

<sup>9</sup> As these cases demonstrate, a "wrongful" taking means a taking without the victim's consent; a "fraudulent" taking means a taking with the victim's consent that has been obtained fraudulently. As set forth below, both wrongful and fraudulent takings satisfy the "without consent" element of larceny under Virginia law. In contrast, under the generic federal definition of "theft," fraudulent takings do not constitute takings "without consent." See *Soliman v. Gonzales*, 419 F.3d 276, 282-83 (4th Cir. 2005). The "without consent" element under Virginia law is thus significantly broader than the federal "without consent" element.



By contrast, HNS the INA expressly distinguishes between theft and fraud offenses. Unlike the INA's theft offense, which is not tied to any dollar threshold, the INA's fraud offense only applies if the loss to the victim exceeds \$10,000. Compare 8 U.S.C. § 1101(a)(43)(G) (theft) with id. § 1101(a)(43)(M)(i) (fraud). Consistent with this distinction, we have previously held that a conviction for credit card fraud for less than \$10,000 [\*\*11] under Virginia law does not amount to a "theft offense" or "fraud offense" for purposes of the INA. Soliman, 419 F.3d at 282-83 (noting that any other result would transform all fraud offenses into theft offenses, thus rendering the \$10,000 threshold for fraud offenses "superfluous").

In short, HNE Virginia law treats fraud and theft as the same for larceny purposes, but the INA treats them differently. As such, Virginia larceny "sweeps more broadly" than the INA's theft offense. Descamps, 133 S. Ct. at 2283. We therefore conclude that Omargharib's Virginia larceny conviction does not constitute an aggravated felony for purposes of the INA under the categorical approach.

B.

The government claims a different result is warranted under the modified categorical approach. As Descamps recently clarified, HNT the modified categorical approach applies only if a state crime consists of "multiple, alternative elements" creating "several different crimes," some of which would match the generic federal offense and others that would not. 133 [\*198] S. Ct. at 2284-85. Under this approach, courts may look beyond the statutory text and consult a limited set of documents in the record — so-called Shepard documents<sup>10</sup> — to determine which crime the defendant was convicted of committing. Id. at 2283-84. In [\*\*12] this way, the modified approach is a tool for implementing the categorical approach. Id. at 2284.

According to the government, the BIA correctly applied the modified categorical approach and so properly examined the underlying facts of Omargharib's

<sup>10</sup>These documents derive their name from the Supreme Court's decision in Shepard v. United States, 544 U.S. 13, 16, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). Relevant Shepard documents include the "charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms." Johnson v. United States, 559 U.S. 133, 130 S. Ct. 1273, 176 L. Ed. 8d 1 (2010).

conviction to determine that he was convicted of theft, not fraud.<sup>11</sup> For the following reasons, we disagree.

After Descamps, HNB we may apply the modified categorical approach only if the state crime at issue is divisible. Id. at 2283. A crime is divisible only if it is defined to include "potential offense elements in the alternative," thus rendering "opaque which element played a part in the defendant's conviction." [\*\*13] Id. Stated differently, crimes are divisible only if they "set out elements in the alternative and thus create multiple versions of the crime."<sup>12</sup> United States v. Montes-Flores, 736 F.3d 357, 365 (4th Cir. 2013).

The government asserts that the Virginia common-law crime of larceny is divisible because it purportedly lists the elements of theft and fraud in the alternative. See Britt, 667 S.E.2d at 765 (defining "larceny" as a "wrongful or fraudulent taking" (emphasis added)). In the government's view, the use of the word "or" creates two different versions of the crime of larceny: one involving wrongful takings (theft), and one involving fraudulent takings (fraud). In this view, the Virginia larceny would be divisible under Descamps and so the modified categorical approach would apply.

As we have previously held, however, HNG use of the word "or" in the definition of a crime does not automatically render the crime divisible. See United States v. Royal, 731 F.3d 333, 341-42 (4th Cir. 2013); see also Rendon v. Holder, 764 F.3d 1077, 1086-87 (9th Cir. 2014) (reasoning that when a state criminal law "is written in the disjunctive . . . , that fact alone cannot end the [\*\*14] divisibility inquiry"). As these cases recognize, a crime is divisible under Descamps only if it is defined to include multiple alternative elements (thus creating multiple versions of a crime), as opposed to multiple alternative means (of committing the same crime). Royal, 731 F.3d at 341; United States v. Cabrera-Umanzor, 728 F.3d 347, 353 (4th Cir. 2013); see also Rendon, 764 F.3d at 1086. Elements, as

<sup>11</sup>Because we find that the modified categorical approach does not apply, we need not address Omargharib's alternative argument that he would also prevail under that approach because the Shepard documents purportedly do not demonstrate whether he was convicted of a "theft offense."

<sup>12</sup>An indivisible crime, by contrast, contains the same elements as the federal crime (or omits an element entirely), but construes those elements expansively to criminalize a "broader swath of conduct" than the relevant federal law. Descamps, 133 S. Ct. at 2281.



distinguished from means, are factual circumstances of the offense the jury must find "unanimously and beyond a reasonable doubt." *Royal*, 731 F.3d at 341 (quoting [\*199] *Descamps*, 133 S. Ct. at 2288). In analyzing this distinction, we must consider how Virginia courts generally instruct juries with respect to larceny. *See id.*

Our decision in *Royal* is particularly instructive. In that case we addressed a crime defined in the alternative — assault under Maryland law — and held that it was indivisible under *Descamps*. 731 F.3d at 340-341. Like here, the government argued that use of the disjunctive "or" in the definition of assault made the crime divisible, thus warranting application of the modified approach. *Id.* at 341. But we rejected that argument, holding that the requirements on either side of the "or" were "merely alternative means of satisfying a single element" of assault, rather than alternative elements. *Id.* at 341. This was true because "Maryland juries are not instructed that they must [\*15] agree 'unanimously and beyond a reasonable doubt' on whether the defendant caused either 'offensive physical contact' or 'physical harm' to the victim; rather, it is enough that each juror agree only that one of the two occurred, without settling on which." *Id.*

We likewise conclude here that Virginia juries are not instructed to agree "unanimously and beyond a reasonable doubt" on whether defendants charged with larceny took property "wrongfully" or "fraudulently." Rather, as in *Royal*, it is enough for a larceny conviction that each juror agrees only that either a "wrongful or fraudulent" taking occurred, without settling on which. By way of example, the Virginia model jury instruction for grand larceny requires only a finding that "the taking was against the will and without the consent of the owner." 2-36 *Virginia Model Jury Instructions — Criminal* G36.100 (2014). The model instruction does not tell the jury to distinguish between wrongful and fraudulent takings — rather, it only requires a finding of a taking "without the consent of the owner." *Id.* Moreover, Virginia law has long used the "wrongful" versus "fraudulent" distinction as two different means of satisfying the "without [\*16] consent" element:

The common law had substantial difficulty with cases in which the thief, intending permanently to deprive the possessor of his chattel, obtained possession of it with the apparent consent of the possessor by use of some fraud. Such conduct, called larceny by trick, was assimilated into larceny on the theory that consent obtained by fraud was not true consent and hence that the taker had trespassed upon the chattel without consent of the

possessor. The Virginia definition [of larceny], by use of the word "fraudulent" has adopted this doctrine and often applied it. This is the theory upon which cashing a forged check becomes larceny.

Ronald J. Bacigal, *Larceny and Receiving*, in *Virginia Practice Series, Va. Prac. Criminal Offenses & Defenses L3* (2014); *see also* John Wesley Bartram, Note, *Pleading for Theft Consolidation in Virginia: Larceny, Embezzlement, False Pretenses and § 19.2-284*, 56 *Wash. & Lee L. Rev.* 249, 260-61 (1999) (noting that Virginia incorporates larceny by trick into its common law larceny definition through the use of the word "fraudulent"); *Skeeter*, 232 *S.E.2d* at 758 (holding that personal property acquired with fraudulently obtained consent will sustain a larceny conviction); *United States v. Argumedo-Perez*, 326 *F. App'x* 293, 295-98 (5th Cir. 2009) (per curiam) (holding that the "without consent" [\*17] element of Virginia larceny includes "fraudulently obtained consent" and so a Virginia larceny conviction does not constitute [\*200] a generic federal theft crime).<sup>13</sup> Put simply, [HN10](#) wrongful or fraudulent takings are alternative means of committing larceny, not alternative elements.

In summary, we conclude that larceny in Virginia law is indivisible as a matter of law. That means only the categorical approach applies. And as established above, Omargharib's larceny conviction is not categorically an INA theft offense. The government makes no meaningful argument to rebut this analysis other than pointing to the disjunctive "or" in Virginia's definition of larceny.<sup>14</sup> As such, it has not satisfied its

<sup>13</sup> Although Virginia law does distinguish certain types of fraud offenses from general larceny, *see Va. Code Ann. §§ 18.2-111* (proscribing embezzlement), 18.2-178 (proscribing obtaining money by false pretense), the above authorities clearly demonstrate that larceny by trick — a fraud-based offense — is included within Virginia's general definition of larceny.

<sup>14</sup> The government's policy argument that a ruling in Omargharib's favor will end deportations for theft and [\*18] fraud crimes in Virginia is not well-founded. Although Virginia larceny convictions will no longer support an "aggravated felony" finding under the INA, "escaping aggravated felony treatment does not mean escaping deportation . . . . It means only avoiding mandatory removal." *Moncrieffe*, 133 *S. Ct.* at 1602. A Virginia larceny conviction can still render a non-citizen deportable in some instances, though with the opportunity to seek discretionary relief. *See 8 U.S.C. §§ 1227(a)(2)(A)(i), 1229b*. Thus, "to the extent that our rejection of the Government's broad understanding of the scope of



burden to establish removability by clear and convincing evidence. See *Karimi*, 715 F.3d at 566.

III.

Because Omargharib's 2011 conviction for grand larceny, in violation of *Va. Code Ann. § 18.2-95*, was not a "theft offense" under the INA, the BIA erred as a matter of law in relying on that conviction as a basis to order his removal under *8 U.S.C. § 1227(a)(2)(A)(iii)*. Accordingly, we grant Omargharib's petition for review, reverse the BIA's decision, and remand the action with instructions to vacate Omargharib's order of removal.

**PETITION FOR REVIEW GRANTED; REVERSED AND REMANDED WITH INSTRUCTIONS**

Concur by: NIEMEYER

**Concur**

NIEMEYER, Circuit Judge, concurring:

I am pleased to concur in Judge Floyd's well-crafted [**\*\*19**] opinion, especially in light of the existing state of the law regarding when to apply the modified categorical approach. Because of the ever-morphing analysis and the increasingly blurred articulation of applicable standards, we are being asked to decide, without clear and workable standards, whether disjunctive phrases in a criminal law define alternative elements of a crime or alternative means of committing it.

More particularly, in this case, we are called upon to decide whether a wrongful taking and a fraudulent taking are alternative elements defining two versions of the crime of larceny or alternative means of committing larceny. While Judge Floyd concludes that the applicable Virginia law defines alternative means, thereby precluding use of the modified categorical approach under current law, I find it especially difficult to comprehend the distinction. Virginia's law could just as easily be viewed as prescribing two crimes: (1) larceny by wrongful taking, and (2) larceny by fraudulent taking.\*

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\*'aggravated felony' may have any practical effect on policing our Nation's borders, it is a limited one." *Moncrieffe*, 133 S. Ct. at 1692 (quoting *Carachun-Rosendo v. Holder*, 560 U.S. 563, 581, 130 S. Ct. 2577, 177 L. Ed. 2d 63 (2010)).

\*The applicable statute prohibits "simple larceny not from the person of another of goods and chattels of the value of \$200

[**\*\*201**] The Supreme Court's recent decision in *Descamps v. United States*, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), which adopted the elements-versus-means distinction, is the source of much of the confusion. In *Descamps*, the Court held that it was error to apply the modified categorical approach to determine whether a defendant's prior burglary conviction was for generic burglary when the California statute under which he was convicted prohibited a person from entering specified locations with intent to commit grand or petit larceny or any felony. *Id.* at 2282. In its discussion, the Court recognized that a hypothetical statute defining burglary as the illegal "entry of an automobile as well as a building" would be divisible, thus justifying application of the modified categorical approach. *Id.* at 2284 (quoting *Taylor v. United States*, 495 U.S. 575, 602, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990)) (internal quotation marks omitted). It similarly noted that it had previously recognized such divisibility in *Nijhawan v. Holder*, 557 U.S. 29, 129 S. Ct. 2294, 174 L. Ed. 2d 22 (2009). To distinguish those cases and others, however, the *Descamps* Court explained that "[a]ll those decisions rested on the explicit premise that the laws [**\*\*21**] 'contain[ed] statutory phrases that cover several different . . . crimes,' not several different methods of committing one offense." 133 S. Ct. at 2285 n.2 (quoting *Johnson v. United States*, 559 U.S. 133, 144, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010)). While the Court acknowledged that the California statute left open the possibility that several means could be employed to commit burglary, some but not all of which would qualify as generic burglary, it dismissed the concern that "distinguishing between 'alternative elements' and 'alternative means' is difficult," telling us not "to worry." *Id.* The Court elaborated:

Whatever a statute lists (whether elements or means), the documents we approved in *Taylor* and *Shepard* . . . [will] reflect the crime's elements. So a court need not parse state law in the way the dissent suggests: When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.

Id. Respectfully, this purportedly comforting language

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or more," *Va. Code Ann. § 18.2-95(ii)*, leaving "larceny" to be defined by common law. The [**\*\*20**] Virginia Supreme Court has defined larceny as "the wrongful or fraudulent taking of another's property without his permission and with the intent to permanently deprive the owner of that property." *Britt v. Commonwealth*, 276 Va. 569, 667 S.E.2d 763, 765 (Va. 2008) (emphasis added).



hardly clarifies. Indeed, in dissent, Justice Alito stated:

While producing very modest benefits at most, the Court's holding will create several serious problems. . . . To determine whether a statute contains alternative elements, as opposed to merely alternative [**\*\*22**] means of satisfying an element, a court . . . will be required to look beyond the text of the statute, which may be deceptive. . . . The only way to be sure whether particular items are alternative elements or simply alternative means of satisfying an element may be to find cases concerning the correctness of jury instructions that treat the items one way or the other. And such cases may not arise frequently.

*Id.* at 2301-02 (Alito, J., dissenting). In Justice Alito's view, a more practical approach is required.

Similarly, in his separate concurring opinion, Justice Kennedy agreed that "the dichotomy between divisible and indivisible state criminal statutes is not all that clear" and suggested that the Court's decision would require state legislatures to amend [**\*\*202**] their statutes to meet the Court's new divisibility requirement. *Descamps*, 133 S. Ct. at 2293-94 (Kennedy, J., concurring). He indicated that "[t]his is an intrusive demand on the States." *Id.* at 2294.

The relevant Virginia conviction for grand larceny in this case could have been obtained either by showing that the defendant wrongfully took property, which Judge Floyd notes would constitute a generic theft conviction, or by showing that the defendant fraudulently took property, which he [**\*\*23**] notes would not constitute generic theft. One would think that whether the defendant was convicted of a wrongful taking or a fraudulent taking could appropriately be resolved by looking at the documents identified in *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). And this seems to have been the approach taken for years before *Descamps*. Yet *Descamps* now applies a confusing layer to this analysis that renders this area of the law unsatisfactorily amorphous by limiting the use of Shepard documents to distinguish elements but not means. Judge Floyd's analysis in this case is thus as good as any.

Were the Supreme Court willing to take another look at this area of law, it might well be persuaded, when focusing on the goals of the categorical approach, to simply allow lower courts to consider Shepard documents in any case where they could assist in

determining whether the defendant was convicted of a generic qualifying crime. See, e.g., *United States v. Gomez*, 690 F.3d 194, 204 (4th Cir. 2012) (Niemeyer, J., dissenting) ("In determining what convictions qualify as a sentencing enhancement, courts [should be] authorized to use the modified categorical approach pragmatically whenever the approach yields an answer, in circumstances made ambivalent by an overbroad statute, to whether the prior [**\*\*24**] conviction qualifies as a predicate conviction, so long as the use of the approach avoids 'subsequent evidentiary inquiries in the factual basis for the earlier conviction' and 'collateral trials'" (quoting *Shepard*, 544 U.S. at 20, 23)). It is difficult to find any downside to such a pragmatic approach. Moreover, such an approach would yield the same result here because no Shepard documents were available to show that Omargharib was convicted of a crime that qualifies as generic theft.

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BENCH BAR CONFERENCE JUNE 22, 2017  
BREAK-OUT SECTION  
2:10 – 3:10

SANCTIONS, ATTORNEY CONDUCT, AND THE TENSION BETWEEN ETHICAL  
RESPONSIBILITIES AND PROFESSIONAL ASPIRATIONS

- PANEL DISCUSSION – Featuring the Honorable Judge Stephen Mahan
- Rich Cromwell as moderator

Judge Mahan

Sanctions in connection with discovery, motions to compel, depositions, and in trial in light of Rule 4:12 and Ragland v. Soggin, 291 Va. 282 (2016)

\*CLE Materials to be distributed electronically and utilized during CLE.

Questions and Answers from participants to Judge Mahan



## Virginia Sanctions Law Update

**“A high level of professionalism has always been expected and encouraged of all attorneys in this Commonwealth. Before being admitted to the Bar of this Court, every attorney swears the following oath:**

**Do you solemnly swear or affirm that you will support the Constitution of the United States and the Constitution of the Commonwealth of Virginia, and that you will faithfully, *honestly, professionally, and courteously* demean yourself in the practice of law and execute your office of attorney at law to the best of your ability, so help you God?”**

Environment Specialist, Inc., etc. v. Wells Fargo Bank Northwest, N.A., etc., 291 Va. 111, 121, 782 S.E.2d 147, 152 (2016) (emphasis in original and added) (Lemons, J.)

I. Virginia’s trial courts have the inherent power to discipline attorneys, but not an inherent power to impose monetary sanctions on attorneys. That authority is granted by statute, Va. Code Ann. § 8.01-271.1, which empowers courts to award monetary sanctions against attorneys and pro se plaintiffs for, among other things, making intentional or reckless misrepresentations of fact or law in written pleadings or in oral motions. The statute states pertinent part:

The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Simply put, this statute “creates a dual responsibility by an attorney who signs a pleading.”

