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Deportation and Driving: Felony DUI and Reckless Driving as Crimes of Violence following Leocal v. Ashcroft

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DEPORTATION AND DRIVING: FELONY DUI AND RECKLESS DRIVING AS CRIMES OF VIOLENCE FOLLOWING *LEOCAL V. ASHCROFT*

I. INTRODUCTION

Every thirty-one minutes, someone is killed in the United States as a result of an alcohol-related motor vehicle crash.[1] Because of the high societal costs, it is hardly surprising that states impose severe penalties for driving under the influence ("DUI")[2] of alcohol as a method of deterrence. But how far these penalties can extend has serious implications on other areas of law; particularly in the arena of immigration law, the classification of DUI convictions has far-reaching consequences.

Some circuit courts[3] have ruled that aliens can be deported for multiple DUI offenses based on U.S. immigration law,[4] stating that aliens can be removed from the United States for committing an "aggravated felony."[5] An aggravated felony is a "crime of violence" in which the imprisonment term is at least one year.[6] Therefore, whether DUI is a crime of violence has significant impact on immigration law. Circuit courts that ruled DUI convictions were deportable offenses based their rulings on the

[1] NAT'L CTR. FOR STATISTICS & ANALYSIS, TRAFFIC SAFETY FACTS: 2003 DATA: - ALCOHOL (2005), *available at* http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2003/809761.pdf.

[2] For purposes of simplification within this note, the terms "driving under the influence" and "driving while intoxicated" are used interchangeably; both are classified as DUI offenses. This is not to say that there are no instances where the distinction between the crimes is crucial to the analysis as a crime of violence. However, in the cases analyzed in this case note, the inquiry involved in each crime is the same, and so the two offenses are analyzed together.

[3] *See, e.g.*, Tapia Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001); Le v. U.S. Attorney Gen., 196 F.3d 1352 (11th Cir. 1999).

[4] Anti-Drug Abuse Act of 1988, tit. VII, sec. 7000, § 7342, 8 U.S.C. § 1101(a)(43)(F) (2000) (amending Immigration and Nationality Act of 1957).

[5] 8 U.S.C. § 1227(a)(2)(A)(iii).

[6] *Id.* § 1101(a)(43)(F).

determination that DUI is a crime of violence.[7] Other circuit courts disagreed and held that DUI is *not* a crime of violence.[8] The Supreme Court attempted to cure this circuit split in *Leocal v. Ashcroft*, holding that DUI is *not* a crime of violence, and therefore is not an aggravated felony that warrants deportation.[9]

This Note argues that while the Supreme Court reached the proper decision, it construed the question very narrowly. The Supreme Court addressed:

> Whether, in the absence of a mens rea of at least recklessness with respect to the active application of force against another, DUI with serious bodily injury is a "crime of violence" under 18 U.S.C. § 16 that constitutes an "aggravated felony" under § 101 of the [Immigration and Nationality Act]?[10]

By answering this question in the negative, the Court made it clear that DUI convictions absent a mens rea component or with a mens rea of negligence are not deportable offenses. However, the Court explicitly refused to address whether an offense with a mens rea of recklessness as to the use of force against another person or property of another may constitute a crime of violence under 18 U.S.C. § 16.[11] By failing to address this question, the Court did not determine whether felony reckless driving is a deportable offense, thus leaving much confusion and complication in this area of law.

Reckless driving, similarly to DUI, is a major societal problem in this country. It has been estimated that five percent of all motor vehicle fatalities are due to "[o]perating a vehicle in an erratic, reckless, careless, or negligent manner."[12] This translates to 2,132 of the 42,636 motor vehicle fatalities *each year.*

Though this case was recently decided, a potential circuit split has developed in the classification of reckless driving, an offense closely related to DUI. Because the term classification has such far-reaching consequences on aliens and the same reasoning used by courts in excluding crimes with a mens rea of negligence could have been extended to exclude crimes with a

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[7] *See Tapia Garcia*, 237 F.3d at 1223; *Le*, 136 F.3d at 1354.