*Keeler v. Keeler*, 80 Va. Cir. 205, 207 (Fairfax County 2010). “First, the attorney is certifying

that the pleading is well-grounded in fact, to the best of his knowledge.” *Id.* (citing *Ford Motor Co. v. Benitez*, 273 Va. 242, 250, 639 S.E.2d 203, 206 (2007)). “Second, the attorney is certifying that the pleading is warranted by law or a good faith argument for a change in the law.” *Id.*

This responsibility is not to be taken lightly as it goes to “the fundamental purpose of pleadings in judicial proceedings: to inform the opposite party of the true nature of the claim or defense.” *Ford Motor Co. v. Benitez*, 273 Va. 242, 251, 639 S.E.2d 203, 207 (2007) (internal quotation marks and citation omitted). By enacting this statute, the General Assembly was expressing a public policy of this Commonwealth, a “policy intended to increase respect for the law and confidence in the legal system; to deter abuses of the judicial process; and to assure that good-faith claims will be heard and considered.” *Boyce v. Pruitt*, 80 Va. Cir. 590, 592-93 (Patrick County 2010).

This statute achieves this policy goal by ensuring that “Virginia will not tolerate baseless suits or motions, [that] its courts will protect litigants from the mental anguish and expense of frivolous assertions of unfounded factual and legal claims, [and that] Virginia’s courts will hold accountable those who flout this public policy.” *Id.* (citing *Taboada v. Daily Seven, Inc.*, 272 Va. 211, 215-16, 636 S.E.2d 889, 891 (2006); *Gilmore v. Finn*, 259 Va. 448, 466, 527 S.E.2d 426, 435-36 (2000); *Oxenham v. Johnson*, 241 Va. 281, 286, 402 S.E.2d 1, 3 (1991)). Indeed, the Supreme Court of Virginia has held that “the manifest purpose of the statute is to hold attorneys, who are officers of the court, responsible for specified failures involving the integrity of the documents that they have signed.” *Williams & Connolly v. PETA*, 273 Va. 498, 510, 643 S.E.2d 136, 141 (2007).



The first responsibility described above “require[s] [that litigants] plead only those claims that have factual support.” *Northern Virginia Real Estate Inc. v. Martins*, 79 Va. Cir. 667, 680 (Fairfax County 2009) (citing *Benitez*, 273 Va. at 252, 639 S.E.2d at 207). Assertions “that rely on speculation are inherently not well-grounded in fact” and are not permitted. *Id.* (citing *Benitez*, 273 Va. at 252). Accordingly, “[l]itigants may not make baseless allegations in a pleading and hope to have support after discovery.” *Id.* (citing *Benitez*, 273 Va. at 252, 639 S.E.2d at 207-08). “Distorted representations in a pleading never serve a proper purpose and inherently render that pleading as one ‘interposed for [an] improper purpose,’ within the meaning of clause (iii) of the second paragraph of Code § 8.01-271.1.” *PETA*, 273 Va. at 519, 643 S.E.2d at 146.

The second responsibility described above requires that only those legal claims warranted by law (or a good faith argument for a change in the law) be made. “A lawyer’s duty of zealous representation within the bounds of the law encompasses an obligation to ascertain that every claim he or she brings is supported by the law and an obligation to dissuade clients from [pursuing] meritless claims.” *Boyce*, 80 Va. Cir. at 600-01.

Making such unsupported claims might at first glance appear to be harmless, but it is not. “A pleading that puts the opposing party to the burden of preparing to meet claims and defenses the pleader knows to have no basis in fact is oppressive [and] constitutes an abuse of the pleading process . . . .” *Benitez*, 273 Va. at 252, 639 S.E.2d at 207. Furthermore, it leads to unnecessary “expense” for the party defending against such “unfounded factual and legal claims” who must spend considerable time and effort not only to dismiss such claims, but to even ascertain which claims are legitimate and which are not. *Boyce*, 80 Va. Cir. at 600. It also constitutes a drag on the resources of Virginia courts which must spend time holding hearings,

reviewing motions, and issuing opinions to dismiss such unwarranted claims instead of spending such time on cases with litigants who actually have legitimate claims.

If there is a violation of Virginia Code § 8.01-271.1, then “Virginia courts are required to sanction attorneys who have violated the statute.” *Minix v. Wells Fargo Bank*, No. CL 2009-12067, 2010 Va. Cir. LEXIS 115, at \*6 (Aug. 24, 2010). The statute’s language indicates that no discretion is involved; however, a court’s decision to impose sanctions is reviewed under an abuse of discretion standard, primarily because the decision to impose sanctions often involves mixed questions of law and fact. Virginia courts have not hesitated to enforce this statute; they have frequently invoked Virginia Code § 8.01-271.1 and sanctioned lawyers in recent years. *See, e.g., Benitez*, 273 Va. at 253, 639 S.E.2d at 208; *Cardinal Holding Co. v. Deal*, 258 Va. 623, 633, 522 S.E.2d 614, 620 (1999); *PETA*, 273 Va. at 522, 643 S.E.2d at 148; *Nedrech v. Jones*, 245 Va. 465, 477, 429 S.E.2d 201, 207(1993); *Boyce*, 80 Va. Cir. at 605; *Lester v. Allied Concrete Co.*, 80 Va. Cir. 454, 462 (City of Charlottesville 2010); *Gray Diversified Asset Management, Inc.*, 77 Va. Cir. 187, 187 (Fairfax County 2008); *Keeler*, 80 Va. Cir. at 205; *Northern Virginia Real Estate, Inc.*, 79 Va. Cir. at 670; *Minix*, 2010 Va. Cir. LEXIS 115, at \*1.

Virginia courts employ “an objective standard of reasonableness in evaluating the written representations” made in pleadings. *PETA*, 273 Va. at 510, 643 S.E.2d at 141 (internal quotation marks and citations omitted). This standard is “whether after reasonable inquiry, counsel could have formed a reasonable belief that the pleadings were well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and not interposed for an improper purpose.” *Id.* (omitting internal quotation marks) (quoting *Flippo v. CSC Assocs.*, 262 Va. 48, 65-66, 547 S.E.2d 216, 227 (2001)).



## Recent Virginia Supreme Court Decisions on Sanctions

2. **Westlake Legal Group, etc. v. Flynn, 798 S.E.2d 187, 2017 Va. LEXIS 60 (April 13, 2017). Don't use the court system to do something that is illegal or improper.** Award of sanctions against attorney arising out of effort to collect fees and costs from a client affirmed. Attorney sought to enforce confession of judgment in retention agreement against client by filing suggestion in garnishment. However, confession of judgment not served on client, and therefore void, rendering garnishment illegal. The Court held that the attorney should have confirmed that the judgment was valid before filing suggestion in garnishment. "A few minutes of search would have revealed to the attorney that the judgment was void for failure to comply with Va. Code Ann. §8.01-438."

3. **Ragland, et al. v. Soggin, Admin., 291 Va. 282, 784 S.E.2d 698 (2016). Inadvertent mistakes do not rise to level of sanctionable conduct under Va. Code Ann. § 8.01-271.1.** Award of sanctions against attorneys was reversed. The Court found that the trial court abused its discretion in sanctioning two attorneys for submitting a jury instruction with an error despite the trial court's express finding that the mistake was inadvertent. The Court noted that the trial court's inherent power to discipline attorneys does not include the power to issue monetary sanctions, and that there was nothing in Va. Code Ann. § 8.01-271.1 that gave a trial court authority to impose monetary sanctions on an attorney for what is found to be an inadvertent mistake, as opposed to the sanctionable conduct stated in the statute. The Court also recognized that the contempt statute, Va. Code Ann. §18.2-456, gives trial courts the power to issue attachments for contempt and punish summarily, but that is only for the most egregious misbehavior, and requires an element of intent in order to sustain a criminal contempt conviction. "We appreciate the trial court's frustration with the manner in which the jury instructions in this case were handled. However, there is nothing in code §8.01-271.1 that gives a trial judge authority to impose monetary sanctions on an attorney for what she found was an inadvertent mistake."

4. **Environment Specialist, Inc., etc. v. Wells Fargo Bank Northwest, etc., 291 Va. 111, 782 S.E.2d 147 (2016). Ethical duty to represent client's best interests trumps professional aspirations.** Award of sanctions against plaintiff's counsel reversed. In mechanic's lien suit, plaintiff's counsel refused request to voluntarily extend the time in which defendant could file its answer under Rule 3:8(a). Defendant filed a motion for leave to file answer out of time, and requested its "fees and costs incurred with regard to the motion." The trial court granted the motion and awarded \$1,200.00 in sanctions against plaintiff's counsel "for its failure to voluntarily extend the time in which Wells Fargo might file its answer." In reversing the award, the Court recognized that trial courts have long had the inherent power to supervise the conduct of attorneys practicing before them and to discipline any attorney who engages in misconduct. This power includes removing an attorney of record in a case, and even suspending the attorney's license to practice in a Court. The purpose of this power is not to punish the attorney, but to protect the public. However, this power does not include an inherent power to impose monetary sanctions against an attorney. That is a power that must be authorized by statute. The Court stated that there is nothing in Va. Code Ann. §8.01-271.1 that gives a trial court authority to impose sanctions on an attorney for failing to voluntarily agree to an extension of a deadline for an opposing party. "We applaud the bench and bar as they

encourage the aspirational values of professionalism, but there is a difference between behavior that appropriately honors an attorney's obligation to his client's best interest, behavior that falls short of the aspirational standards, and behavior that is subject to discipline and/or sanctions."

5. **Kambis, et al. v. Considine, et al., 290 Va. 460, 778 S.E.2d 117 (2015).** **Abusive litigation can generate pleadings filed for an "improper purpose" and lead to sanctions under Va. Code Ann. § 8.01-271.1.** Award of sanctions affirmed. Following the end of a romantic relationship between business partners, vexatious litigation ensued. Plaintiff filed a second amended complaint that contained 19 mostly tort-based claims in which was essentially a breach of contract case. Following several hearings and rulings, the trial court awarded sanctions of \$84, 541.61 against what was eventually a *pro se* plaintiff. The Virginia Supreme Court affirmed. "In determining the amount of sanctions, the trial court explained that it looked at the number of claims, the type of claims, and whether the [plaintiff] parties' behavior increased the cost and duration of the litigation in violation of Code §8.01-271.1." "The trial court also found that there was 'a certain level of intent to intimidate [defendant] in this particular case' and that the [plaintiff] personally 'was aware of the extent of the litigation' based on an email he sent to his original counsel." The Court also found that the plaintiff's filings were interposed for an improper purpose under the statute: "In determining whether a pleading is interposed for an improper purpose, we are guided by the purpose of Code §8.01-271.1 as well as various policy considerations." These include reducing "the volume of *unnecessary* litigation," and also that "the possibility of a sanction can protect litigants from the mental anguish and expense of frivolous assertions of unfounded factual and legal claims and against the assertions of valid claims for improper purposes."

6. **Williams & Connolly, LLP, et al. v. PETA, 273 Va. 498, 643 S.E.2d 136 (2007).** **This goes without saying, but be careful when you criticize the trial court.** Award of sanctions against attorneys who filed a motion to recuse circuit court judge affirmed. The motion contained allegations that the trial judge knew, without the necessity of evidence, were not well grounded in fact or warranted by existing law, and were interposed for an improper purpose within the meaning of clauses (ii) and (iii) of the second paragraph of Code §8.01-271.1. The circuit court stated, "There is some very contemptuous language in those filings. It is unacceptable." "I've never seen anything like [the language in the attorney's motions] outside of something filed by *pro se* [litigants] . . . ." "Not only do I not find there is a legal basis for [the motion to recuse], but the things that are in this motion, some of them didn't even happen, and the rest of them were either twisted or distorted in a manner that I found to be highly inappropriate." In addition to granting sanctions, the trial court relied on its inherent power to discipline to discipline attorneys to revoke certain attorneys' *pro hac vice* admissions. In affirming the revocations, the Virginia Supreme Court stated that "[s]uch a *pro hac vice* admission is a privilege that is solely permissive in nature . . . . We hold that Virginia courts have broad discretion in determining whether to revoke an attorney's *pro hac vice* admission. A court may revoke the *pro hac vice* admission of counsel at any stage of court proceedings when it appears that counsel's conduct adversely impacts the administration of justice."

7. **Ford Motor Company, et al. v. Benitez, 273 Va. 272, 639 S.E.2d 203 (2007).** **The more you know ("the best of your knowledge"), the more you will be held accountable for what you say.** Award of sanctions affirmed against defense attorneys who, after discovery,



nonsuit and re-filing, re-asserted previously disproved affirmative defenses. “This case, unlike its predecessors, is an action refiled after the nonsuit of a previous case in which full discovery was taken between the same parties by the same counsel. All information obtained by counsel in that earlier case was known to the attorney who signed the grounds of defense in this case. The evidence of the information defense counsel acquired when deposing the driver of the case in which the plaintiff received her injury was in itself a sufficient basis for a finding that counsel knew, when signing the grounds of defense in the present case, that no factual basis existed for the defenses of contributory negligence or assumption of risk.”

### Recent Circuit Court Opinions on Sanctions

8. **Donnelly, Admin. v. Autumn Corp., et al., etc., 217 Va. Cir. LEXIS 41 (Chesapeake Cir. Ct. Feb. 27, 2017).** A medical malpractice case, sanctions awarded against plaintiff’s counsel for failure to obtain necessary certification of an expert witness in compliance with Va. Code Ann. §8.01-201.

9. **Byington, Guardian, etc. v. Sentara Lifecare Corp., etc., 216 Va. Cir. LEXIS 198 (Norfolk Cir. Ct., Dec. 30, 2016).** **Talk to your client and follow procedure.** Award of sanctions against plaintiff’s counsel who either did not realize that his client was incompetent or that his incompetent client could not sue personally. “A long and tortured procedural path and led the parties to their present positions.”

10. **Black v. Rhodes, et al., 216 Va. Cir. LEXIS 140 (Roanoke Cir. Ct., Sept. 29, 2016).** Court considers imposing sanctions against attorney for directing defendant not to answer questions during a deposition. “What should happen when an objection is made during a deposition? Rule 4:5(c) answers that question: The objection should be made on the record, and the witness should then answer, subject to the objection. If counsel proceeds that genuine claims of privilege must be asserted or that someone is behaving unreasonably, Rule 4:5(d) provides the road map: suspend the deposition and see or talk with a judge.” Virginia Supreme Court Rule 4:12 provides remedies for discovery abuse.

11. **Doe v. Virginia Wesleyan College, etc., 216 Va. Cir. LEXIS 80, (Norfolk Cir. Ct., May 13, 2016).** Plaintiff student provided untruthful interrogatory answers and false deposition testimony while represented by an attorney. The trial court found that sanctions pursuant to Va. Code Ann. §8.01-271.1 were not available based on the language of the statute: “When a party is represented by an attorney, therefore, it is the signature of the attorney that is required and to which the statutory certification – as well as the potential imposition of related sanctions – applies. There is nothing in the language of the statute – or in Rule 4:12 – that equates an attestation of a party represented by an attorney with the required attorney certification; hence, the available sanctions associated with signing in violation of the statute when a party is represented by counsel, can be assessed only against the attorney to whom the certification attaches.” The trial court did, however, recognize its inherent power to find that a party committed a fraud on the court, which the plaintiff did by submitting false interrogatory answers and giving false deposition testimony. Accordingly, the court found that sanctions were warranted, but, due to the difficulty in ascertaining the amount of fees and costs attributable to the false discovery issue, the Court held that if plaintiff prevailed at trial, then the defendant

would receive five percent of any judgment “to both compensate [the defendant] and sanction [the plaintiff] for her dishonesty.”



# 2017 Bills of Interest

Passed or Considered  
by the  
2017 Session  
of the  
General Assembly of Virginia

Legislative Update Panel

The Honorable Jason Miyares  
The Honorable Gregory D. Habeeb

Materials Provided By and With The Permission Of:  
Virginia Trial Lawyers Association



VTLA BILLS OF INTEREST – 2017 GENERAL ASSEMBLY

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## GENERAL PRACTICE

**HB 1411 Withdrawal of privately retained counsel.** Allows a privately retained counsel in a criminal case to withdraw from representation without leave of court after certification of a charge by a district court by providing written notice within 10 days of the certification to the client, the attorney for the Commonwealth, and the circuit court. The bill also directs the Judicial Council to review the current process for withdrawal of privately retained counsel in civil cases and submit a report by November 1, 2017, to the Chairmen of the House and Senate Committees for Courts of Justice. **PASSED**

**HB 1516 Surviving spouse's elective share; homestead allowance benefit.** Provides that if a surviving spouse of a decedent dying on or after January 1, 2017, claims and receives an elective share, the homestead allowance available to the spouse shall be in addition to any benefit or elective share passing to such surviving spouse. The bill provides consistency with other provisions of Article 1.1 (§ 64.2-308.1 et seq.) of Chapter 3 of Title 64.2, which governs the elective share of the surviving spouse of a decedent dying on or after January 1, 2017, which was enacted in 2016. The bill contains an emergency clause. This bill is identical to [SB 1177](#). **PASSED**

**HB 1448 Qualified trustee of self-settled spendthrift trusts.** Allows any legal entity authorized by law to act as a trustee to serve as a qualified trustee of a self-settled spendthrift trust. Under current law, only a

natural person who resides in the Commonwealth or a legal entity authorized to engage in trust business (i.e., a bank or trust company) may serve as a qualified trustee. **PASSED HOUSE, FAILED SENATE**

**HB 1524 Special conservators of the peace; liability insurance.** Requires that each person registered as or seeking registration as a special conservator of the peace be covered by a policy of (i) personal injury liability insurance, (ii) property damage liability insurance, and (iii) miscellaneous casualty insurance that includes professional liability insurance that provides coverage for any activity within the scope of the duties of a special conservator of the peace, in an amount and with coverage for each as fixed by the Criminal Justice Services Board. **PASSED**

**HB 1546 Juror information; confidentiality.** Limits to name and home address the personal information of a juror impaneled in a criminal case that the court may only regulate the disclosure of upon a showing of good cause, which includes a likelihood of bribery, tampering, or physical injury to or harassment of a juror. The bill limits the release of any additional personal information, defined in the bill as any information other than a name and home address, of a juror impaneled in a criminal case to the counsel of record in the case or a pro se defendant. The bill also provides that the court may, upon the motion of either party or its own motion, and for good cause shown, authorize the disclosure of such personal information to any other person, subject to any restrictions imposed



by the court on further dissemination of such personal information. **PASSED**

**HB 1608 Uniform Fiduciary Access to Digital Assets Act.** Creates the Uniform Fiduciary Access to Digital Assets Act. The bill allows fiduciaries to manage digital property like computer files, web domains, and virtual currency, and restricts a fiduciary's access to electronic communications such as email, text messages, and social media accounts unless the original user consented to such access in a will, trust, power of attorney, or other record. The bill repeals the Privacy Expectation Afterlife and Choices Act, which was enacted in 2015. This bill is identical to [SB 903](#). **PASSED**