[8] *See* Dalton v. Ashcroft, 257 F.3d 200, 208 (2d Cir. 2001); United States v. Chapa-Garza, 243 F.3d 921, 927 (5th Cir. 2001); Bazan-Reyes v. INS, 256 F.3d 600, 612 (7th Cir. 2001); United States v. Trinidad-Aquino, 259 F.3d 1140, 1146 (9th Cir. 2001).

[9] Leocal v. Ashcroft, 543 U.S. 1, 3-4 (2004).

[10] Questions Presented, *Leocal*, 543 U.S. 1 (No. 03-583), *available at* http://www.supremecourtus.gov/qp/03-00583qp.pdf.

[11] *Leocal*, 543 U.S. at 11.

[12] NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DEP'T OF TRANSP., TRAFFIC ENFORCEMENT: MYTHS AND FACTS, *available at* http://www.nhtsa.dot.gov/people/injury/alcohol/Archive/safesobr/12qp/ myth.html.

mens rea of recklessness, the Court should next determine that intent to use force is required for a crime of violence. This would exclude both DUI offenses and a felony reckless driving offense, thus fully curing the ambiguity in this area of law.

II. HISTORICAL BACKGROUND

Statutory authority for the deportation of legal aliens is derived from the Immigration and Nationality Act of 1957 ("INA"),[13] which grants the Attorney General the power to initiate deportation proceedings against legal aliens upon conviction of certain offenses.[14] Initially, the INA authorized deportation of a legal alien only for commission of a "crime involving moral turpitude."[15] The statute provides no definition for moral turpitude, but crimes such as fraud, murder, kidnapping, rape, prostitution, burglary, and theft have been determined by the courts to be representative.[16] An alien is subject to this provision if either: 1) at any time within five years after entry, the crime of moral turpitude is committed and the alien is imprisoned for any length of time; or 2) at any time after entry, the crime of moral turpitude is committed and the alien is imprisoned for a year or more.[17]

A. AMENDMENTS TO THE STATUTE

As immigration expanded in the 1980s, reported levels of criminal activity of aliens arose as well.[18] In response, Congress decided to take a hard-line approach against criminal aliens and impose harsher punishment. Their first act was the passage of the Anti-Drug Abuse Act of 1988 ("ADAA"), which expanded the scope of removable offenses by introducing the "aggravated felony" provision.[19] This new classification, which serves separately from the crimes of moral turpitude classification as

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[13] Immigration and Nationality Act of 1957, Pub. L. No. 85-316, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1778 (2000)) [hereinafter INA]. All existing immigration laws are incorporated into this statute.

[14] "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(2)(A)(iii).

[15] *Id.* § 1227(2)(A)(i).

[16] *See, e.g.*, Jordan v. DeGeorge, 341 U.S. 223 (1951); Abdelqadar v. Gonzales, 413 F.3d 668 (7th Cir. 2005); Chanmoury v. Ashcroft, 376 F.3d 810 (8th Cir. 2004).

[17] 8 U.S.C. § 1227(a)(2)(A)(i).

[18] Craig H. Feldman, Note, *The Immigration Act of 1990: Congress Continues to Aggravate the Criminal Alien*, 17 SETON HALL LEGIS. J. 201, 209 (1993).

[19] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, tit. VII, sec. 7000, § 7341, 102 Stat. 4181 (codified as amended at 8 U.S.C. § 1101(a)(43)).

an independent basis for removal, included only murder, drug trafficking, and weapons trafficking.[20]

Congress expanded the aggravated felony list with the passage of the Immigration Act of 1990 ("Immigration Act").[21] The Immigration Act added additional enumerated crimes to the list of removable offenses; the most notable addition was the inclusion of any "crime of violence" for which the term of imprisonment is five years or more.[22] The inclusion of crimes of violence is particularly relevant to this discussion because the determination of whether DUI is a crime of violence forms the basis of whether DUI is an aggravated felony rendering the alien criminal subject to deportation.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), passed in the wake of the 1995 Oklahoma City bombing, significantly altered the INA and greatly expanded the types of removable offenses.[23] The AEDPA impacted the aggravated felony definition in two material ways. First, the AEDPA lowered the sentence requirement of the aggravated felony definition.[24] Whereas the determination of an aggravated felony initially required a sentence of at least five years, crimes carrying a sentence of only one year could now be classified as aggravated felonies.[25]

The second material change was that the AEDPA removed the requirement that actual incarceration be imposed for determination of an aggravated felony, making suspended sentences and parole grants irrelevant to the deportation determination.[26] Rather, the AEDPA mandates that as long as the statute under which the alien is convicted carries a maximum sentence of at least a year, the offense can be considered an aggravated felony.[27] As a result of the AEDPA amendment to the INA, an aggravated

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[20] *Id.*

[21] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended throughout scattered sections of 8 U.S.C.).

[22] The Act made it clear that the "crime of violence" would be construed as defined in 18 U.S.C. § 16. Immigration Act of 1990, § 501(a)(2), 104 Stat. 5048 (codified at 8 U.S.C. § 1101(a)(43)(F)).

[23] For a discussion of the AEDPA, see generally Ella Din, *The Antiterrorism and Effective Death Penalty Act of 1996: An Attempt to Quench Anti-Immigration Sentiments?* 38 CATH. LAW. 49 (1998).

[24] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 401(e), 110 Stat. 1214 (codified as amended at 8 U.S.C. § 1101(a)(43)(F), (G)).

[25] *Id.*

[26] *Id.*

[27] *Id.*

felony is now a "crime of violence (as defined in section 16 of Title 18 . . .) for which the term of imprisonment [is] at least one year."[28]

B. CRIME OF VIOLENCE

Under 18 U.S.C. § 16, a crime of violence under is defined as:

> i) an offense that has as an element the use, attempted use, or threatened use of physical force against the property of another, or
>
> ii) 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.[29]

1. Legislative History

As previously mentioned, the concept of crime of violence as defined in § 16 was introduced as an aggravated felony for INA purposes in the Immigration Act. The § 16 definition was adopted as part of the Comprehensive Crime Control Act of 1984 ("CCCA").[30] It is important to examine the legislative history of this act to appropriately determine what offenses Congress intended to be considered crimes of violence.

The Senate Committee Report ("CCCA Senate Report") noted that although the term "crime of violence" was occasionally used in other law, it was previously undefined in the United States Code.[31] The origin of the term "crime of violence" stems from the District of Columbia Court Reform and Criminal Procedural Act of 1970 ("D.C. Reform Act"), which was passed fourteen years before the enactment of the CCCA.[32] The D.C. Reform Act substantially revised the District of Columbia's criminal code. One key alteration of the code was in the designation of crimes of violence as the types of offenses grave enough to entitle a court to order the detention of defendants before trial proceedings.[33] Because specific offenses were enumerated as crimes of violence under the D.C. Reform Act, there was no general definition of a crime of violence.[34]

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[28] *Id.*

[29] 18 U.S.C. §§ 16(a)-(b).

[30] Pub. L. No. 98-473, tit. II, § 1001(a), 98 Stat. 2136 (1984).

[31] The legislative history document associated with the term "crime of violence" is the Report of the Senate Judiciary Committee. S. REP. No. 98-225, at 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3202 [hereinafter CCCA Senate Report].

[32] District of Columbia Court Reform and Criminal Procedural Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, *reprinted in* 1970 U.S.C.C.A.N. 551, 764 [hereinafter DC-CRCPA].

[33] *Id.*

[34] CCCA Senate Report, *supra* note 31, at 19.

The CCCA Senate Report recognized that the offenses Congress intended to include as crimes of violence under § 16 were "essentially the same" as the types of offenses that the D.C. Reform Act enumerated as crimes of violence.[35] Accordingly, the crimes in the D.C. Reform Act (which were the types of crime Congress intended to include in § 16) comprised:

> Murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, or an attempt or conspiracy to commit any of the foregoing offenses, as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year.[36]

Each of the enumerated offenses denotes conduct requiring specific intent for commission of the crime.[37] The inclusion of voluntary manslaughter and the exclusion of involuntary manslaughter are particularly illustrative of this point, as voluntary manslaughter has an intent element that is lacking for involuntary manslaughter.[38]