**HB 1617 Legal malpractice; estate planning.** Provides that the statute of limitations for legal malpractice related to estate planning is five years if the legal representation was based on a written contract and three years if the legal representation was based on an unwritten contract. The bill provides that the accrual date for such an action is the date of completion of the representation. The bill further provides that a person who is not party to the representation shall have standing to maintain such an action only if there is a written agreement between the individual who is the subject of the estate planning and the defendant that expressly grants standing to such person. This bill is in response to *Thorsen v. Richmond Society for the Prevention of Cruelty to Animals*, 786 S.E.2d 453 (Va. 2016). This bill is identical to [SB 1140](#). **PASSED**

**SB 870 Electronic filing of land records; fee for paper filing.** Provides that a clerk of a circuit court that has established an

electronic filing system for land records may charge a fee not to exceed \$5 per instrument for every land record filed by paper. This bill is identical to [HB 2035](#). **PASSED**

**SB 874 Attorney discipline; procedures.** Conforms the statutory procedures for disciplining attorneys to the Rules of Supreme Court of Virginia. **PASSED**

**HB 1618 Nonexoneration of debts on property of decedent; notice to creditor and beneficiaries.** Provides a procedure by which a personal representative of a decedent's estate may notify a creditor of a debt on certain property in the decedent's estate that such property passes without the right of exoneration. The bill provides the method by which such notice shall be sent. The bill provides that if such procedure is used, the creditor may file a claim for such debt with the commissioner of accounts, and if the creditor does not timely file such claim, the personal representative shall be liable for the debt up to an amount not exceeding the assets of the decedent remaining in possession of the personal representative and available for application to the debt. The bill does not have an effect on either the liability of the estate for such debt to the extent of the decedent's assets remaining at the time a claim is filed or the liability of the beneficiaries that receive the decedent's assets to the extent of such receipt. This bill is identical to [SB 1176](#). **PASSED**

**HB 1646 Form of garnishment summons; maximum portion of disposable earnings subject to garnishment.** Provides that the form of garnishment summons will state that an employee who makes the minimum wage or less for his week's earnings will

ordinarily get to keep 40 times the minimum hourly wage when such earnings are subject to a garnishment, not 30 times as stated in Title 8.01, Civil Remedies and Procedures. The bill is intended to reflect the current statutory requirement for exemptions in Title 34, Homestead and Other Exemptions, and is technical in nature. The bill further directs the Office of the Executive Secretary of the Supreme Court to update the form of garnishment summons accordingly. This bill is identical to [SB 1333](#). **PASSED**

**HB 1713 Secure remote access to nonconfidential court records; date of birth verification.** Provides that the Supreme Court and any other court clerk may provide online access to subscribers who have entered into an agreement with the clerk to have secure remote access to court records of nonconfidential criminal case information to confirm the complete date of birth of a defendant. This bill is identical to [SB 1044](#). **PASSED**

**HB 2276 Death certificate; amendments.** Establishes a process for amending death certificates to change the name of the deceased, the deceased's parent or spouse, or the informant; the marital status of the deceased; or the place of residence of the deceased when the place of residence is outside the Commonwealth. This bill is identical to [SB 1048](#). **PASSED**

**HB 2324 Payment of jurors; prepaid debit card or card account.** Adds payment by credit to a prepaid debit card or card account to the methods by which a juror may be paid. The bill requires that, where

such method is used, such card or card account permit the juror to make at least one withdrawal or transfer without incurring a fee. **PASSED**

**SB 946 Appeal to Supreme Court; time frame for filing of petition.** Expresses the time frame within which petitions for appeal from a final judgment of a trial court or the State Corporation Commission to the Supreme Court shall be filed, currently expressed in months, in an equivalent number of days. As introduced, the bill is a recommendation of the Judicial Council. **PASSED**

**SB 947 Petition for appeal to Supreme Court; time period within which petition must be presented.** Authorizes the Supreme Court of Virginia to grant a 30-day extension of the deadline for presentation of the petition for appeal in all cases for good cause shown. Under current law, the Court may grant an extension in criminal cases only. The bill also converts all time periods expressed as months to equivalent days to reduce any ambiguity. This bill is a recommendation of the Judicial Council of Virginia. **PASSED**

**SB 1341 Digital certification of government records.** Provides for the Secretary of the Commonwealth, in cooperation with the Virginia Information Technologies Agency to develop standards for the use of digital signatures the authentication of digital records by state agencies. The bill further provides that state agencies may provide copies of digital records, via a website or upon request and may charge a fee of \$5 for each digitally certified copy of a record. Any digitally certified record submitted to a court in the Commonwealth shall be deemed to be



authenticated by the custodian of the record. **PASSED**

**HB 1654 Examining and approving a statement in lieu of the settlement of accounts; fee for commissioner of accounts.** Removes the provision that allows the commissioner of accounts to charge a fee of up to \$75 for the examination and approval of a statement in lieu of the settlement of accounts. This bill is a recommendation of the Judicial Council. **PASSED**

**SB 1153 Inverse condemnation proceeding; reimbursement of owner's costs.** Directs the court to reimburse a plaintiff for the costs of an inverse condemnation proceeding for "damaging" property if a judgment is entered for the plaintiff. Under current law, the court is directed to award costs only for the "taking" of property. The change made in this bill corresponds with the language of amendments to Article I, Section 11 of the Constitution of Virginia, which became effective on January 1, 2013. **PASSED**

**HB 1523 Appointment of substitute judges; district courts.** Requires substitute judges for the general district and juvenile and domestic relations district courts to be appointed by the chief judges of those courts instead of the chief judge of the circuit court. **FAILED**

**HB 1584 Solicitation of professional employment; person charged with traffic infraction or reckless driving.** Provides that it is unlawful for an attorney to solicit professional employment from a person charged with a traffic infraction or reckless driving until 30 days after a summons

containing the charge is issued to such person. **FAILED**

**SB 823 Service of process; multifamily residential real estate and common interest communities.** Requires an employee or agent of an owner of multifamily residential real estate or a common interest community to grant entry into such property to a person attempting to execute service on a person who resides in, occupies, or is known to be present in such property. **FAILED**

**SB 913 Uniform Trust Decanting Act; creation.** Codifies the Uniform Trust Decanting Act, which governs a trustee's ability to distribute assets from one trust into a second trust. **FAILED**

**SB 924 Government Data Collection and Dissemination Practices Act; collection and use of personal information by law-enforcement agencies.** Provides that, unless a criminal or administrative warrant has been issued, law-enforcement and regulatory agencies shall not use surveillance technology to collect or maintain personal information where such data is of unknown relevance and is not intended for prompt evaluation and potential use regarding suspected criminal activity or terrorism by any individual or organization. **FAILED**

**HB 1643 Electronic wills.** Provides a process for the execution of an electronic will, which has the same force and effect as a traditional, written will. The bill requires the electronic will to be stored in an "authoritative electronic record," kept under the control of a "qualified custodian," and contain the electronic signature of the testator and the electronic signatures of

either two witnesses or a notary public. The bill defines the terms "authoritative electronic record," "certified paper original," and "qualified custodian." **FAILED**

**HB 1648 Notice by trustee required before foreclosure sale; tenant of property subject to sale.** Requires a trustee to give written notice to any tenant living in property subject to foreclosure. The bill provides the contents of such written notice and requires the trustee to serve such notice at least 30 days prior to a foreclosure sale by mail or hand delivery. **FAILED**

**HB 1765 Appeal to circuit court; failure to appear.** Provides that if any person convicted of a misdemeanor in a general district court, a juvenile and domestic relations district court, or a court of limited jurisdiction perfects an appeal and (i) fails to appear in circuit court at the time for setting the appeal for trial, (ii) fails to appear in circuit court on the trial date, or (iii) absconds from the jurisdiction, the circuit court shall enter an order affirming the judgment of the lower court, and the clerk shall tax the costs as provided by statute. **FAILED HOUSE, 49-45**

**HB 1794 Public accessibility of case management system.** Requires the case management system operated and maintained by the Executive Secretary of the Supreme Court of Virginia to be open to the public for inspection. The bill provides that the case management system shall be searchable by party name, charge (for criminal cases), filing type (for civil cases), hearing date, and case number across all localities and that the entire compilation of

records contained in the system shall be made available. **FAILED**

**SB 1128 Virginia Freedom of Information Act; failure to respond to request for records; rebuttable presumption.** Provides that there shall be a rebuttable presumption that a failure to respond to a request for records was willful and knowing. **FAILED**

**HB 2385 Assessed court costs; electronic summons system.** Requires, in any criminal or traffic case in which the Virginia State Police issued the summons, ticket, or citation, executed the warrant, or made the arrest for a violation of any statute, an additional assessment of \$5 as part of the costs, which shall be remitted to the state treasury to be placed in a fund for the Virginia State Police solely to fund software, hardware, and associated equipment costs for the implementation and maintenance of an electronic summons system. **FAILED**

## TORT LAW

**HB 1590 Duty of care to law-enforcement officers and firefighters; fireman's rule.** Provides that the common-law doctrine known as the fireman's rule, as described in the bill, shall not be a defense to certain claims. The fireman's rule is based on assumption of the usual risks of injury in such employment, whether caused by a negligent or a nonnegligent act of the defendant. **PASSED**



**HB 1609 Nurse practitioner as expert witness; scope of activities.** References the specific Code section outlining the scope of a nurse practitioner's activities in the context of the current provision that authorizes a nurse practitioner to testify as an expert witness within the scope of his activities. **PASSED**

**SB 867 Lien against person whose negligence causes injury; emergency medical services agency.** Clarifies that whenever any person sustains personal injuries caused by the alleged negligence of another and receives emergency medical services and transportation provided by an emergency medical services vehicle, the emergency medical services provider or agency shall have a lien for the amount of a just and reasonable charge for the services rendered, not to exceed \$200 for each emergency medical services provider or agency, on the claim of such injured person or of his personal representative against the person, firm, or corporation whose negligence is alleged to have caused such injuries. **PASSED**

**SB 873 Authority of fire chief over unmanned aircraft systems at a fire, explosion, or other hazardous situation.** Includes immediate airspace under the current authority of the fire chief or other officer in charge at fires, explosions, or other hazardous to maintain order at the incident. **PASSED**

**HB 1661 Administration of medications to treat adrenal crisis.** Provides that a prescriber may authorize an employee of (i) a school board, (ii) a school for students with disabilities, or (iii) an accredited private school who is trained in the administration of injected medications for

the treatment of adrenal crisis resulting from a condition causing adrenal insufficiency to administer such medications to a student diagnosed with a condition causing adrenal insufficiency when the student is believed to be experiencing or about to experience an adrenal crisis pursuant to a written order or standing protocol issued within the course of the prescriber's professional practice and with the consent of the student's parents. The bill provides that any such authorized employee who administers or assists in the administration of such medications to a student diagnosed with a condition causing adrenal insufficiency when the student is believed to be experiencing or about to experience an adrenal crisis in accordance with the prescriber's instructions shall not be liable for any civil damages for ordinary negligence in acts or omissions resulting from the rendering of such treatment. **PASSED**

**HB 1689 Requests for medical records or papers; fee limits; penalty for failure to provide.** Provides the requestor of medical records or papers has the option of specifying in which format the records or papers are to be produced. The bill allows a health care provider to produce such records or papers in paper or other hard copy format if the items are requested to be produced in electronic format, but the health care provider does not maintain such items in an electronic format or have the capability to produce items in an electronic format. The bill increases from 15 to 30 days the time allowed for health care providers to comply with a request received for records or papers. The bill imposes maximum charges for the production of requested medical records or papers, which vary depending on the format in which the

records are produced. The bill sets a maximum total fee of \$150 for requests made on or after July 1, 2017, but before July 1, 2021, and \$160 for requests made on or after July 1, 2021. The bill directs a provider to comply with a subpoena duces tecum by returning the specified records or papers either on the return date on the subpoena, or five days after receipt of a certification sent by the issuing party, whichever is later. If a court finds that such records or papers are not produced (i) for a reason other than compliance with privacy requirements or (ii) due to an inability to retrieve or access such records or papers, the subpoenaing party shall be entitled to a rebuttable presumption that expenses and attorney fees related to the failure to produce such records shall be awarded by the court. **PASSED**

**SB 1060 Female genital mutilation; criminal penalty and civil action.** The bill also makes it a Class 1 misdemeanor for any parent, guardian, or other person responsible for the care of a minor to knowingly remove or cause or permit the removal of such minor from the Commonwealth for the purposes of performing such circumcision, excision, or infibulation. The bill also provides a civil cause of action for any person injured by such circumcision, excision, or infibulation. **PASSED**

**HB 1811 Initial hearings on a summons for unlawful detainer; amendments of amount requested on summons for unlawful detainer; immediate issuance of writs of possession in certain case judgments; written notice of satisfaction rendered in a court not of record.** Provides that, at the initial hearing on a summons for unlawful detainer, upon request of the

plaintiff, the court shall bifurcate the unlawful detainer case and set a continuance date no later than 120 days from the date of the initial hearing to determine final rent and damages. The bill requires the court, on such continuance date, to permit amendment of the amount requested on a summons for unlawful detainer in accordance with the notice of hearing, evidence presented to the court, and the amounts contracted for in the rental agreement. The bill further clarifies types of judgments for which a writ of possession may be immediately executed but specifies that an eviction pursuant to such a writ shall not be executed (i) until the expiration of a tenant's 10-day appeal period or (ii) if a tenant perfects an appeal. **PASSED**

**SB 1224 Landowner liability; recreational access.** Provides that a landowner who has entered into an agreement with a public entity or nonprofit organization concerning the use of his land for public recreation shall be immune from liability to a member of the public arising out of the recreational use of the land. **PASSED**

**HB 2022 Department of Transportation; traffic incident response and management.** Allows individuals or entities acting on behalf of the Department of Transportation to operate as needed in response to traffic incidents and to access and to remove from moving lanes on a highway vehicles and cargo that are impeding traffic flow due to a traffic incident. The bill requires a driver to move a vehicle from the roadway after an emergency, accident, or breakdown that did not result in injury or death if the vehicle is movable and the driver is capable of safely doing so. **PASSED**



**SB 1486 Report of law-enforcement officer involved in accident.** Provides that any law-enforcement officer who is listed as a driver in a motor vehicle accident report submitted to the Department of Motor Vehicles will not have the accident listed on his driving record if he was driving a motor vehicle provided by a law-enforcement agency in the course of his employment and was engaged in law-enforcement activity at the time of such accident. **PASSED**

**SB 1498 Punitive damages for persons injured by intoxicated drivers; evidence.** Extends to blood tests performed by the Department of Forensic Science pursuant to a search warrant the rebuttable presumption in civil cases for punitive damages for injuries caused by intoxicated drivers that provides that a person's blood alcohol level demonstrated by a test performed pursuant to the implied consent statute is at least as high as the driver's blood alcohol level at the time of the accident. The bill further establishes a rebuttable presumption applicable in a civil case for punitive damages for injuries caused by an intoxicated driver that a person who has consumed alcohol knew or should have known that his ability to drive was or would be impaired by such consumption. **PASSED**

**HB 2022 Department of Transportation; traffic incident response and management.** Allows individuals or entities acting on behalf of the Department of Transportation to operate as needed in response to traffic incidents and to access and to remove from moving lanes on a highway vehicles and cargo that are impeding traffic flow due to a traffic incident. The bill requires a driver to move a vehicle from the roadway after an

emergency, accident, or breakdown that did not result in injury or death if the vehicle is movable and the driver is capable of safely doing so. **PASSED**

**SB 981 Charity health care services; liability protection for administrators.** Provides that persons who administer, organize, arrange, or promote the rendering of services to patients of certain clinics shall not be liable to patients of such clinics for any civil damages for any act or omission resulting from the rendering of such services unless the act or omission was the result of such persons' or the clinic's gross negligence or willful misconduct. This bill is identical to [HB 1748](#). **PASSED**

**HB 1495 Servicemembers Civil Relief Act; attorney fees.** Provides that, where the appointment of counsel is necessary pursuant to the Servicemembers Civil Relief Act, any attorney fees assessed shall not exceed \$125. **FAILED**

**HB 1510 Appointment of guardian ad litem in civil cases.** Requires the court to appoint a guardian ad litem for a person under a disability who is a party in a civil case. Current law requires the appointment only for a person under a disability who is a party defendant. **FAILED**

**HB 1557 Temporary injunction of contract for services; rape, forcible sodomy, or object sexual penetration.** Requires a court, in an action for a temporary injunction of a contract for services, to consider a conviction or finding of rape, forcible sodomy, or object sexual penetration, committed by one party to a contract against the other, in assessing whether to grant the injunction. **FAILED**

**HB 1602 Invasion of privacy; civil action; damages; attorney fees and costs.** Creates a civil cause of action for the physical and constructive invasion of privacy where a person, with the intent to coerce, intimidate, or harass, enters onto the land or into the airspace above the land of another person to capture an image, as specified in the bill, of private property or an individual located on the private property without consent or uses any device, including an unmanned aircraft system, to capture such an image in lieu of physically entering the land or airspace. **FAILED**

**SB 814 Services of summons for witness or subpoena duces tecum on foreign business entities.** Allows the court to enforce compliance with a summons for witness or a subpoena duces tecum served on the registered agent of a foreign business entity registered with the State Corporation Commission to transact business in the Commonwealth, regardless of whether the foreign business entity is a party to the underlying case. This bill is in response to the Supreme Court of Virginia decision in *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, Record No. 140242, 770 S.E.2d 440 (2015). **FAILED IN SENATE COURTS, 4-8**

**SB 858 Reinstatement of discontinued cases; court's discretion.** Provides that a court has discretion to reinstate a discontinued case where a plaintiff has properly moved for such a case to be reinstated. This bill is in response to *JSR Mechanical Inc. v. Aireco Supply, Inc.*, 786 S.E.2d 144 (Va. 2016). **FAILED IN SENATE COURTS, 12-3.**

**SB 888 Civil immunity; emergency services and communications.** Extends immunity from civil liability to persons involved in providing, operating, or maintaining services or equipment used for emergency assistance, unless the act or omission that gave rise to the injury is a result of such person's gross negligence or willful misconduct. **FAILED**

**SB 901 Park authority liability; immunity.** Grants immunity from liability in any civil action to park authorities created pursuant to the Park Authorities Act (§ 15.25700 et seq.) for damages caused by ordinary negligence on the part of any officer or agent of such park authority in the maintenance or operation of any such park, recreational facility, or playground. **PASSED SENATE, FAILED HOUSE**