It is also important to note the inclusion of burglary as a crime of violence. This is particularly significant to the inquiry of whether DUI is a crime of violence because many courts have compared the two crimes in their determination that DUI is not a crime of violence.[39] Those courts have identified burglary as the type of crime that § 16(b) covers. When a criminal commits burglary, the criminal is taking a substantial risk that *intentional* force may be used in the commission of that crime.[40] The courts that have compared the crime of burglary to the crime of DUI have concluded that the offender must take the risk of intentional force for the commission of the crime to constitute a crime of violence under § 16(b).[41]

Furthermore, the CCCA Senate Report stated that the Judiciary Committee derived the definition of a crime of violence from a previous bill by noting that "[t]he definition is taken from [Senate Resolution] 1630."[42]

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[35] *Id.*

[36] DC-CRCPA, *supra* note 32.

[37] Intention is "a decision to bring about [the proscribed result] . . . ." ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 174 (2003).

[38] *Id.* at 293.

[39] *See, e.g.*, Leocal v. Ashcroft, 543 U.S. 1, 8 (2004); United States v. Chapa-Garza, 243 F.3d 921, 927 (5th Cir. 2001).

[40] *See, e.g., Leocal*, 543 U.S. at 8.

[41] *Id.*; *see* ASHWORTH, *supra* note 37, at 394.

[42] *See* CCCA Senate Report, *supra* note 31 at 307, *reprinted in* 1984 U.S.C.C.A.N. at 3486.

Senate Resolution 1630 was considered with House Resolution 6915.[43] The House Resolution is particularly important because it reinforces the idea that Congress intended the term crime of violence to encompass only volitional acts. "The term 'physical force' refers to 'physical action' against another. 'Action,' a variant of the term 'act,' requires affirmative, volitional behavior."[44]

2. Definition Under the Sentencing Guidelines

Understanding the definition of a "crime of violence" under the Sentencing Guidelines is imperative because many courts have examined this definition in determining whether DUI is a crime of violence under § 16.[45] As a result of the Sentencing Reform Act of 1984,[46] Congress created the Sentencing Commission to promulgate guidelines that promote systematic sentencing procedures as well as uniformity among sentences.[47] Additionally, Congress mandated that the Commission promulgate guidelines that ensure that convictions carry sentences at or near the maximum term.[48]

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[43] Brief for Nat'l Ass'n of Criminal Def. Lawyers, et al. as Amici Curiae Supporting Petitioner at 19, Leocal v. Ashcroft, 543 U.S. 1 (No. 03-583) (citing H.R. REP. NO. 96-6915, at 14 (1980)), *available at* http://www.nysda.org/NYSDA_Resources/Immigrant_Defense_Project/04_LeocalAmicusBrief.pdf.

[44] *Id.* (quoting H.R. REP. NO. 96-6915, at 14 (1980)).

[45] *See, e.g.*, Dalton v. Ashcroft, 257 F.3d 200, 208 (2d Cir. 2001); United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001); Bazan-Reyes v. INS, 256 F.3d 600 (7th Cir. 2001).

[46] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987. The Sentencing Reform Act was Chapter II of the CCCA (the Act that defined a crime of violence under § 16).

[47] *See* S. REP. NO. 98-225, *supra* note 31, at 37-39, 65, 161-62 (1983). For a review of the development of the Sentencing Commission and the philosophy of the sentencing guidelines, see generally Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003); Michael E. O'Neill & Linda D. Maxfield, *Judicial Perspectives on the Federal Sentencing Guidelines and the Goal of Sentencing: Debunking the Myths*, 56 ALA. L. REV. 85, 87 (2004).

[48] *See* Mistretta v. United States, 488 U.S. 361, 363-69 (1989) (upholding the constitutionality of the U.S. Sentencing Commission and the Sentencing Guidelines).

> The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and –
>
> (1) has been convicted of a felony that is –
>
> (A) a crime of violence . . . .