**SB 914 Reduction of amount of lien for medical services paid for by the Commonwealth.** Provides that in the event that the Commonwealth's lien against any recovery from a third party obtained by an injured person whose medical costs were paid in whole or in part by the Commonwealth is compromised by the Attorney General pursuant to § 2.2-514, such lien shall be reduced by an amount proportionate to the amount that costs, expenses, and attorney fees incurred by the injured person bear to the total recovery obtained from the third party. **FAILED**

**HB 1706 Law-enforcement immunity; storage of firearms.** Shields from civil or criminal liability any law-enforcement agency or law-enforcement officer that stores, possesses, or transports a firearm with the consent of a person prohibited from possessing a firearm because he is subject to a protective order for any



damage, deterioration, loss, or theft of such firearm. **FAILED**

**SB 1090 Computer trespass; computer invasion of privacy; penalty; civil relief.**

Makes it a Class 5 felony for a person to maliciously install or cause to be installed a computer program that takes control of or restricts access to another computer or computer network, or data therein, and demand money or anything else of value to remove the computer program; restore control of or access to the computer or computer network, or data therein; or remediate the impact of the computer program. **FAILED**

**HB 1739 Civil immunity; emergency services and communications.** Extends immunity from civil liability to persons involved in providing, operating, or maintaining services or equipment used for emergency assistance, unless the act or omission that gave rise to the injury is a result of such person's gross negligence or willful misconduct. **FAILED**

**HB 1989 Excusable or justifiable self-defense; costs and attorney fees.** Provides that in any civil or criminal case, a party or criminal defendant that successfully prevails on a self-defense claim shall be entitled to reasonable costs and attorney fees, unless the award of fees is unjust. The bill exempts criminal defendants that have appointed counsel whose fees are paid by the Commonwealth from collecting reasonable costs and attorney fees. **FAILED**

**HB 2188 Civil liability for sale or transfer of a firearm; background check.** Provides that a person may be held civilly liable for injuries to person or property or wrongful death of another caused by a third party if it

can be shown that the civil defendant sold or transferred a firearm to the person who committed the crime resulting in injury or death without obtaining a background check and verification that the transferee was not prohibited from possessing a firearm. **FAILED**

**HB 2197 Unmanned aircraft systems; designated facility; critical infrastructure; unlawful use; penalties.** Creates a civil cause of action for the invasion of privacy when a person uses an unmanned aircraft system to enter without consent into the airspace above any designated facility, as defined in the bill, or critical infrastructure to capture an image or attempt to capture an image, as specified in the bill. The bill allows a plaintiff to recover actual damages and allows the court to award punitive damages where actual damages are awarded and to order any other appropriate relief. **FAILED**

**HB 2235 Motorcyclists; equipment.** Removes the requirement that individuals operating motorcycles or autcycles and their passengers wear protective helmets. **FAILED**

**HB 2270 . Spousal liability for emergency medical care; property held as tenants by the entireties.** Provides that a lien arising out of a judgment for a spouse's emergency medical care shall not be enforced against the judgment debtor's property held as tenants by the entireties unless each spouse was a defendant to the underlying suit from which the judgment arose. **FAILED**

**HB 2288 Computer trespass; computer invasion of privacy; penalty; civil relief.** Makes it a Class 5 felony for a person to maliciously install or cause to be installed

a computer program that takes control of or restricts access to another computer or computer network, or data therein, and demand money or anything else of value to remove the computer program; restore control of or access to the computer or computer network, or data therein; or remediate the impact of the computer program. The bill adds medical information to the list of information that if obtained without authority constitutes computer invasion of privacy. The bill expands the private right of action for a person or property that is injured by a computer trespass. **FAILED**

**SB 1432 Excusable or justifiable self-defense; costs and attorney fees.** Provides that in any civil or criminal case, a party or criminal defendant that successfully prevails on a self-defense claim shall be entitled to reasonable costs and attorney fees, unless the award of fees is unjust. The bill exempts criminal defendants that have appointed counsel whose fees are paid by the Commonwealth from collecting reasonable costs and attorney fees. **FAILED**

**SB 998 Department of Motor Vehicles; availability of accident reports.** Requires the Commissioner of the Department of Motor Vehicles to furnish a copy of an accident report to the requesting party within five days of the request. **FAILED**

**HB 1834 Distracted driving; penalty.** Expands the prohibition on manually entering multiple letters or text in a handheld communications device while operating a motor vehicle to also prohibit the manual selection of multiple icons and removes the condition that such manual entry is prohibited only if performed as a means of communicating with another

person. The bill prohibits the operator of a motor vehicle from reading any information displayed on the device; current law prohibits reading an email or text message. The bill provides that this prohibition does not apply to reading any information displayed through the use of a global position system for the purposes of navigation. The bill eliminates the current exemption from the prohibition on using a handheld personal communications device while operating a motor vehicle when the vehicle is stopped or not moving; the current exemption from the prohibition when the vehicle is parked is not affected.

**FAILED HOUSE COURTS, 9-10**

**HB 2446 Immunity of persons; defamation; statements regarding matters of public concern; sanctions.** Adds defamation to the causes of action from which a citizen shall be immune when making statements regarding matters of public concern, as defined in the bill, to a third party, including those made at a public hearing before the governing body of any locality or other political subdivision, or the boards, commissions, agencies, and authorities thereof, and other governing bodies of any local governmental entity. The bill changes from permissive to mandatory the provision that reasonable attorney fees and costs be awarded to any individual who has a suit against him dismissed pursuant to such immunity. **FAILED**



## MEDICAL MALPRACTICE

**HB 1453 Dispensing of naloxone.** Allows a person who is authorized by the Department of Behavioral Health and Developmental Services to train individuals on the administration of naloxone for use in opioid overdose reversal and who is acting on behalf of an organization that provides services to individuals at risk of experiencing opioid overdose or training in the administration of naloxone for overdose reversal and that has obtained a controlled substances registration from the Board of Pharmacy pursuant to § 54.1-3423 to dispense naloxone to a person who has completed a training program on the administration of naloxone for opioid overdose reversal, provided that such dispensing is (i) pursuant to a standing order issued by a prescriber, (ii) in accordance with protocols developed by the Board of Pharmacy in consultation with the Board of Medicine and the Department of Health, and (iii) without charge or compensation. The bill also provides that dispensing may occur at a site other than that of the controlled substance registration, provided that the entity possessing the controlled substance registration maintains records in accordance with regulations of the Board of Pharmacy. The bill further provides that a person who dispenses naloxone shall not be liable for civil damages of ordinary negligence for acts or omissions resulting from the rendering of such treatment if he acts in good faith and that a person to whom naloxone has been dispensed pursuant to the provisions of the bill may possess naloxone and may administer naloxone to a person who is believed to be experiencing or about to experience a life-

threatening opioid overdose. The bill contains an emergency clause. This bill is identical to [SB 848](#). **PASSED**

**HB 1474 Dental hygiene; remote supervision.** Eliminates the requirement that a dental hygienist providing dental hygiene services under remote supervision be employed by the supervising dentist; clarifies continuing education requirements for dental hygienists practicing under remote supervision; eliminates the requirement for written permission to treat a patient from a dentist who has treated the patient in the previous 12 months; and allows a dental hygienist practicing under remote supervision to treat a patient who provides verbal confirmation that he does not have a dentist of record whom he is seeing regularly. **PASSED**

**HB 1514 Health care practitioners; reporting disabilities of drivers.** Provides that any doctor of medicine, osteopathy, chiropractic, or podiatry or any nurse practitioner, physician assistant, optometrist, physical therapist, or clinical psychologist who reports to the Department of Motor Vehicles the existence, or probable existence, of a mental or physical disability or infirmity of any person licensed to operate a motor vehicle that the reporting individual believes affects such person's ability to operate a motor vehicle safely is not subject to civil liability or deemed to have violated the practitioner-patient privilege unless he has acted in bad faith or with malicious intent. This bill is identical to [SB 1024](#). **PASSED**

**SB 1009 Practice of telemedicine; prescribing.** Provides that a health care practitioner who performs or has

performed an appropriate examination of the patient, either physically or by the use of instrumentation and diagnostic equipment, for the purpose of establishing a bona fide practitioner-patient relationship may prescribe Schedule II through VI controlled substances to the patient, provided that the prescribing of such controlled substance is in compliance with federal requirements for the practice of telemedicine. The bill also authorizes the Board of Pharmacy to register an entity at which a patient is treated by the use of instrumentation and diagnostic equipment for the purpose of establishing a bona fide practitioner-patient relationship and is prescribed Schedule II through VI controlled substances to possess and administer Schedule II through VI controlled substances when such prescribing is in compliance with federal requirements for the practice of telemedicine and the patient is not in the physical presence of a practitioner registered with the U.S. Drug Enforcement Administration. The bill contains an emergency clause. This bill is identical to [HB 1767](#). **PASSED**

**HB 1746 Institutions of higher education; possession and administration of epinephrine, insulin, and glucagon.** Authorizes and provides liability protection for employees of a public or private institution of higher education who are authorized by a prescriber and trained in the administration of epinephrine, insulin, or glucagon to possess and administer such epinephrine, insulin, or glucagon. This bill is identical to [SB 944](#). **PASSED**

**HB 1747 Advance medical directives; person authorized to provide assistance in completing.** Defines "qualified advance

directive facilitator" as a person who has successfully completed a training program approved by the Department of Health for providing assistance in completing and executing a written advance directive; establishes requirements for training programs for qualified advance directive facilitators; and provides that distribution of a form for an advance directive that meets the requirements of § 54.1-2984 and the provision of ministerial assistance to a person with regard to the completion or execution of such form shall not constitute the unauthorized practice of law. **PASSED**

**HB 1748 Charity health care services; liability protection for administrators.** Provides that persons who administer, organize, arrange, or promote the rendering of services to patients of certain clinics shall not be liable to patients of such clinics for any civil damages for any act or omission resulting from the rendering of such services unless the act or omission was the result of such persons' or the clinic's gross negligence or willful misconduct. This bill is identical to [SB 981](#). **PASSED**

**HB 1750 Dispensing of naloxone; patient-specific order not required.** Provides that a pharmacist may dispense naloxone in the absence of a patient-specific prescription pursuant to a standing order issued by the Commissioner of Health authorizing the dispensing of naloxone or other opioid antagonist used for overdose reversal in the absence of an oral or written order for a specific patient issued by a prescriber and in accordance with protocols developed by the Board of Pharmacy in consultation with the Board of Medicine and the Department of Health. **PASSED**



**HB 2209 Emergency Department Care Coordination Program**

**established.** Establishes the Emergency Department Care Coordination Program in the Department of Health to provide a single, statewide technology solution that connects all hospital emergency departments in the Commonwealth to facilitate real-time communication and collaboration between physicians, other health care providers, and other clinical and care management personnel for patients receiving services in hospital emergency departments, for the purpose of improving the quality of patient care services. The bill does not become effective unless and until the Commonwealth receives federal Health Information Technology for Economic and Clinical Health (HITECH) Act funds to implement its provisions. This bill is identical to [SB 1561](#). **PASSED**

**SB 1242 Qualified advance directive**

**facilitators.** Defines "qualified advance directive facilitator" as a person who has successfully completed a training program approved by the Department of Health for providing assistance in completing and executing a written advance directive; establishes requirements for training programs for qualified advance directive facilitators; and provides that distribution of a form for an advance directive that meets the requirements of § 54.1-2984 and the provision of ministerial assistance to a person with regard to the completion or execution of such form shall not constitute the unauthorized practice of law. **PASSED**

**HB 2301 Licensed practical nurses; administration of vaccinations.** Removes the requirement that the supervision of licensed practical nurses administering

vaccinations by registered nurses be immediate and direct. **PASSED**

**HB 2317 Comprehensive harm reduction program; public health**

**emergency.** Authorizes the Commissioner of Health (the Commissioner) to establish and operate local or regional comprehensive harm reduction programs during a declared public health emergency that include the provision of sterile and disposal of used hypodermic needles and syringes. The objectives of the programs are to reduce the spread of HIV, viral hepatitis, and other blood-borne diseases in Virginia, to reduce the transmission of blood-borne diseases through needlestick injuries to law-enforcement and other emergency personnel, and to provide information to individuals who inject drugs regarding addiction recovery treatment services. **PASSED**

**HB 2318 Virginia Birth-Related Neurological Injury Compensation Program.**

Removes from the definition of "birth-related neurological injury" a provision that the definition shall apply retroactively to any child born on and after January 1, 1988, who suffers from an injury to the brain or spinal cord caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital. The measure includes an enactment clause stating that its provisions are declarative of existing law. The bill has a delayed effective date of January 1, 2018. **PASSED**

## MENTAL HEALTH

### **HB 1548 Advance directives; mental health treatment; capacity determinations.**

Provides that in cases in which a person has executed an advance directive granting an agent the authority to consent to the person's admission to a facility for mental health treatment and the advance directive so authorizes, the person's agent may exercise such authority after a determination that the person is incapable of making an informed decision regarding such admission has been made by (i) the attending physician, (ii) a psychiatrist or licensed clinical psychologist, (iii) a licensed psychiatric nurse practitioner, (iv) a licensed clinical social worker, or (v) a designee of the local community services board as defined in § 37.2-809. The bill also provides that a person's agent may make a health care decision over the protest of the person if, in addition to other factors, at the time the advance directive was made, a licensed physician, licensed clinical psychologist, licensed physician assistant, licensed nurse practitioner, licensed professional counselor, or licensed clinical social worker who is familiar with the person attested in writing that the person was capable of making an informed decision and understood the consequences of the provision. This bill is identical to [SB 1511](#). **PASSED**

**HB 1549 Community services boards and behavioral health authorities; services to be provided.** Provides that the core of services provided by community services boards and behavioral health authorities shall include, effective July 1, 2019, same-day access to mental health screening services. The bill also requires the

Department of Behavioral Health and Developmental Services to report annually regarding progress in the implementation of this act. **PASSED**

**HB 1551 Commitment hearings; sharing of records and information.** Requires the Office of the Executive Secretary of the Supreme Court to provide electronic data, including individually identifiable information, on proceedings pursuant to Article 16 of Chapter 11 of Title 16.1 and Chapter 8 of Title 37.2 to the Department of Behavioral Health and Developmental Services upon request and provides that the Department may use such data for the purpose of developing and maintaining statistical archives, conducting research on the outcome of such proceedings, and preparing analyses and reports for use by the Department. The bill requires the Department to take all necessary steps to protect the security and privacy of the records and information provided pursuant to the provisions of the bill in accordance with the requirements of state and federal law and regulations governing health privacy. **PASSED**

**SB 894 Commissioner of Behavioral Health and Developmental Services; reports of critical incidents or deaths.** Requires the Commissioner of Behavioral Health and Developmental Services to provide a written report setting forth the known facts of serious injuries or deaths of individuals receiving services in programs operated or licensed by the Department of Behavioral Health and Developmental Services to the Director of the Commonwealth's designated protection and advocacy system within 15 working days of the serious injury or death. Currently, reports are required only for



critical incidents or deaths occurring at facilities operated by the Department. This bill is identical to [HB 1508](#). **PASSED**

**SB 935 Inpatient psychiatric hospital admission; defendant found incompetent.** Removes the prohibition on inpatient psychiatric hospital admission for defendants who have already been ordered to receive treatment to restore their competency to stand trial. This bill incorporates [SB895](#). **PASSED**

**SB 940 Mental health screening of inmates at local correctional facilities.** Requires that the staff of a local correctional facility screen persons admitted to the facility for mental illness using a scientifically validated instrument designated by the Commissioner of Behavioral Health and Developmental Services. The bill provides that if the screening indicates that a person may have a mental illness, an assessment of his need for mental services shall be conducted within 72 hours of the time of the screening by a qualified mental health professional, which is defined in the bill. The bill requires the Department of Criminal Justice Services, in consultation with the State Board of Corrections and the Department of Behavioral Health and Developmental Services, to (i) ensure that local and regional correctional facilities are aware of the aforementioned requirements and (ii) develop and deliver a training program for employees of such facilities regarding the administration of such instrument. This bill incorporates [SB 933](#). **PASSED**

**SB 941 Forensic discharge planning services; local and regional correctional facilities.** Directs the Commissioner of Behavioral Health and Developmental

Services, in conjunction with the relevant stakeholders, to develop a comprehensive plan, by November 1, 2017, for the provision of forensic discharge planning services at local and regional correctional facilities for persons who have serious mental illnesses who are to be released from such facilities. This bill is identical to [HB 1784](#). **PASSED**

**SB 975 Community services boards; preadmission screening; regional jail inmates.** Provides that the duties of a community services board include reviewing any existing Memorandum of Understanding between the community services board and any other community services boards that serve the regional jail to ensure that such memorandum sets forth the roles and responsibilities of each community services board in the preadmission screening process, provides for communication and information sharing protocols between the community services boards, and provides for due consideration, including financial consideration, should there be disproportionate obligations on one of the community services boards. **PASSED**

**SB 1020 Registration of peer recovery specialists and qualified mental health professionals.** Authorizes the registration of peer recovery specialists and qualified mental health professionals by the Board of Counseling. The bill defines "qualified mental health professional" as a person who by education and experience is professionally qualified and registered by the Board of Counseling to provide collaborative mental health services for adults or children. The bill requires that a qualified mental health professional provide such services as an employee or

independent contractor of the Department of Behavioral Health and Developmental Services or a provider licensed by the Department of Behavioral Health and Developmental Services. **PASSED**

**SB 1062 Definition of mental health service provider.** Adds physician assistant to the list of mental health service providers who have a duty to take precautions to protect third parties from violent behavior or other serious harm. This bill is identical to **HB 1910**. **PASSED**

**SB 1063 State Board of Corrections; membership; powers and duties; review of death of inmates in local correctional facilities.** Authorizes the State Board of Corrections (Board) to conduct a review of the death of any inmate in a local or regional correctional facility in order to determine the circumstances surrounding the inmate's death and whether the facility was in compliance with the Board's regulations. The bill requires the Board to develop and implement policies and procedures for the review of the death of any inmate that occurs in any local or correctional facility. The bill provides that the Board (i) may request the Department of Corrections to conduct a death review if the Board determines that it cannot adequately conduct such review because the Board is already in the process of conducting another review and (ii) shall request the Office of the State Inspector General to review the operation of any entity other than a correctional facility if such review is necessary to complete the death review. Finally, the bill also specifies requisite qualifications for individuals appointed to the Board. **PASSED**

**HB 1777 Hospitals providing psychiatric services; denials of admission.** Requires the Board of Health to promulgate regulations that require each hospital that provides inpatient psychiatric services to establish a protocol that (i) requires, for any refusal to admit a medically stable patient referred to its psychiatric unit, direct verbal communication between the on-call physician in the psychiatric unit and the referring physician, if requested by the referring physician, and (ii) prohibits on-call physicians or other hospital staff from refusing a request for such direct verbal communication by a referring physician. **PASSED**

**HB 1784 Forensic discharge planning services; local and regional correctional facilities.** Directs the Commissioner of Behavioral Health and Developmental Services, in conjunction with the relevant stakeholders, to develop a comprehensive plan, by November 1, 2017, for the provision of forensic discharge planning services at local and regional correctional facilities for persons who have serious mental illnesses who are to be released from such facilities. This bill is identical to **SB 941**. **PASSED**

**HB 1996 Incompetent defendants; psychiatric treatment.** Requires that a defendant who is found incompetent to stand trial for a crime and who is ordered to receive treatment to restore his competency at an inpatient hospital be transferred to and accepted by the hospital as soon as practicable, but no later than 10 days, from the receipt of the court order for restoration treatment. **PASSED**



**HB 2095 Registration of peer recovery specialists and qualified mental health professionals.** Authorizes the registration of peer recovery specialists and qualified mental health professionals by the Board of Counseling. The bill defines "qualified mental health professional" as a person who by education and experience is professionally qualified and registered by the Board of Counseling to provide collaborative mental health services for adults or children. **PASSED**

**HB 2184 Evaluation of inmate; inpatient psychiatric hospital admission.** Requires that if the person having custody of an inmate of a local correctional facility files a petition for inpatient psychiatric hospital admission of the inmate, the person having custody shall ensure that the appropriate community services board or behavioral health authority is advised of the need for a preadmission screening. The bill further requires the person having custody of the inmate to contact the director or other senior management at the community services board or behavioral health authority if such board or authority does not respond to the advisement that a preadmission screening is necessary or fails to complete the preadmission screening. **PASSED**

**HB 2331 Community services boards; preadmission screening; regional jail inmates.** Provides that the duties of a community services board include reviewing any existing Memorandum of Understanding between the community services board and any other community services boards that serve the regional jail to ensure that such memorandum sets forth the roles and responsibilities of each community services board in the

preadmission screening process, provides for communication and information sharing protocols between the community services boards, and provides for due consideration, including financial consideration, should there be disproportionate obligations on one of the community services boards. **PASSED**

**SB 1511 Advance directives; mental health treatment; capacity determinations.** Provides that in cases in which a person has executed an advance directive granting an agent the authority to consent to the person's admission to a facility for mental health treatment and the advance directive so authorizes, the person's agent may exercise such authority after a determination that the person is incapable of making an informed decision regarding such admission has been made by (i) the attending physician, (ii) a psychiatrist or licensed clinical psychologist, (iii) a licensed psychiatric nurse practitioner, (iv) a licensed clinical social worker, or (v) a designee of the local community services board as defined in § 37.2-809. The bill also provides that a person's agent may make a health care decision over the protest of the person if, in addition to other factors, at the time the advance directive was made, a licensed physician, licensed clinical psychologist, licensed physician assistant, licensed nurse practitioner, licensed professional counselor, or licensed clinical social worker who is familiar with the person attested in writing that the person was capable of making an informed decision and understood the consequences of the provision. This bill is identical to **HB 1548. PASSED**

**HB 2462 Inpatient psychiatric hospital admission; defendant found**

**incompetent.** Removes the prohibition on inpatient psychiatric hospital admission for defendants who have already been ordered to receive treatment to restore their competency to stand trial. This bill is identical to [SB 935](#). **PASSED**

[HB 1522](#) **Death penalty; severe mental illness.** Provides that a defendant in a capital case who had a severe mental illness, which is defined in the bill, at the time of the offense is not eligible for the death penalty. The bill establishes procedures for determining whether a defendant had a severe mental illness at the time of the offense and provides for the appointment of expert evaluators. When the defendant's severe mental illness is at issue, a determination will be made by the jury, or by the judge in a bench trial, as part of the sentencing proceeding, and the defendant bears the burden of proving his severe mental illness by a preponderance of the evidence. **FAILED**

[SB 1064](#) **Mental health awareness training; law-enforcement officers, firefighters, and emergency medical services personnel.** Requires the Department of Criminal Justice Services to develop compulsory training standards for law-enforcement officers regarding mental health awareness. The bill also emergency medical services personnel, and firefighters other than volunteer firefighters to participate in a mental health awareness program created or certified by the Mental Health Work Group, established in the Department of Fire Programs. **PASSED SENATE, FAILED HOUSE**

## INSURANCE LAW

[HB 1628](#) **Private security; compliance agent experience; surety bond.** Removes the requirement that a compliance agent for a private security services business have either five years of experience or three years of managerial or supervisory experience in a private security services business, a state or local law-enforcement agency, or a related field. The bill also removes the option for a private security services business or a private security services training school to be covered by a bond in lieu of liability insurance. The bill provides that it will not become effective unless reenacted by the 2018 Session of the General Assembly. **PASSED**

[HB 1641](#) **Disclosure of insurance policy limits; homeowners or personal injury liability insurance; personal injury and wrongful death actions.** Allows an injured person, the personal representative of a decedent, or an attorney representing either to request the disclosure of the liability limits of a homeowners insurance policy or personal injury liability insurance policy prior to filing a civil action for personal injuries or wrongful death from injuries sustained at the residence of another person. The party requesting this information shall provide the insurer with (i) the date the injury was sustained; (ii) the address of the residence at which the injury was sustained; (iii) the name of the owner of the residence; (iv) the claim number, if available; (v) for personal injury actions, the injured person's medical records, medical bills, and wage-loss documentation pertaining to the injury; and (vi) for wrongful death actions, (a) the decedent's death certificate; (b) the certificate of



qualification of the personal representative of the decedent's estate; (c) the names and relationships of the statutory beneficiaries of the decedent; (d) medical bills, if any; and (e) a description of the source, amount, and payment history of the claimed income loss for each beneficiary. The bill provides that in personal injury actions, the insurer only has to disclose liability limits if the amount of the injured person's medical bills and wage losses equals or exceeds \$12,500. The bill also provides that disclosure of a policy's limits shall not constitute an admission that the alleged injury is subject to the policy.

**PASSED**

#### **SB 1074 Automobile clubs;**

**insurance.** Provides that a service agreement offered by an automobile club does not constitute insurance. The measure also provides that the types of services related to motor travel or to the operation, use, or maintenance of a motor vehicle that may be supplied by an automobile club are not limited to towing service, emergency road service, indemnification service, guaranteed arrest bond certificate service, discount service, financial service, theft service, map service, or touring service. **PASSED**

**SB 1158 Insurance; reciprocals.** Allows a foreign reciprocal to obtain a license to transact the business of insurance in the Commonwealth if an affiliate of the foreign reciprocal is licensed to write the class of insurance it proposes to write in Virginia and is writing actively that class of insurance in its state of domicile or at least two other states. The measure also provides that a foreign or alien reciprocal is prohibited from transacting the business of insurance in Virginia until it obtains from the State Corporation Commission both a certificate of authority and a license to

transact the business of insurance in the Commonwealth. **PASSED**

**HB 2026 Department of Motor Vehicles; regulation of property carriers.** Combines the current property carrier and bulk property carrier authorities and eliminates the current license requirement for property brokers. The bill eliminates the requirement for the Department of Motor Vehicles to issue specially designated license plates for property-carrying vehicles operated for hire. The bill reduces from \$750,000 to \$300,000 insurance limits for carriers operating vehicles with a gross vehicle weight rating in excess of 7,500 pounds but not in excess of 10,000 pounds. For passenger cars, motorcycles, autocycles, and vehicles with a gross vehicle weight rating of 10,000 pounds or less, the bill requires liability coverage for property carriers of a minimum of (i) \$25,000 per person, \$50,000 per incident for death and bodily injury, and \$20,000 for property damage when the motor carrier is available to transport property and (ii) \$100,000 per person, \$300,000 per incident for death and bodily injury, and \$50,000 for property damage from the time the motor carrier accepts the request to transport property and the vehicle is en route to pick up the property until the time the property has been removed from the vehicle and delivered to its final destination. The bill has a delayed effective date of January 1, 2018. This bill is identical to **SB 1364**. **PASSED**

**SB 1207 Electric personal delivery devices.** Allows for the operation of electric personal delivery devices on the sidewalks and shared-use paths and across roadways on crosswalks in the Commonwealth unless otherwise prohibited by a locality. The bill directs that such devices shall not be

considered vehicles and are exempt from the motor carrier provisions of Title 46.2. **PASSED**

**SB 1435 Department of Motor Vehicles; regulation of property carriers.** Combines the current property carrier and bulk property carrier authorities and eliminates the current license requirement for property brokers. The bill eliminates the requirement for the Department of Motor Vehicles to issue specially designated license plates for property-carrying vehicles operated for hire. The bill reduces insurance limits for carriers operating vehicles with a gross vehicle weight rating in excess of 7,500 pounds but not in excess of 10,000 pounds from \$750,000 to \$300,000. The bill reduces current liability coverage requirements for property carriers from \$750,000 to \$50,000 per person, \$100,000 per incident for death and bodily injury, and \$25,000 for property damage for passenger cars, motorcycles, autocycles, and vehicles with a gross vehicle weight rating of 7,500 pounds or less. The bill has a delayed effective date of October 1, 2017. **INCORPORATED INTO SB 1364.**

**HB 2019 Transportation network company partner vehicle registration repeal.** Removes the requirement that a transportation network company (TNC) partner register his personal vehicle for use as a TNC partner vehicle with the Department of Motor Vehicles. The bill allows the Department of State Police to recognize another state's annual motor vehicle safety inspection in lieu of a Virginia inspection and clarifies that a TNC partner can keep proof of inspection in or on the vehicle. The bill contains an emergency clause. This bill is identical to **SB 1366. PASSED**

**SB 1219 Property transportation network companies.** Requires property transportation network companies to provide motor vehicle liability coverage in the same amounts as are currently required for transportation network companies. **INCORPORATED INTO SB 1364.**

**SB 1494 Transportation network company; brokers.** Allows brokers to arrange rides with transportation network company (TNC) partner vehicles. The bill requires such brokers to be licensed by the Department of Motor Vehicles and includes insurance requirements for TNC partner vehicles operating at the request of a broker. **PASSED**

**HB 2422 Insurance institutions and agents; notice of financial information collection and disclosure practices.** Creates an exemption from the requirement that insurance institutions and agents provide policyholders with an annual notice of financial information collection and disclosure practices in connection with insurance transactions. The exemption applies when the insurance institution or agent provides nonpublic personal information to nonaffiliated third parties only in accordance with § 38.2-613 and has not changed its policies and practices with regard to disclosing nonpublic financial information from the policies and practices that were disclosed in the most recent notice sent to the policyholder. **PASSED**

**SB 1213 Insurance notices.** Requires that the policy owner, contract owner, or plan owner under an individual policy, contract, or plan of life insurance, an annuity, or accident and sickness insurance be sent written notice by registered or certified mail prior to the date that the policy,



contract, or plan will lapse for failure to pay premiums due. **FAILED IN COMMERCE & LABOR, 11-3.**

**HB 1920 Property transportation network companies.** Requires property transportation network companies to provide motor vehicle liability coverage in the same amounts as are currently required for transportation network companies. The bill exempts passenger cars, motorcycles, autocycles, mopeds, and vehicles with a gross vehicle weight rating of 10,000 pounds or less from the motor carrier provisions of Chapter 21 (Regulation of Property Carriers) except for insurance requirements. **FAILED**

## WORKERS COMPENSATION

**HB 1571 Workers' compensation; fees for medical services.** Provides that the pecuniary liability of an employer for a medical service provided for the treatment of a traumatic injury or serious burn includes liability for any professional service rendered during the dates of service of the admission or transfer to a Level I or Level II trauma center or to a burn center, as applicable. The measure increases the initial charge outlier threshold, which under the stop-loss feature allows hospitals to receive payments or reimbursements that exceed the fee schedule amount for certain claims, from 150 percent of the maximum fee for the service set forth in the applicable fee schedule to 300 percent of such amount. The measure allows the Workers' Compensation Commission to adjust the charge outlier threshold percentage; under existing law, it is allowed only to decrease the percentage. **PASSED**

**SB 904 Concealed handgun permit; Workers' Compensation commissioner or deputy commissioner exempt.** Provides an exception from the prohibition against carrying a weapon into courthouses in the Commonwealth for a commissioner or deputy commissioner of the Workers' Compensation Commission. **PASSED**

**HB 1659 Workers' compensation; employer's lien; third party actions.** Requires that any arbitration proceeding regarding an employer's right of subrogation to an employee's claim against a third party shall be limited solely to arbitrating the amount and validity of the employer's lien and shall not affect the employee's rights in any way. Such arbitration shall not be held unless (i) any contested expenses remaining have been submitted to the Virginia Workers' Compensation Commission (the Commission) for a determination of their validity and the Commission has made such determination of validity prior to the commencement of the arbitration; (ii) prior to the commencement of such arbitration the employer has provided the injured employee and his attorney, if any, with an itemization of the expenses associated with the lien that is the subject of the arbitration; (iii) upon receipt of the itemization of the lien, the employee shall have 21 days to provide a written objection to any expenses included in the lien to the employer, and if the employee does not do so any objections to the lien to be arbitrated shall be deemed waived; and (iv) the employer shall have 14 days after receipt of the written objection to notify the employee of any contested expenses that the employer does not agree to remove from the lien, and if the employer does not do so any itemized expense

objected to by the employee shall be deemed withdrawn and not included in the arbitration. This bill is identical to [SB 1175](#). **PASSED**

[SB 1201](#) **Workers' compensation; suitably equipped automobile.** Authorizes the Workers' Compensation Commission to require an employer to provide funds for the purchase of a suitably equipped automobile for an incapacitated employee if it finds that it is medically necessary and that modifications to the employee's automobile are not technically feasible or will cost more than the funds available for a replacement automobile. The total of the costs of the automobile and of any bedside lifts, adjustable beds, and modification of the employee's principal home are limited to \$42,000, which is the amount of the existing cap on expenses for modifications to the injured employee's automobile and home. **PASSED**

[SB 1120](#) **Workers' compensation; volunteer firemen and emergency medical services personnel.** Provides that for the purposes of the Virginia Workers' Compensation Act volunteer firemen and emergency medical services personnel shall be deemed employees of the political subdivision or state institution of higher education in which the principal office of the volunteer fire company or volunteer emergency medical services agency is located. The measure repeals the existing provision that volunteer firemen and emergency medical services personnel shall be deemed the employees of the political subdivision or state institution of higher education if its governing body has adopted a resolution acknowledging those persons as employees. **FAILED IN SENATE COMMERCE & LABOR, 5-9**

[HB 2155](#) **Workers' compensation; modifications to employee's home and automobile.** Increases from \$42,000 to \$50,000 the maximum aggregate cost of (i) bedside lifts, adjustable beds, and modifications and alterations to an injured employee's principal home and (ii) modifications to or equipment for an injured employee's automobile that the Workers' Compensation Commission may award on account of any one accident. **FAILED**

[HB 2353](#) **Workers' compensation; failure to make reports; deterring employee from filing claim; penalty.** Provides that an employer is guilty of a Class 2 misdemeanor if he knowingly and intentionally fails to comply with the requirement that he report an employee's injury or death or dissuades or deters an employee from filing a claim for compensation under the Virginia Workers' Compensation Act. **FAILED**

[SB 1472](#) **Workers' compensation; accident reports; filing claims; civil penalty.** Requires an employer's accident report filed with the Workers' Compensation Commission to include the signature of the injured employee or his personal representative. The measure provides that the employer's filing of the accident report constitutes the filing with the Commission by or on behalf of the employee of a claim for workers' compensation benefits with respect to any injury arising from the accident. The measure also provides that an employer that fails to comply with the requirement that it report an employee's injury or death, or dissuades or deters an employee from filing a claim for compensation, shall be assessed a civil penalty of not more than \$500, which civil penalty is increased to not



less than \$500 and not more than \$5,000 if the violation is willful. **FAILED**

meet the definition of nonrepairable and rebuilt vehicles. **PASSED**

## CONSUMER LAW

**SB 839 Virginia Consumer Protection Act; storm-related repairs.** Provides that it is a prohibited practice under the Virginia Consumer Protection Act for a supplier to engage in fraudulent or improper or dishonest conduct while engaged in a transaction that was initiated (i) during a declared state of emergency or (ii) to repair damage resulting from the event that prompted the declaration of a state of emergency, regardless of whether the supplier is a licensed contractor. This bill is identical to **HB 1422**. **PASSED**

**SB 950 Nonrepairable and rebuilt vehicles.** Eliminates the requirement that nonrepairable and rebuilt vehicles have incurred damage that exceeds 90 percent of their cash value prior to such damage to meet the definition of nonrepairable and rebuilt. The bill requires the Department of Motor Vehicles to report to the Chairmen of the House and Senate Transportation Committees on the impact of the bill, if any, on the number of nonrepairable vehicle and salvage certificates issued over the three-year period after July 1, 2017, compared with the number of such certificates issued over the three-year period before July 1, 2017. **PASSED**

**HB 1687 Nonrepairable and rebuilt vehicles.** Eliminates the requirement that nonrepairable and rebuilt vehicles have incurred damage that exceeds 90 percent of their cash value prior to such damage to

**SB 1069 Titling out-of-state salvage vehicles.** Provides a process by which the owner of a salvage vehicle that has been rebuilt, titled, and registered in another state may obtain a nonnegotiable title for such vehicle to operate on the highways of the Commonwealth. **PASSED**

**SB 1123 Manufactured Home Lot Rental Act; failure of landlord to correct violations; notification of tenants.** Provides that if a landlord does not remedy a violation of an ordinance involving the health and safety of tenants in a manufactured home park within seven days of receiving notice from the locality of such violation, the locality must notify tenants of the manufactured home park who are affected by the violation. The notification may consist of posting the notice of violation in a conspicuous place in the manufactured home park or mailing copies of the notice to affected tenants. **PASSED**