28 U.S.C. § 994(h) (2000).

In its original form, the Sentencing Reform Act did not define what constitutes a crime of violence. However, in November 1989, the Sentencing Commission adopted a definition of a crime of violence for use in the implementation of the Sentencing Guidelines.[49] The stated purpose of the definition was *not* to create a crime of violence definition separate from that of § 16, but, rather, to clarify the meaning of § 16's definition.[50] The Sentencing Commission defined a crime of violence as:

> [A]ny offense under federal or state law punishable by imprisonment for a term exceeding one year that—
>
> (1) has as an element the use, attempted use, or the threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.[51]

Despite the commission's intention, courts have interpreted the Sentencing Commission's definition of a crime of violence as separate from § 16's definition rather than a mere clarification.[52] The § 16 definition looks only at the *use* of force, and frames the question as whether actual force is used or if there is a risk that force will be used.[53] On the other hand, the Sentencing Commission's definition, in addition to looking at the use of actual force, also focuses on the *effect* of the offense and frames the question as whether there is a risk of injury to others.[54] In fact, courts have suggested that while DUI would be a crime of violence if the Sentencing Guidelines' definition were used, since § 16's definition is used, DUI is *not* a crime of violence because DUI presents a risk of injury but no risk of intentional force.[55]

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[49] *See* United States v. Parson, 955 F.2d 858, 864-65 (3d Cir. 1992) (citing U.S. SENTENCING GUIDELINES MANUAL app. C (1989)).

[50] *See id.* at 865 (citing U.S. SENTENCING GUIDELINES MANUAL app. C (1989)).

[51] The Sentencing Guidelines definition was used to determine the career offender provision. 18 U.S.C. app. § 4B1.2(a) (2000).

[52] *See, e.g.*, Dalton v. Ashcroft, 257 F.3d 200, 207-08 (2d Cir. 2001); United States v. Chapa-Garza, 243 F.3d 921, 925-26 (5th Cir. 2001); Bazan-Reyes v. INS, 256 F.3d 600, 607-11 (7th Cir. 2001).

[53] 18 U.S.C. § 16 (2000).

[54] *See Parson*, 955 F.2d at 865 (citing U.S. SENTENCING GUIDELINES MANUAL app. C (1989)).

[55] *See Dalton*, 257 F.3d at 207-08; *Chapa-Garza*, 243 F.3d at 925; *Bazan-Reyes*, 256 F.3d at 606-09.

C. THE PREVIOUS CASE LAW

The previous case history predominately focused on whether DUI is a crime of violence under § 16(b).[56] Despite circuit courts' disagreement over whether DUI is a crime of violence, there is agreement that the courts must follow a categorical approach in determining whether an offense constitutes a crime of violence as defined in 18 U.S.C. § 16(b) because it questions the *nature* of the offense.[57] Under this approach, courts looked to the generic elements of an offense, as opposed to the underlying facts of the conviction.[58] "[T]he issue is not whether [the] actual conduct constituted an aggravated felony, but whether the full range of conduct encompassed by [the state statute] constitutes an aggravated felony."[59] Although the courts uniformly applied this approach, different answers emerged.

1. Some Circuit Courts Have Held DUI Is Not a Crime of Violence

These courts found that the inclusion of "use" in § 16's definition of a crime of violence requires that the offender must risk voluntary use of force in the furtherance of a crime. The Second, Fifth, and Seventh Circuits held that because a drunk driver does not risk the *intentional* use of force, DUI is not a crime of violence.[60] The Ninth Circuit, however, held that a crime of violence did not require a risk of intentional use of force.[61] Instead, if an offender *recklessly* risks applying force against another, this force could constitute a crime of violence.[62]

a. Second Circuit

Dalton v. Ashcroft[63] involved a lawful permanent resident who had been living in the United States since 1958, before he was one year old.[64] In January 1998, Dalton pleaded guilty to a DUI conviction under New York Vehicle and Traffic Law section 1192.3.[65] Because he had several previous DUI convictions, his crime and sentence were enhanced under

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[56] The exception is *Le v. U.S. Attorney General*, which focused on whether DUI is a crime of violence under § 16(a). 196 F.3d 1352 (11th Cir. 1999).

[57] *Bazan-Reyes*, 256 F.3d at 606.

[58] *Id.*

[59] United States v. Sandoval-Barajas, 206 F.3d 853, 856 (9th Cir. 2000).

[60] *Dalton*, 257 F.3d 200, *followed by*, Pichardo v. Ashcroft, 374 F.3d 46 (2d Cir. 2004); *Chapa-Garza*, 243 F.3d 921; *Bazan-Reyes*, 256 F.3d 600.

[61] United States v. Trinidad-Aquino, 259 F.3d 1140, 1146 (9th Cir. 2001).

[62] *Id.*

[63] *Dalton*, 257 F.3d at 200.

[64] *Id.* at 202.

[65] *Id.*

New York law to a felony carrying a one-and-a-half to four-and-a-half year sentence.[66] While Dalton was serving his prison sentence, the Immigration and Naturalization Service ("INS") began removal proceedings based on 8 U.S.C. § 1227(a)(2)(A)(iii).[67] The Bureau of Immigration Appeals ("BIA") affirmed the immigration judge's removal order, and the Second Circuit reviewed the BIA's decision.[68]

The court noted the numerous ways that the New York drunk driving statute could be satisfied without intentional actions (such as an intoxicated individual falling asleep at the wheel of a non-moving vehicle) and found that conviction under the statute did not require the commission of a per se crime of violence.[69] In determining that DUI is not a crime of violence under § 16(b), the court focused on the fact that DUI presents the risk of an accident, but does not risk that the offender will use force in furtherance of the crime (compared to burglary where an offender takes the risk that he will need to use force to commit the crime).[70] Similar to the Seventh and Fifth Circuits, the court explored the inclusion of "use" in the statutory definition and found that it implies an intent requirement not present in DUI offenses.[71]

Contrary to the government's arguments, the court found that the difference between the risk of injury and the risk of use of physical force was dispositive.[72] Focusing on the distinction between the Sentencing Commission's definition and the § 16 definition,[73] the court held that the determination of a crime of violence needs to be predicated on the risk of the use of force rather than the risk of unintended injury.[74]

b. Fifth Circuit

In *United States v. Chapa-Garza*, the Fifth Circuit examined the consolidated appeals of five defendants convicted of unlawful presence in the United States after removal.[75] The defendants each faced elevated sentences because their previous convictions on which deportation was

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[66] *Id.*

[67] "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii) (2000).

[68] *Dalton*, 257 F.3d at 203.

[69] *Id.* at 205-06.

[70] *Id.* at 206.

[71] *Id.* at 206-07.

[72] *Id.* at 207.

[73] *See supra* note 52 and accompanying text.

[74] *Dalton*, 257 F.3d at 207-08.

[75] United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001).

predicated were considered aggravated felonies.[76] Under the Sentencing Guidelines, if an offender was previously deported for an aggravated felony, a sixteen-level increase would be applied to the offender's current sentence.[77] The court was therefore asked to determine whether a state drunk driving conviction constituted a crime of violence under § 16(b) as the basis for an aggravated felony conviction.[78]

The court based its holding that DUI is not a crime of violence on three factors. First, determining DUI as a crime of violence under § 16(b) would require that this provision be interpreted in the same manner as the much broader definition of a crime of violence under the Sentencing Guidelines.[79] Noting that § 16(b) was a starting reference point for the definition under the Sentencing Guidelines, the court further noted that the numerous amendments to the Sentencing Guidelines' definition made it inappropriate to construe the definitions in the same manner.[80]

Second, the court found that in order to satisfy the crime of violence's requirement that there be a substantial risk that physical force may be employed, § 16(b)'s definition required that an offender must recklessly disregard the risk that intentional force may be used.[81] Because there is no disregard of the risk of intentional force in DUI, it cannot be classified as a crime of violence.[82]

Finally, the court found that the physical force specified in § 16(b) refers to the force used in the commission of the offense, *not* the force that is a result of the offense.[83] Because there is no force used in the commission of DUI, it is not a crime of violence.[84]

c. Seventh Circuit

In *Bazan-Reyes v. INS*,[85] the Seventh Circuit examined the consolidated appeals of three resident aliens from INS removal orders based on state drunk driving convictions under Indiana, Illinois, and Wisconsin law.[86] The decision that the aliens were appealing held that crimes of