**HB 2033 Landlord and tenant law; residential tenancies; landlord and tenant obligations and remedies.** Provides that the Virginia Residential Landlord and Tenant Act (§ 55-248.2 et seq.) (the Act) shall apply to all residential tenancies; however, a landlord who is a natural person, an estate, or a legal entity that owns no more than two single-family residential dwelling units in its own name subject to a rental agreement may opt out of the Act by stating so in the rental agreement. The bill conforms general landlord and tenant law relating to residential tenancies to the Act, including the security deposits, lease terms, notice, and disclosure provisions. The bill also allows the landlord, for unclaimed

security deposits, to submit such funds to the State Treasurer rather than the Virginia Housing Trust Fund, and changes the requirement that a landlord make reasonable efforts to advise the tenant of the right to be present at the landlord's inspection to a requirement that written notice of the right be provided. The bill provides for a landlord to provide a tenant with a written statement of charges and payments over the previous 12 months rather than an accounting as required under current law. In addition, the bill includes any activity that involves or constitutes a criminal or willful act that also poses a threat to health and safety by the tenant or authorized occupants, guests, or invitees as an immediate nonremediable violation for which the landlord may terminate the tenancy. The bill also authorizes a landlord to dispose of the property of a deceased tenant if a personal representative has not been appointed by the circuit court. The landlord may proceed with the disposal after providing 10 days' notice. The bill (i) provides that authorized occupants, guests, or invitees must vacate the dwelling unit after the death of a sole tenant; (ii) allows a landlord to request during the pendency of an unlawful detainer action an order requiring the tenant to provide the landlord with access to the dwelling unit; (iii) adds oil to the utilities that may be included in ratio utility billing; (iv) requires the landlord to provide a written security deposit disposition statement following a move-out inspection and provides for the landlord to seek recovery for additional damages discovered after the security deposit disposition has been made, provided however that the tenant may present evidence of the move-out report to support the tenant's position that such additional damages did not exist

at the time of the move-out inspection; and (v) authorizes a landlord to retain an attorney to prepare or provide any required written notice and permits the use of an electronic signature or an electronic notarization. **PASSED**

**HB 2203 Manufactured Home Lot Rental Act; notice to tenant of building code violation; renewal of lease.** Requires the Department of Housing and Community Development to consider including in the current revision of the Uniform Statewide Building Code a provision designed to ensure that localities provide appropriate notice to residents of manufactured home parks of any Building Code violation by a park owner that jeopardizes the health and safety of those residents and to report to the General Assembly regarding the status of such efforts no later than November 1, 2017. **PASSED**

**HB 2281 Residential rental property.** Provides that if a residential dwelling unit is foreclosed upon and a tenant is lawfully occupying the dwelling unit at the time of the foreclosure, the foreclosure shall act as a termination of the rental agreement by the landlord. The bill also provides that, if there is in effect at the date of the foreclosure sale a written property management agreement between the landlord and a real estate licensee licensed pursuant to the provisions of § 54.1-2106.1, the foreclosure shall convert the property management agreement into a month-to-month agreement between the successor landlord and the real estate licensee acting as a managing agent, except in the event that the terms of the original property management agreement between the landlord and the real estate licensee acting as a managing agent require an



earlier termination date. Except in the event of foreclosure, the bill permits a real estate licensee acting on behalf of a landlord client as a managing agent who elects to terminate the property management agreement to transfer any funds held in escrow by the licensee to the landlord client without his consent, provided that the real estate licensee provides written notice to each tenant that the funds have been so transferred. The bill provides that, in the event of foreclosure, a real estate licensee shall not transfer any funds to a landlord client whose property has been foreclosed upon. The bill provides immunity, in the absence of gross negligence or intentional misconduct, to any such licensee acting in compliance with the provisions of § 54.1-2108.1. The bill clarifies that a tenant residing in a dwelling unit that has been foreclosed upon is eligible to file an assertion pursuant to § 55-225.12 and that a court may order any moneys accumulated in escrow to be paid to the successor landlord or the successor landlord's managing agent, if any. This bill is identical to [SB 966](#). **PASSED**

**SB 1228 Virginia Fair Housing Law; rights and responsibilities with respect to the use of an assistance animal in a dwelling.** Sets out the rights and responsibilities under the Virginia Fair Housing Law (§ 36-96.1 et seq.) with respect to maintaining an assistance animal in a dwelling. The bill establishes a process through which a person with a disability may submit a request for a reasonable accommodation to maintain an assistance animal in a dwelling, including any supporting documentation verifying the disability and disability-related need for an accommodation. Under the bill, a request for reasonable accommodation to maintain an assistance animal may be denied for any

one of the following reasons: (i) the request is not reasonable because it constitutes an undue financial and administrative burden as determined on a case-by-case basis; (ii) the requester does not have a disability; (iii) the requester does not have a disability-related need for an assistance animal; (iv) the supporting documentation does not state certain specified information regarding task, service, or support performed by the assistance animal; (v) the requested assistance animal poses a direct threat to the health or safety of others or the property of others; or (vi) the insurance carrier for the owner of the dwelling would take certain adverse action based on the presence of the assistance animal. **PASSED**

**HB 1638 Virginia Residential Landlord and Tenant Act; insurance; early termination of rental agreement.** Prohibits a landlord from requiring a tenant to agree to a waiver of subrogation for damage or renter's insurance. **FAILED**

**HB 1639 Virginia Residential Landlord and Tenant Act; disclosure of relationship between landlord and insurance company.** Requires a landlord, prior to the execution or renewal of a rental agreement, to provide a written disclosure to a tenant in cases where (i) there exists a business or financial relationship between the landlord and any insurance company (a) providing to the landlord any insurance coverage that under current law the landlord may require as a condition of tenancy or (b) referred by the landlord to a tenant to obtain such insurance coverage and (ii) any such coverage contains a waiver of subrogation provision. **FAILED**

**SB 1094 Manufactured Home Lot Rental Act; right of resident upon eviction from a manufactured home park.** Provides that a manufactured home owned by an evicted resident of a manufactured home park when there is no secured party shall be held in trust for the resident by the park owner until such time as the home is sold. **FAILED**

**HB 2073 Certain fraud crimes; multi-jurisdiction grand jury; Virginia Consumer Protection Act.** Adds the offenses of obtaining money by false pretense, financial exploitation of mentally incapacitated persons, and construction fraud to the criminal violations that a multi-jurisdiction grand jury may investigate and to prohibited practices under the Virginia Consumer Protection Act (§ 59.1-196 et seq.) **PASSED HOUSE, FAILED SENATE COURTS, 9-6**

**SB 1126 Consumer finance companies; Internet loans.** Provides that the laws regulating consumer finance companies apply to persons making loans to individuals for personal, family, household, or other nonbusiness purposes over the Internet to Virginia residents or any individuals in Virginia, whether or not the person making the loans maintains a physical presence in the Commonwealth. The measure has a reenactment clause and directs the Bureau of Financial Institutions to conduct an analysis of the legal, administrative, and other relevant issues relating to the feasibility of regulating Internet lending activities by consumer finance companies. **PASSED SENATE, FAILED HOUSE**

## JUDICIAL ADMINISTRATION

**HB 1515 Circuit court clerks; electronic transfer of certain documents.** Permits circuit court clerks to transfer electronically, or provide electronic access to, documents related to certain real property information to certain public officials. **PASSED**

**SB 864 Electoral board appointments; chief judge of the judicial circuit or his designee to make appointment.** Provides that appointments to the electoral board of each county and city are to be made by the chief judge of the judicial circuit for the county or city or that judge's designee, who shall be any other judge sitting in that judicial circuit. Currently, such appointments are made by a majority of the circuit judges and if a majority of the judges cannot agree, the senior judge makes the appointment. **PASSED**

**SB 928 Substitute judges.** Removes the prohibition against substitute judges sitting in the courts in which they regularly practice. **PASSED**

**HB 1854 Lobbyist reporting, the State and Local Government Conflict of Interests Act, and the General Assembly Conflicts of Interests Act; filing of required disclosures; registration of lobbyists; candidate filings; judges; definition of gift; informal advice; civil penalties; technical amendments.** Makes numerous changes to the laws governing lobbyist reporting, the conflict of interest acts, and the Virginia Conflict of Interest and Ethics Advisory Council. The bill exempts members of the

judiciary from certain provisions governing prohibited gifts and prohibited personal interests in a transaction where such members are already subject to similar or greater prohibitions under the Canons of Judicial Conduct for the State of Virginia. This bill is identical to **SB 1312. PASSED**

**SB 879 Retired circuit court judges under recall; qualification by Committees for Courts of Justice.** Requires that retired circuit court judges sitting as substitutes be found qualified every three years by the Courts Committees instead of authorized by the Chief Justice. The bill provides that the Chief Justice may call upon and authorize any circuit court judge whose retirement becomes effective during the interim period between regularly scheduled sessions of the General Assembly to sit in recall. **PASSED SENATE, FAILED HOUSE**

**SB 1481 Judicial Candidate Evaluation Committee; Virginia State Bar.** Codifies the procedures used by the State Bar to evaluate and recommend candidates for election by the General Assembly to the appellate courts, the federal courts, and the State Corporation Commission. **FAILED SENATE COURTS, 13-2**

## FAMILY LAW

**HB 1456 Custody and visitation orders; parenting time.** Provides that the court, in its discretion and as to a parent, may use the phrase "parenting time" to be synonymous with the term "visitation" in a custody or visitation order. **PASSED**

**HB 1586 Court-ordered custody and visitation arrangements; transmission of order to child's school.** Provides that, in any custody or visitation case in which an order prohibiting a party from picking a child up from school is entered, the court shall order a party to provide a copy of such order to the child's school within three business days of the receipt of the order. The bill requires that, where a custody determination affects a child's school enrollment, the court order a party to provide a copy of the custody order to the child's new school within three business days of the child's enrollment. The bill further provides that if the court determines that a party is unable to deliver the order to the school, such party shall provide the court with the name of the principal and address of the school, and the court shall cause the order to be mailed to such principal. **PASSED**

**HB 1604 Foster care; reasonable efforts to prevent removal of child.** Allows a local board of social services to take a child into immediate custody pursuant to an emergency removal order in cases in which the child is alleged to have been abused or neglected, and allows a court to issue certain orders in such cases, without requiring that reasonable efforts be made to prevent removal of the child from his home if (i) the parental residual rights of the child's parent over a sibling were involuntarily terminated; (ii) the parent was convicted of murder or voluntary manslaughter, or a felony attempt, conspiracy, or solicitation to commit any such offense, if the victim was a child of or resided with the parent or was the other parent of the child; (iii) the parent was convicted of felony assault resulting in serious bodily injury or felony bodily wounding resulting in serious bodily injury



or felony sexual assault, if the victim was a child of or resided with the parent; or (iv) on the basis of clear and convincing evidence, the parent has subjected any child to aggravated circumstances or abandoned a child under circumstances that would justify the termination of residual parental rights. The bill provides that, in each permanency planning hearing and in any hearing regarding the transition of the child from foster care to independent living, the court shall consult with the child, unless the court finds that such consultation is not in the best interests of the child. **PASSED**

**SB 815 Priority of debts to be paid from decedent's assets; unpaid child support.** Prioritizes debts owed for child support arrearages over debts and taxes due to localities and other, unenumerated claims against the estate of a decedent. **PASSED**

**SB 868 State Board of Social Services; complaints of child abuse or neglect where child is under the age of two.** Requires the State Board of Social Services to promulgate regulations that require local departments of social services to respond to valid reports and complaints alleging suspected abuse or neglect of a child under the age of two within 24 hours of receiving such reports or complaints. **PASSED**

**HB 1692 Effect of divorce proceedings; transfer of matters to the juvenile and domestic relations district court; concurrent jurisdiction.** Provides that, where a circuit court enters a divorce decree and transfers certain matters to the juvenile and domestic relations district court, the circuit court is not deprived of concurrent jurisdiction to hear such

matters. The bill requires that any motions in the circuit court filed regarding such matters be heard by the circuit court after such transfer, unless the parties agree otherwise. The bill allows the court to transfer any matters covered by the divorce decree to a more appropriate forum. **PASSED**

**HB 1737 Personal jurisdiction over a person; domicile and residential requirements for suits for annulment, affirmance, or divorce; civilian employees and foreign service officers.** Extends to all civilian employees of the United States, where current law applies to foreign service officers, certain requirements for a court to exercise personal jurisdiction over a person stationed in a territory or foreign country and establishing domicile in the Commonwealth for the purposes of an annulment, affirmance, or divorce. **PASSED**

**HB 1795 Adoptive and foster placements; Mutual Family Assessment home study.** Requires that home studies conducted by local boards of social services to determine the appropriateness of an adoptive or foster placement comply with the Mutual Family Assessment home study template and any addenda thereto developed by the Department of Social Services. The bill authorizes the Department to amend or update its Mutual Family Assessment home study template and any addenda thereto when necessary to improve the process of adoptive and foster placements, provided that such amendments or updates do not lessen the requirements of the home study process. **PASSED**

**HB 2025 Religious freedom; solemnization of marriage.** Provides that no person shall be (i) required to participate in the solemnization of any marriage or (ii) subject to any penalty by the Commonwealth, or its political subdivisions or representatives or agents, solely on account of such person's belief, speech, or action in accordance with a sincerely held religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman. The bill defines "person" as any (a) religious organization; (b) organization supervised by or controlled by or operated in connection with a religious organization; (c) individual employed by a religious organization while acting in the scope of his paid or volunteer employment; (d) successor, representative, agent, agency, or instrumentality of any of the foregoing; or (e) clergy member or minister. The bill also defines "penalty." This bill is identical to [SB 1324](#). **PASSED**

**HB 2050 Severance of tenancy by the entirety by written instrument.** Clarifies that a husband and wife may own real or personal property as tenants by the entirety for as long as they are married. The bill provides that, in order to sever a tenancy by the entirety by written instrument, the instrument must be a deed that is signed by both spouses as grantors of the property. This bill is in response to *Evans v. Evans*, Record No. 141277, 772 S.E.2d 576, 2015 Va. LEXIS 84 (2015). **PASSED**

**SB 1177 Surviving spouse's elective share; homestead allowance benefit.** Provides that if a surviving spouse of a decedent dying on or after January 1, 2017, claims and receives an elective share, the homestead allowance available to the spouse shall be in addition to any benefit or

elective share passing to such surviving spouse. The bill provides consistency with other provisions of Article 1.1 (§ 64.2-308.1 et seq.) of Chapter 3 of Title 64.2, which governs the elective share of the surviving spouse of a decedent dying on or after January 1, 2017, which was enacted in 2016. This bill is identical to [HB 1516](#). **PASSED**

**HB 2216 Putative Father Registry.** Changes the name of the Putative Father Registry to the Virginia Birth Father Registry and modifies certain registration and notice provisions associated with such registry. **PASSED**

**HB 2279 Child-protective services; complaints involving members of the United States Armed Forces.** Requires local departments of social services to transmit information regarding reports, complaints, family assessments, and investigations involving children of active duty members of the United States Armed Forces or members of their household to family advocacy representatives of the United States Armed Forces. Under current law, local departments of social services may transmit such information, but are only required to transmit information regarding founded complaints or family assessments. This bill is identical to [SB 1164](#). **PASSED**

**HB 2289 Award of life insurance upon divorce or dissolution of marriage.** Provides that where an order for spousal support or separate maintenance has been entered by the court, the court may order a party to maintain an existing life insurance policy, designate the other party as beneficiary, allocate the premium cost of life insurance between the parties, and order the insured party to facilitate the

provision of certain information from the insurer to the beneficiary. The bill sets out factors to be considered by the court when making such an award and provides that the obligation to maintain a life insurance policy ceases upon the termination of the party's obligation to pay spousal support or separate maintenance. **PASSED**

**HB 1611 Child support arrearages; suspension of driver's license.** Requires the Department of Motor Vehicles to renew a driver's license or terminate a license suspension imposed due to delinquency in the payment of child support when it receives from the Department of Social Services a certification that (i) the person has reached an agreement with the Department of Social Services to satisfy the delinquency and has begun paying current support and arrears pursuant to an income withholding order or (ii) the person is indigent and has reached an agreement with the Department of Social Services to satisfy the delinquency based on the person's ability to pay. **FAILED**

**SB 859 Spousal support; termination upon payor's retirement.** Provides that, for spousal support orders filed on or after July 1, 2017, any periodic payments awarded shall terminate upon the payor spouse's attainment of full retirement age. The bill provides that the court may set a later date for termination of such payments for good cause shown. The bill also requires a court to order the modification of an initial support order filed before July 1, 2017, so that support terminates upon the payor spouse's attainment of full retirement age, unless good cause is shown to deny the petition for modification. **FAILED**

**HB 2048 Nonpayment of child support and fines; suspension of driver's license; ability to pay; written findings.** Prohibits the court from suspending the driver's license of a person who has failed to pay his fines or child support if the court finds that the person's failure to pay is due to his inability to pay. The bill requires that a hearing be held prior to the suspension of a person's driver's license for the nonpayment of fines and that the court make a written finding for the suspension of a person's license due to nonpayment of fines or child support. **FAILED**

**SB 1190 Judicial training; law related to rights of persons of legitimate interest in custody and visitation proceedings.** Directs the Office of the Executive Secretary of the Supreme Court of Virginia to require that all juvenile and domestic relations district court judges receive training, at least once during each six-year judicial term, on the rights of persons of legitimate interest in child custody and visitation proceedings. **FAILED**

**SB 1199 Rights of blind parents.** Provides that a blind parent's blindness, as defined in the bill, shall not be the sole basis of the denial or restriction of such parent's custody or visitation rights. **PASSED SENATE, FAILED HOUSE**

**HB 2128 Custody and visitation agreements; best interests of the child.** Requires the court to consider any history of abuse of persons other than family members when determining the best interests of the child for the purposes of custody and visitation arrangements. **FAILED HOUSE COURTS, 10-10**



**HB 2271 Custodial rights of person who committed sexual assault; clear and convincing standard.** Provides that a person who has been found by a clear and convincing evidence standard to have committed rape, carnal knowledge, or incest, which act resulted in the conception of a child who is the subject of the following, is not a party with a legitimate interest for the purposes of (i) the approval of a petition for custody of or rights of visitation with the child, (ii) the approval of an entrustment agreement for the termination of parental rights without the birth father's signature, or (iii) the validity of an adoption of the child without the birth father's consent. **FAILED**

**SB 861 Preliminary protective orders; contents of order.** Provides that if a preliminary protective order is issued in an ex parte hearing where the petition for the order is supported by sworn testimony and not an affidavit or a completed form submitted with an emergency protective order request, the court issuing the order shall state in the order the basis on which the order was entered, including a summary of the allegations made and the court's findings. **PASSED SENATE, FAILED HOUSE**

**HB 2292 Judicial training; law related to rights of persons of legitimate interest in custody and visitation proceedings.** Directs the Office of the Executive Secretary of the Supreme Court of Virginia to require that all juvenile and domestic relations district court judges receive training, at least once during each six-year judicial term, on the rights of persons of legitimate interest in child custody and visitation proceedings. **FAILED**

**SB 1495 Suits to annul marriage.** Removes the prohibition against entering an order for annulment when parties have been married for two years or longer. **FAILED SENATE COURTS, 9-3**

**SB 1592 Juvenile and domestic relations district court; jurisdiction over juveniles who are not lawfully present in the United States.** Prohibits the juvenile and domestic relations district court from making a determination that it is not in a juvenile's best interest to return to his home country when such juvenile is not lawfully present in the United States and when the purpose of making such determination is for the juvenile's eligibility for special immigrant juvenile classification. **STRICKEN**

## LONG TERM CARE

**HB 2072 Nursing home family councils; rights of family members.** Provides that no family member of a resident of a nursing home or other resident representative shall be restricted from participating in meetings in the facility with the families or resident representatives of other residents in the facility. **PASSED**

**SB 1191 Assisted living facilities; cap on civil penalties.** Increases the aggregate amount of civil penalties that the Commissioner of Social Services may assess against an assisted living facility for noncompliance with the terms of its license from \$10,000 per 24-month period to \$10,000 per 12-month period. This bill is identical to **HB 1919**. **PASSED**

**HB 2156 Licensure of facilities operated by agencies of the Commonwealth.** Provides for licensure of child welfare agencies operated by agencies of the Commonwealth. **PASSED**

**HB 2304 Department of Medical Assistance Services; requirements related to long-term care.** Provides that the Department of Medical Assistance Services shall require all individuals who administer preadmission screenings for long-term care services to receive training on and be certified in the use of the Uniform Assessment Instrument; requires the Department to develop a program for the training and certification of preadmission screeners, develop guidelines for a standardized preadmission screening process, and strengthen oversight of the preadmission screening process to ensure that problems are identified and addressed promptly. The bill requires the Department to make a number of changes to contracts for long-term care services provided by managed care organizations; directs the Department to impose additional requirements related to submission of data and information by managed care organizations; and requires the Department to implement a number of spending and utilization control measures in conjunction with managed care organizations. **PASSED**

articles of incorporation or bylaws do not require the meeting to be held at a place. The measure also limits the provision that currently authorizes the holders of at least 20 percent of the votes entitled to be cast on an issue to call a special meeting of shareholders of a corporation that has 35 or fewer shareholders by requiring that the corporation not be a public corporation. **PASSED**

**SB 1226 Virginia Freedom of Information Act; Public Procurement Act; proprietary records and trade secrets; solar energy agreements.** Excludes from the mandatory disclosure provisions of FOIA proprietary information, voluntarily provided by a private business under a promise of confidentiality from a public body, used by the public body for a solar photovoltaic services agreement, a solar power purchase agreement, or a solar self-generation agreement. The bill requires the private business to specify the records for which protection is sought before submitting them to the public body and to state the reasons why protection is necessary. **PASSED**

**HB 1984 Limited Liability Company Protected Series Act.** Provides for the creation by a limited liability company (LLC) of one or more protected series. **FAILED**

## BUSINESS/COMMERCIAL LAW

**HB 2230 Stock corporations; shareholders' meetings.** Authorizes the board of directors of a stock corporation to determine that any meeting of shareholders not be held at any place and instead be held by means of remote communication, if the

## EMPLOYMENT LAW

**SB 783 Nondiscrimination in public employment.** Prohibits discrimination in public employment on the basis of sexual orientation or gender identity, as defined in the bill. The bill also codifies for state and local government employment the current

prohibitions on discrimination in employment on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, or status as a veteran. **PASSED SENATE, FAILED HOUSE**

**SB 824 Paid sick days for employees; civil penalties.** Requires private employers to give to each full-time employee paid sick days. Paid sick days would accrue at a rate of no less than one hour for every 50 hours worked in 2018 or, if an employer commences operations in 2018 or thereafter, in the employer's first year of operations. In subsequent years, paid sick days would accrue at a rate of no less than one hour for every 30 hours worked. An employee would be entitled to use accrued sick days beginning on the ninetieth calendar day of employment. The bill would require an employer to provide paid sick days, upon the request of the employee, for diagnosis, care, or treatment of health conditions of the employee or the employee's family member. The bill would prohibit an employer from discriminating or retaliating against an employee who requests paid sick days. **FAILED SENATE COMMERCE & LABOR, 11-4**

**SB 1080 Equal pay irrespective of sex.** Amends the existing law requiring equal pay for equal work irrespective of sex to (i) prohibit unequal provision of benefits and privileges; (ii) prohibit employers from punishing employees for sharing salary information with their coworkers; and (iii) authorize a court to award reasonable attorney fees and costs to an employee who substantially prevails on the merits in an action for wrongful withholding of wages, benefits, or privileges. **FAILED SENATE COMMERCE & LABOR, 10-5**

**SB 1171 Public employment; inquiries by state agencies and localities regarding criminal convictions, charges, and arrests.** Prohibits state agencies from including on any employment application a question inquiring whether the prospective employee has ever been arrested or charged with, or convicted of, any crime, subject to certain exceptions. A prospective employee may not be asked if he has ever been convicted of any crime unless the inquiry takes place after the prospective employee has received a conditional offer of employment, which offer may be withdrawn if the prospective employee has a conviction record that directly relates to the duties and responsibilities of the position. **PASSED SENATE, FAILED HOUSE**

**HB 2129 Virginia Human Rights Act; public employment, public accommodation, and housing; prohibited discrimination; sexual orientation.** Prohibits discrimination in employment and public accommodation on the basis of sexual orientation. **FAILED**

**HB 2261 Virginia Human Rights Act; unlawful discriminatory practice; anti-Semitism.** Provides that the terms "because of religion" and "on the basis of religion," and terms of similar import when used in reference to discrimination in the Code of Virginia and acts of the General Assembly, include anti-Semitism. **FAILED**

**HB 2283 Nonpayment of wages; private action.** Provides that an employee has cause of action against an employer who fails to pay wages. **FAILED**

**HB 2295 Virginia Human Rights Act; pregnancy, childbirth, or related medical conditions; causes of action.** Provides that no employer may discharge any employee



on the basis of pregnancy, childbirth, or related medical conditions, including lactation. **FAILED**

**HB 2323 Public employment; inquiries by state agencies and localities regarding criminal convictions, charges, and arrests.**

Prohibits state agencies from including on any employment application a question inquiring whether the prospective employee has ever been arrested or charged with, or convicted of, any crime, subject to certain exceptions. **FAILED**

## CRIMINAL LAW

**HB 1545 Delayed appeals in criminal cases; assignment of errors dismissed in part.**

Provides that an appellant may file a motion for leave to pursue a delayed appeal in a criminal case in the Court of Appeals of Virginia when the appeal was dismissed, in whole or in part, for a failure to (i) initiate the appeal; (ii) adhere to proper form, procedures, or time limits in the perfection of the appeal; or (iii) file the indispensable transcript or written statement of facts, even if other parts of the appeal were refused on the merits. Under current law, an appellant may not pursue a delayed appeal in such a case if part of the appeal was refused on the merits. The bill also provides that an appellant may file a motion for leave to pursue a delayed appeal in a criminal case that is appealed to the Supreme Court of Virginia from the Court of Appeals of Virginia for those assignments of error that were dismissed because they did not adhere to a proper form, even if other assignments of error were refused on the merits. This bill is identical to [SB 853](#).

**PASSED**

**HB 1622 Driving commercial vehicle while intoxicated; penalties.**

Harmonizes the penalties for driving under the influence (DUI) and commercial DUI. The bill imposes a \$250 mandatory minimum fine for a first offense of commercial DUI and mandatory minimum sentences of five days if the person's blood alcohol level was at least 0.15 and 10 days if the person's blood alcohol level was more than 0.20. The bill increases from five to 20 days the mandatory minimum sentence for a second offense committed within five years, adds a 10-day mandatory minimum sentence for a second offense committed within five to 10 years, and imposes a \$500 mandatory minimum fine for any second offense committed within a 10-year period. The bill also imposes additional mandatory minimum sentences for a second offense committed within 10 years of 10 days if the person's blood alcohol level was at least 0.15 and 20 days if the person's blood alcohol level was more than 0.20 as well as an additional \$500 mandatory minimum fine. **PASSED**

**SB 817 Restricted driver's license; purposes.**

Adds travel to and from a job interview to the list of purposes for the issuance of a restricted driver's license. The bill provides that a person issued a restricted driver's license for this purpose is required to maintain on his person written proof from the prospective employer of the date, time, and location of the job interview. **PASSED**

**SB 853 Delayed appeals in criminal cases; assignment of errors dismissed in part.**

Provides that an appellant may file a motion for leave to pursue a delayed appeal in a criminal case in the Court of Appeals of Virginia when the appeal was dismissed, in

whole or in part, for a failure to (i) initiate the appeal; (ii) adhere to proper form, procedures, or time limits in the perfection of the appeal; or (iii) file the indispensable transcript or written statement of facts, even if other parts of the appeal were refused on the merits. Under current law, an appellant may not pursue a delayed appeal in such a case if part of the appeal was refused on the merits. The bill also provides that an appellant may file a motion for leave to pursue a delayed appeal in a criminal case that is appealed to the Supreme Court of Virginia from the Court of Appeals of Virginia for those assignments of error that were dismissed because they did not adhere to a proper form, even if other assignments of error were refused on the merits. This bill is identical to [HB 1545](#). **PASSED**

**SB 854 Collection of unpaid court fines, etc.**

Increases the grace period after which collection activity for unpaid court fines, costs, forfeitures, penalties, and restitution may be commenced from 30 days to 90 days after sentencing or judgment. The bill also establishes the requirements for deferred or installment payment agreements that a court must offer a defendant who is unable to pay court-ordered fines, costs, forfeitures, and penalties. The bill requires that a court take into account a defendant's financial circumstances, including whether the defendant owes fines and costs to other courts, in setting the terms of a payment agreement. The bill fixes the maximum down payments that a court may require as a condition of entering a payment plan and provides that payments made within 10 days of their due date are timely made. The bill precludes a court from denying a defendant the opportunity to enter into a

payment agreement solely because of the crime committed, the total amount owed or that such amount has been referred to collections, any previous default by the defendant or failure to establish a payment history, or the defendant's eligibility for a restricted driver's license. The bill allows all costs and fines owed by a defendant to any one court to be incorporated into one payment agreement and allows a defendant to request a modification of the terms of the agreement, which shall be granted upon a good faith showing of need. The bill requires a court to consider a request by a defendant who has defaulted on a payment agreement to enter into a subsequent agreement and requires the court to fix a down payment for subsequent payment agreements. Finally, the bill provides that the payment agreement includes restitution unless the court has entered a separate order regarding the payment of restitution. This bill is identical to [HB 2386](#). **PASSED**

**SB 1091 Driver's license; marijuana**

**possession.** Revises the existing provision that a person loses his driver's license for six months when convicted of or placed on deferred disposition for a drug offense to provide that the provision does not apply to deferred disposition of simple possession of marijuana. The exception applies only to adults; juveniles will still be subject to license suspension. The bill provides that a court retains the discretion to suspend or revoke the driver's license of a person placed on deferred disposition for simple possession of marijuana and must suspend or revoke for six months the driver's license of such person who was operating a motor vehicle at the time of the offense. The bill also requires that such a person whose driver's license is not suspended or revoked perform 50 hours of community service in

addition to any community service ordered as part of the deferred disposition. This bill is identical to [HB 2051](#). **PASSED**

[HB 1647](#) **Presentence report; waiver by defendant.** Expands from guilty to guilty or nolo contendere the pleas for which a court is required to direct a probation officer to create a presentence report upon conviction for certain felonies. The bill provides that upon a conviction or plea agreement for such felonies, the defendant and the attorney for the Commonwealth may waive the presentence report. **PASSED**

[HB 2064](#) **Assault and battery against a family or household member; eligibility for first offender status.** Precludes a person who has been convicted of any felony defined as an act of violence from being eligible for first offender status for assault and battery against a family or household member unless the attorney for the Commonwealth does not object to the person being placed on first offender status. **PASSED**

[HB 2084](#) **Search warrants; person subject to arrest.** Authorizes the issuance of a search warrant to search for and seize any person for whom a warrant or process for arrest has been issued. This bill is identical to [SB 1260](#). **PASSED**

[HB 2327](#) **DUI; implied consent; refusal of blood or breath tests.** Eliminates the criminal penalties for refusing to submit to a blood test to determine the alcohol or drug content of a defendant's blood upon arrest for a DUI-related offense under the law on implied consent. The bill also increases to a Class 1 misdemeanor the criminal penalty for refusing to submit to a breath test under the law on implied

consent for an offense committed within 10 years of a prior offense of refusal or of another DUI-related offense. The bill also extends to blood tests performed by the Department of Forensic Science pursuant to a search warrant the rebuttable presumption that a person is intoxicated based on the person's blood alcohol level demonstrated by such tests. The bill also provides that an application for a search warrant to perform a blood test on a person suspected of committing a DUI-related offense shall be given priority over other matters pending before the judge or magistrate. Finally, the bill establishes a rebuttable presumption applicable in a civil case for punitive damages for injuries caused by an intoxicated driver that a person who has consumed alcohol knew or should have known that his ability to drive was or would be impaired by such consumption. This bill is in response to the U.S. Supreme Court decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). The bill contains an emergency clause. **PASSED**

[HB 2350](#) **Use of electronic device to trespass; peeping into dwelling or occupied building; penalty.** Punishes as a Class 1 misdemeanor the use of an electronic device to enter the property of another to secretly or furtively peep or spy or attempt to peep or spy into a dwelling or occupied building located on such property, unless such use occurs pursuant to a lawful criminal investigation. **PASSED**

[HB 2127](#) **Rights of victims of sexual assault; physical evidence recovery kits.** Requires that victims of sexual assault be advised by the investigating law-enforcement agency of their rights regarding physical evidence recovery kits. The bill requires the Division of



Consolidated Laboratory Services of the Virginia Department of General Services and law-enforcement agencies to store a physical evidence recovery kit for an additional 10 years following a written objection to its destruction from the victim. The bill requires the law-enforcement agency to notify the victim at least 60 days prior to the intended date of destruction of the kit and provides that no victim of sexual assault shall be charged for the cost of collecting or storing a kit. **PASSED**

**HB 2386 Collection of unpaid court fines, etc.** Increases the grace period after which collection activity for unpaid court fines, costs, forfeitures, penalties, and restitution may be commenced from 30 days to 90 days after sentencing or judgment. The bill also establishes the requirements for deferred or installment payment agreements that a court must offer a defendant who is unable to pay court-ordered fines, costs, forfeitures, and penalties. The bill requires that a court take into account a defendant's financial circumstances, including whether the defendant owes fines and costs to other courts, in setting the terms of a payment agreement. The bill fixes the maximum down payments that a court may require as a condition of entering a payment plan and provides that payments made within 10 days of their due date are timely made. The bill precludes a court from denying a defendant the opportunity to enter into a payment agreement solely because of the crime committed, the total amount owed or that such amount has been referred to collections, any previous default by the defendant or failure to establish a payment history, or the defendant's eligibility for a restricted driver's license. The bill allows all costs and fines owed by a defendant to any

one court to be incorporated into one payment agreement and allows a defendant to request a modification of the terms of the agreement, which shall be granted upon a good faith showing of need. The bill requires a court to consider a request by a defendant who has defaulted on a payment agreement to enter into a subsequent agreement and requires the court to fix a down payment for subsequent payment agreements. Finally, the bill provides that the payment agreement includes restitution unless the court has entered a separate order regarding the payment of restitution. This bill is identical to **SB 854**. **PASSED**

**SB 1501 Victim's right to notification of scientific analysis information.** Provides that for any physical evidence recovery kit that was received by a law-enforcement agency prior to July 1, 2016, and submitted for analysis, the victim, a parent or guardian of a minor victim, or the next of kin of a deceased victim shall be notified of the completion of the analysis and shall, upon request, receive information regarding the results of any analysis from the law-enforcement agency. The bill provides that law enforcement shall not be required to disclose the results of any analysis to an alleged perpetrator. **PASSED**

**SB 1564 DUI; search warrants for blood withdrawals.** Provides that an application for a search warrant to perform a blood test on a person suspected of committing a DUI-related offense shall be given priority over matters that do not involve an imminent risk to another's health or safety. **PASSED**

**HB 1403 Driving while intoxicated; subsequent offenses; penalty.** Provides that a person who commits a third offense of driving while intoxicated within a 20-year

period is guilty of a Class 6 felony and the punishment for a person who commits a fourth or subsequent offense within such period must include a mandatory minimum sentence of one year and a mandatory minimum fine of \$1,000. Under current law, the relevant time period for applying enhanced penalties for subsequent offenses is 10 years. **FAILED**

**HB 1613 Testimony of law-enforcement officer; failure of body-worn camera.** Provides that a law-enforcement officer who is required to wear a body-worn camera during the performance of his duties and fails to cause an audiovisual recording to be made may still testify regarding any occurrence that would have otherwise been recorded by the body-worn camera, but the court shall instruct the jury that the officer's failure shall be considered in determining the weight given to his testimony or, if there is no jury, the court shall consider such failure in determining the weight given to his testimony. **FAILED**

**HB 1621 Preliminary hearing; certification of ancillary misdemeanors; fees and costs.** Provides that if, pursuant to a preliminary hearing, a district court certifies a felony offense and any ancillary misdemeanor offense for trial in circuit court, fees and costs shall be assessed against the accused in the same manner as if a final judgment had been entered by the district court on the misdemeanor offense. **PASSED HOUSE, FAILED SENATE 7-7**

**SB 796 Expungement of certain charges and convictions.** Allows a person to petition for expungement of convictions and deferred disposition dismissals for marijuana possession, underage alcohol possession, and using a false ID to obtain

alcohol when the offense occurred prior to the person's twenty-first birthday; all court costs, fines, and restitution have been paid; and five years have elapsed since the date of completion of all terms of sentencing and probation. **PASSED SENATE, FAILED HOUSE**

**SB 808 Discretionary sentencing guideline worksheets; use by juries.** Requires that the jury be given the applicable discretionary sentencing guideline worksheets during a sentencing proceeding and that the court instruct the jury that the sentencing guideline worksheets are discretionary and not binding on the jury. The bill requires sentencing guideline worksheets to be kept confidential by the jurors and filed under seal by the court. **FAILED SENATE COURTS, 8-7**

**SB 825 New sentencing hearing; abolition of parole.** Provides that a person who was sentenced by a jury prior to the date of the Supreme Court of Virginia decision in *Fishback v. Commonwealth*, 260 Va. 104 (June 9, 2000), in which the Court held that a jury should be instructed on the fact that parole has been abolished, for a non-violent felony committed prior to the time that the abolition of parole went into effect (January 1, 1995) is entitled to a new sentencing proceeding if such person is still incarcerated. The bill provides that such person shall file a petition for a new sentencing proceeding with the circuit court in which the order of conviction was originally entered. The circuit court shall empanel a new jury for the purpose of conducting the new sentencing proceeding and notify the appropriate attorney for the Commonwealth. **PASSED SENATE, FAILED HOUSE**