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[76] *Id.* at 923.
[77] *Id.*
[78] *Id.* at 924.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *See id.* at 927.
[83] *Id.* at 924.
[84] *Id.* at 927.
[85] Bazan-Reyes v. INS, 256 F.3d 600 (7th Cir. 2001).
[86] *Id.* at 602-03.

recklessness, including DUI offenses, are crimes of violence under § 16(b).[87]

The court rejected the lower decisions of the BIA and the INS. The court held that DUI is not a crime of violence because § 16(b)'s meaning requires that an offender risks the intentional use of force, which the court found was not the case in DUI offenses.[88] The court focused on the mens rea required to satisfy a crime of violence. The court determined that offenses with no mens rea component or a mens rea of negligence as to the risk that intentional physical force be used (as is the case with DUI offenses) could not be deemed crimes of violence for aggravated felony purposes.[89] It is interesting to note that the court said that a crime of violence for aggravated felony purposes could be found, however, in "crimes in which the offender is *reckless* with respect to the risk that intentional physical force will be used in the course of committing the offense."[90]

Applying the categorical approach to the drunk driving statutes, the court determined that intentional force is not necessary to commit DUI offenses and thus such offenses could not be deemed crimes of violence.[91] The court, like the Fifth Circuit, looked at the Sentencing Guidelines and found that while DUI is a crime of violence under the Sentencing Guidelines, crimes of violence under § 16(b) are distinct from those under the Sentencing Guidelines and should not be interpreted in the same manner.[92] The court followed its precedent that § 16(b)'s inclusion of the verb "use" implied an intent requirement.[93]

d. Ninth Circuit

In *United States v. Trinidad-Aquino*, the district court considered whether a deported alien, who had wrongfully returned to the United States, should receive an elevated sentence based on his previous DUI conviction.[94] The defendant had been convicted and deported for DUI with bodily injury under California law.[95] The court ruled that his prior conviction did not satisfy the aggravated felony definition because DUI could not be deemed a

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[87] *Id.* at 602.
[88] *Id.* at 612.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.* at 610.
[93] *Id.* at 611.
[94] United States v. Trinidad-Aquino, 259 F.3d 1140, 1142-43 (9th Cir. 2001).
[95] *Id.* at 1142.

crime of violence.[96] The government appealed, and the Ninth Circuit examined the district court decision *de novo*.[97]

The Ninth Circuit determined that the categorical approach required that the court use the "ordinary, contemporary, and common" meaning of the language used in the statute's definition.[98] Focusing on the inclusion of the word "use" in the statute, the court held that the word as commonly understood implied a "volitional requirement absent from negligence."[99] The court attempted to reconcile its holding that negligent conduct does not satisfy § 16(b) with its previous holdings that criminally reckless conduct satisfies § 16(b)'s definition of a crime of violence.[100] The court said that intent is not necessary, but a volitional act is.[101]

In attempting to derive a decision consistent with these previous holdings, the court turned to the definition of "recklessness" under the Model Penal Code.[102] The court therefore held that recklessness required that the offender consciously disregard the risk of harm of which the offender is aware.[103] The court found that the conscious disregard of a risk of harm is a volitional component that is not present in crimes of negligence, which the court deemed was the mens rea component in the case at hand.[104]

Under this analysis, the court is essentially saying that the inclusion of "use" in the statutory language precludes the classification of crimes with less than a mens rea of recklessness as a crime of violence because they lack the necessary volitional component.[105] However, it is important to see that the holding applies to all crimes with a mens rea component of less than recklessness.[106] The court did not construe its holding to apply to only crimes with a mens rea of less than recklessness *as to the risk of actual*

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[96] *Id.*

[97] *Id.*

[98] *Id.* at 1144.

[99] *Id.*

[100] *Id.* at 1146 (discussing Park v. INS, 252 F.3d 1018 (9th Cir. 2001) (validity questioned but not explicitly overruled)).

[101] *Id.*

[102] *Id.* at 1145-46.