**SB 833 Community work in lieu of payment of fines and court costs.** Extends to non-jailed defendants a program allowing community service in lieu of payment of fines and court costs. **FAILED**

**SB 850 Correctional Officer Procedural Guarantee Act.** Creates the Correctional Officer Procedural Guarantee Act to establish procedural guarantees for correctional officers when allegations are made against such officers involving matters that may lead to their dismissal, demotion, suspension, or transfer for punitive reasons. **FAILED SENATE REHABILITATION COMMITTEE, 8-7**

**SB 851 Weekend jail time.** Replaces the provision limiting nonconsecutive days in jail for the purpose of allowing the defendant to retain gainful employment with a good cause standard and allows the court to sentence the defendant to nonconsecutive days in jail only if the active portion of the sentence remaining to be served is 90 days or less. If there is no objection from the Commonwealth, the court may sentence felons to nonconsecutive days in jail if the felony was not an act of violence as defined in § 19.2297.1. **FAILED**

**SB 861 Preliminary protective orders; contents of order.** Provides that if a preliminary protective order is issued in an ex parte hearing where the petition for the order is supported by sworn testimony and not an affidavit or a completed form submitted with an emergency protective order request, the court issuing the order shall state in the order the basis on which the order was entered, including a summary of the allegations made and the court's findings. **PASSED SENATE, FAILED HOUSE**

**SB 862 Driving after forfeiture of license.** Provides that a person is guilty of an offense of driving or operating a motor vehicle (i) after his driver's license has been revoked for certain offenses, (ii) in violation of the terms of a restricted license, (iii) without an ignition interlock system if one is required, or (iv) if the person's license had been restricted, suspended, or revoked for certain driving under the influence offenses, with a blood alcohol content of 0.02 percent or more, only if such person was driving or operating the motor vehicle on a highway, as defined in § 46.2-100. **PASSED SENATE, FAILED HOUSE**

**SB 863 Operating a motor vehicle; obstructed view; secondary offense.** Changes the offense of operating a motor vehicle with an object suspended in such vehicle that obstructs the driver's clear view of the highway from a primary offense to a secondary offense (one that can only be charged when the offender is stopped for another, separate offense). **FAILED**

**SB 883 Expungement of police and court records; costs.** Relieves a person who petitions for the expungement of police and court records related to a crime of which the person was acquitted or the charge of which was otherwise dismissed from paying any fees or costs for filing such petition. **FAILED**

**SB 908 Marijuana; decriminalization of simple marijuana possession.** Decriminalizes marijuana possession and provides a civil penalty of no more than \$250 for a first violation and \$1,000 for a second or subsequent violation. Under current law, a first offense is punishable by a maximum fine of \$500 and a maximum 30-day jail sentence, and



subsequent offenses are a Class 1 misdemeanor. **FAILED**

**SB 923 Grand larceny;**

**threshold.** Increases from \$200 to \$500 the threshold amount of money taken or value of goods or chattel taken at which the crime rises from petit larceny to grand larceny. The bill increases the threshold by the same amount for the classification of certain property crimes. This bill was incorporated into [SB816](#). **FAILED**

**HB 1633 Careless driving; cause of injury to vulnerable road user.** Provides that a person is guilty of a Class 1 misdemeanor and shall have his license suspended who operates a motor vehicle in a careless or distracted manner and is the proximate cause of serious physical injury to a vulnerable road user, defined in the bill as a pedestrian or person riding a bicycle, electric wheelchair, electric bicycle, wheelchair, skateboard, skates, foot-scooter, animal, or animal-drawn vehicle. **FAILED**

**HB 1644 Driving under the influence; first offenders; secure transdermal alcohol monitoring.** Provides that in the case of an adult offender's first DUI conviction when the offender's blood alcohol content was less than 0.15, the court may, upon request of the offender, order that the offender (i) wear a transdermal alcohol monitoring device that continuously monitors the person's blood alcohol level and (ii) refrain from alcohol consumption and that these shall be the only conditions of the offender's driver's license restriction. Such offenders will no longer be required to have an ignition interlock as a condition of a restricted license. **FAILED**

**HB 1704 Grand larceny;**

**threshold.** Increases from \$200 to \$500 the threshold amount of money taken or value of goods or chattel taken at which the crime rises from petit larceny to grand larceny. **FAILED**

**SB 1055 Remaining at place of riot or unlawful assembly after warning to disperse; penalty.**

Increases from a Class 3 to a Class 1 misdemeanor the penalty for failure to leave the place of any riot or unlawful assembly after having been lawfully warned to disperse. **FAILED SENATE, 14-26**

**SB 1056 Crossing established police lines, perimeters, or barricades;**

**penalty.** Increases from a Class 3 misdemeanor to a Class 1 misdemeanor the crossing or remaining within lawfully established police lines or barricades without proper authorization. **FAILED SENATE COURTS, 4-8**

**SB 1057 Injuries to property or persons by persons unlawfully or riotously assembled;**

**penalty.** Increases from a Class 6 felony to a Class 5 felony any injury to property or persons by any person unlawfully or riotously assembled. **FAILED**

**SB 1066 Petition for writ of actual**

**innocence.** Provides that a person may petition for a writ of actual innocence based on biological evidence regardless of the type of plea he entered at trial. Under current law, a person may petition for a writ based on biological evidence if he (i) entered a plea of not guilty, (ii) is convicted of murder, or (iii) is convicted of a felony for which the maximum punishment is imprisonment for life. The bill also provides that the Supreme Court of Virginia shall

grant the writ upon finding that the petitioner has proven the allegations supporting the writ by a preponderance of the evidence. Currently, the Court must make such a finding based on clear and convincing evidence. **PASSED SENATE, FAILED HOUSE**

**HB 2083 Restitution; modification of terms and conditions of payment**

**plan.** Permits the court to modify the terms and conditions of a restitution payment plan or amend the total amount of restitution due for good cause shown and only after a hearing of which the defendant, attorney for the Commonwealth, and victim have been notified. **FAILED**

**HB 2086 Writ of actual innocence based on nonbiological evidence; untested evidence.**

Allows a writ of actual innocence based on nonbiological evidence to be granted if scientific testing of previously untested evidence, regardless of whether such evidence was available or known at the time of conviction, proves that no trier of fact would have found proof of guilt of the person petitioning for the writ, provided that the testing procedure was not available at the time of conviction. **FAILED**

**HB 2117 Local law-enforcement agencies; body-worn cameras.** Requires localities to adopt and establish a written policy for the operation of a body-worn camera system, as defined in the bill, that conforms to the model policy established by the Department of Criminal Justice Services (the Department) prior to purchasing or deploying a body-worn camera system. **FAILED**

**SB 1188 Driver's license suspensions for certain non-driving related offenses.**

Removes the existing provision that a person's driver's license is suspended (i) when he is convicted of or placed on deferred disposition for a drug offense and (ii) for violations not pertaining to the operator or operation of a motor vehicle. **PASSED SENATE, FAILED HOUSE**

**HB 2238 DUI manslaughter; ignition interlock.**

Requires that, as a condition of being granted a restricted driver's license, a person convicted of manslaughter as a result of driving under the influence be prohibited from operating a motor vehicle without an ignition interlock and have an ignition interlock installed on all vehicles owned by or registered to such person. **PASSED HOUSE, FAILED SENATE**

**HB 2268 Ignition interlock violations; venue.**

Provides that venue for the prosecution of any offense of (i) tampering or attempting to circumvent an ignition interlock system, (ii) starting a motor vehicle equipped with an ignition interlock for a person prohibited from operating a motor vehicle not equipped with an ignition interlock, or (iii) furnishing a motor vehicle not equipped with an ignition interlock to a person prohibited from operating a motor vehicle not equipped with an ignition interlock shall lie in the county or city in which (a) the offense was committed, (b) the defendant resides, or (c) the order prohibiting a person from operating a motor vehicle that is not equipped with a functioning ignition interlock system was entered. **PASSED HOUSE, FAILED SENATE COURTS, 11-3**

**SB 1443 Firearms; removal from persons posing substantial risk; penalties.** Creates a procedure by which an attorney for the Commonwealth or law-enforcement officer may apply to a circuit court judge for a warrant to remove firearms from a person who poses a substantial risk of injury to himself or others. If firearms are seized pursuant to such warrant, the bill requires a court hearing within 14 days from execution of the warrant to determine whether the firearms should be returned or retained by law enforcement. Seized firearms may be retained by court order for up to 180 days or, with court approval, may be transferred to a third party chosen by the person from whom they were seized. **FAILED SENATE COURTS, 5-10**

**SB 1444 Restricted ammunition; use or attempted use in the commission of a crime; penalty.** Provides that restricted firearms ammunition means any ammunition that has been banned or prohibited from commercial sale by the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives or under federal law. Under current law, restricted firearms ammunition was defined as ammunition that are: (i) coated with or contain, in whole or in part, polytetrafluorethylene or a similar product, (ii) commonly known as "KTW" bullets or "French Arcanes," or (iii) any cartridges containing bullets coated with a plastic substance with other than lead or lead alloy cores, jacketed bullets with other than lead or lead alloy cores, or cartridges of which the bullet itself is wholly comprised of a metal or metal alloy other than lead. **PASSED SENATE, FAILED HOUSE**

**SB 1445 Admissibility of prior inconsistent statements in a criminal case.** Provides that in all criminal cases,

evidence of a prior statement that is inconsistent with testimony at the hearing or trial is admissible if the testifying witness is subject to cross-examination and the prior statement (i) was made by the witness under oath at a trial, hearing, or other proceeding or (ii) narrates, describes, or explains an event or condition of which the witness had personal knowledge and (a) the statement is proved to have been written or signed by the witness; (b) the witness acknowledges under oath the making of the statement in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought; or (c) the statement is proved to have been accurately recorded by using an audio recorder, a video/audio recorder, or any other similar electronic means of sound recording. **FAILED**

**SB 1474 Resisting arrest; penalty.** Expands the Class 1 misdemeanor of resisting arrest to include, in addition to fleeing from a law-enforcement officer, attempting to escape from the lawful custody of a law-enforcement officer by force or violence. **PASSED SENATE, FAILED HOUSE**

**SB 1478 Restitution; modification of terms and conditions of payment plan.** Permits the court to modify the terms and conditions of a restitution payment plan or amend the total amount of restitution due for good cause shown and only after a hearing of which the defendant, attorney for the Commonwealth, and victim have been notified. **FAILED SENATE COURTS, 6-9**

**SB 1480 Digital impersonation; penalty.** Provides that it is a Class 1 misdemeanor for a person to knowingly and with malice impersonate a living individual



without his authorization through the use of a computer and with the intent to defraud or injure that person in his reputation, trade, business, or profession. The bill provides that an impersonation is credible if a reasonable person would believe the defendant was in fact the person who was impersonated. **FAILED SENATE COURTS, 5-8-2**

**SB 1563 Discovery in criminal cases; duty to provide.** Requires the attorney for the Commonwealth, upon written notice by an accused to the court and to the attorney for the Commonwealth, to permit the accused to inspect, copy, or photograph (i) any relevant written or recorded statements or confessions made by the accused or any codefendant, or the substance of any oral statements or confessions made by the accused or any codefendant; (ii) any relevant written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine, and breath tests, other written scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim; (iii) any books, papers, documents, tangible objects, or buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth; (iv) all relevant police reports; and (v) all relevant

statements of any non-expert witness whom the Commonwealth is required to designate on a witness list. If the accused provides written notice for discovery, the accused shall provide reciprocal discovery, which shall include (a) any written reports of autopsy examinations, ballistic tests, fingerprint, blood, urine, and breath analyses, and other scientific tests that may be within the accused's possession, custody, or control and that the accused intends to proffer or introduce into evidence at the trial or sentencing; (b) whether he intends to introduce evidence to establish an alibi; (c) if the accused intends to rely upon an insanity defense, any written reports of physical or mental examination of the accused made in connection with the case; and (d) all relevant statements of any non-expert witness whom the defense designated on a witness list. The bill directs that the Commonwealth provide its expert disclosures no later than 14 days before trial and the accused provide his expert disclosures no later than seven days before trial. The bill provides that for good cause a party may withhold or redact certain information and either party may file a motion to compel disclosure of any information withheld or redacted. **PASSED SENATE, FAILED HOUSE COURTS**

**Virginia Mandatory Continuing Legal Education**  
**Virginia State Bar**  
**1111 East Main Street, Suite 700**  
**Richmond, VA 23219-0026**  
**Phone: (804) 775-0577**  
**Web site: [www.vsb.org](http://www.vsb.org)**

May 30, 2017

Via E-mail

Jean Keary  
Virginia Beach Bar Association  
1206 Laskin Road  
Suite 101  
Virginia Beach, VA 23451

RE: VIEE004

Dear Ms. Keary:

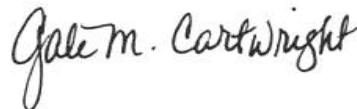
The course titled "Bench Bar Conference" has been approved for 5.0 credit hours including (0.0) credit hours for Ethics by the Virginia Mandatory Continuing Legal Education Board.

Accreditation of this program is approved through October 31, 2017. Enclosed are the applicable certification forms for your course. Virginia attorneys may certify their attendance at our website **upon receipt of this form** and the course ID# may **not** be provided without it. Course attendance lists are not processed as certification of attendance.

Any recording of this program for future presentation by any delivery means requires a separate application.

Please contact the MCLE Department if you have any questions.

Sincerely,



Gale M. Cartwright  
Director of MCLE

# Virginia MCLE Board

## CERTIFICATION OF ATTENDANCE (FORM 2)

MCLE requirement pursuant to Paragraph 17, of Section IV, Part Six, Rules of the Supreme Court of Virginia and the MCLE Board Regulations.

### INSTRUCTIONS

**Certify Your Attendance Online at [www.vsb.org](http://www.vsb.org) see Member Login**

Complete this Certification. Retain for two years.

MCLE Compliance Deadline - October 31. MCLE Reporting Deadline - December 15.

A \$100 fee will be assessed for failure to comply with either deadline.

**Member Name:** \_\_\_\_\_ **VSF Member Number:** \_\_\_\_\_  
**Address:** \_\_\_\_\_ **Daytime Phone:** \_\_\_\_\_  
\_\_\_\_\_ **E-mail Address:** \_\_\_\_\_  
\_\_\_\_\_ **City** **State** **Zip**

**Course ID Number:** VIEE004

**Sponsor:** Virginia Beach Bar Association

**Course/Program Title:** Bench Bar Conference

**Live Interactive \*** **CLE Credits (Ethics Credits):** 5.0 (0.0)

**Date Completed:** \_\_\_\_\_ **Location:** \_\_\_\_\_

#### By my signature below I certify

- \_\_\_\_ I attended a total of \_\_\_\_\_ (hrs/mins) of **approved CLE**, of which (\_\_\_\_\_) (hrs/mins) were in **approved Ethics**.  
Credit is awarded for actual time in attendance (0.5 hr. minimum) rounded to the nearest half hour. (Example: 1hr 15min = 1.5hr)  
\_\_\_\_ The sessions I am claiming had written instructional materials to cover the subject.  
\_\_\_\_ I participated in this program in a setting physically suitable to the course.  
\_\_\_\_ I was given the opportunity to participate in discussions with other attendees and/or the presenter.  
\_\_\_\_ I understand I may not receive credit for any course/segment which is not materially different in substance than a course/segment for which credit has been previously given during the same completion period or the completion period immediately prior.  
\_\_\_\_ I understand that a materially false statement shall be subject to appropriate disciplinary action.

\* NOTE: A maximum of 8.0 hours from pre-recorded courses may be applied to meet your yearly MCLE requirement. Minimum of 4.0 hours from live interactive courses required.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

Questions? Contact the MCLE Department at (804) 775-0577

If not certified online, this form may be mailed

Virginia MCLE Board

Virginia State Bar

1111 East Main Street, Suite 700

Richmond, VA 23219-0026

Web site: [www.vsb.org](http://www.vsb.org)

[Office Use Only: Live]



# Virginia MCLE Board

## CERTIFICATION OF TEACHING (FORM 3)

MCLE requirement pursuant to Paragraph 17, of Section IV, Part Six, Rules of the Supreme Court of Virginia and the MCLE Board Regulations.

### INSTRUCTIONS

E-mail this form to [mymcle@vsb.org](mailto:mymcle@vsb.org)

### Follow Form 1 Instructions after 10/31 Compliance Deadline

Complete this Certification to Include Both Teaching and Attendance hours. Retain copy for two years.

MCLE Compliance Deadline - October 31. MCLE Reporting Deadline - December 15.

A \$100 fee will be assessed for failure to comply with either deadline.

Member Name: \_\_\_\_\_ VSB Member Number: \_\_\_\_\_  
 Address: \_\_\_\_\_ Daytime Phone: \_\_\_\_\_  
 \_\_\_\_\_ E-mail Address: \_\_\_\_\_  
 \_\_\_\_\_  
 City State Zip

Course ID Number: VIEE004

Sponsor: Virginia Beach Bar Association

Course/Program Title: Bench Bar Conference

Live Interactive \* CLE Credits (Ethics Credits): 5.0 (0.0)

Date(s) of Teaching: \_\_\_\_\_ Location(s): \_\_\_\_\_

ONLY SESSIONS WITH WRITTEN INSTRUCTIONAL MATERIALS ARE APPROVABLE FOR CREDIT

- My teaching segment was \_\_\_\_\_ (hrs/mins) of CLE, of which (\_\_\_\_\_) (hrs/mins) were in Ethics.
- In addition, I attended *other* segments totaling \_\_\_\_\_ (hrs/mins) of CLE, of which (\_\_\_\_\_) (hrs/mins) were in Ethics.
- I spent \_\_\_\_\_ hours preparing for teaching my segment of the course.
- No more than four (4) hours of preparation credit may be claimed per one hour of instructional time in your presentation, and no more than eight (8) hours total for any one course. Total credit is awarded for actual time spent teaching, attendance and preparation rounded to the nearest half hour. (Example: 1hr 15min = 1.5hr)
- A materially false statement shall be subject to appropriate disciplinary action.

\* NOTE: A maximum of 8.0 hours from pre-recorded courses may be applied to meet your yearly MCLE requirement. Minimum of 4.0 hours from live interactive courses required.

\_\_\_\_\_ Date \_\_\_\_\_ Signature

Questions? Contact the MCLE Department at (804) 775-0577

If not e-mailed, this form may be mailed to:

Virginia MCLE Board  
 Virginia State Bar  
 1111 East Main Street, Suite 700  
 Richmond, VA 23219-0026  
 Web site: [www.vsb.org](http://www.vsb.org)