[103] *Id.* at 1146.

[104] As Judge Kozinski notes in the dissent, however, the dangers of drunk driving are well-known. *Id.* at 1147 (Kozinski, J., dissenting). The *Trinidad-Aquino* court focused on the *negligence* that caused the accident and not the *recklessness* of the drinking and driving which led to the occurrence of the accident. *Id.* at 1145.

[105] *Id.* at 1146.

[106] *Id.*

force being used.[107] In this manner, the court reinforced the idea that specific intent to use force is not required for determination of a crime of violence.[108]

The Ninth Circuit claimed that while the analysis employed was different, this decision was consistent with the holdings of the circuit courts that held that DUI is not a crime of violence.[109] The court repeatedly emphasized that under this analysis, a mens rea of at least recklessness is required for the commission of a crime of violence under the § 16 definition, a holding that was not precluded by the decisions of the other circuits.[110]

It is interesting to consider the dissenting opinion, as it is relevant to the final analysis explored in Part IV. Judge Kozinski noted his disapproval, stating that this case cannot be reconciled with the circuit's precedent that criminal recklessness can satisfy § 16's crime of violence definition.[111] Because of the precedent case, the court was forced to recognize that recklessly disregarding a substantial and known risk is sufficient to satisfy a crime of violence under § 16.[112] However, Kozinski said that the court erred in deciding that the DUI offense does not satisfy that test.[113] The court's error, he suggested, was based on its reliance on the negligent mens rea as to the occurrence of the accident as opposed to the recklessness employed in the conduct of drinking and driving.[114] This issue will be addressed again in Part IV.

2. Other Circuit Courts Have Held that DUI Is a Crime of Violence

Other courts have held that DUI is a crime of violence under § 16. The Tenth Circuit held that DUI is a crime of violence under § 16(b) because a drunk driver risks the use of force in the course of committing this offense.[115] The Eleventh Circuit focused the question differently and instead looked at the effect of the offense.[116] The court held that DUI is a

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 1147 (Kozinski, J., dissenting).
[112] *Id.* (Kozinski, J., dissenting).
[113] *Id.* (Kozinski, J., dissenting).
[114] *Id.* at 1147-48 (Kozinski, J., dissenting).
[115] Tapia Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001).
[116] Le v. U.S. Attorney Gen., 196 F.3d 1352 (11th Cir. 1999).

crime of violence because physical force is used and therefore satisfies § 16(a)'s definition of crime of violence.[117]

a. Tenth Circuit

The defendant in *Tapia Garcia v. INS*[118] received a DUI conviction in Idaho in 1998. Though released after serving only two months of his five-year sentence, he became the subject of INS deportation proceedings.[119] The BIA determined that his DUI conviction was a crime of violence and thus an aggravated felony as defined in 8 U.S.C. § 1227(a)(2)(A)(iii).[120] The defendant was subsequently deported to Mexico.[121] The Tenth Circuit faced the issue of whether Idaho's DUI offense was an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), which includes crime of violence as defined in § 16.[122]

This court applied *Chevron* deference to the BIA's removal order.[123] This meant that, because of possible differentiation in the interpretation of § 16(b), the court would defer to the BIA if the interpretation of the statute that the BIA had presented was reasonable.[124] The court held that DUI was a crime of violence because the elements of the offense present a substantial risk that physical force may be used.[125] The court employed a categorical approach and refused to examine the particular facts of the defendant's case.[126] This court neither analyzed the term "use" nor decided whether this term implied a risk of an intentional forceful act. The court noted the inherent danger involved in a DUI offense and stated that a drunk driver risks the use of force in furtherance of the crime, thus satisfying the crime of violence definition.[127]

It is also important to note that this is the only circuit court that used the Sentencing Guidelines definition to determine that DUI *is* a crime of violence. The court relied on federal precedent that held that DUI

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[117] *Id.* at 1354.

[118] *Tapia Garcia*, 237 F.3d at 1216.

[119] *Id.* at 1217.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 1220.

[123] *Id.*

[124] *Id.* at 1222 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984))

[125] *Id.* at 1222-23.

[126] *Id.*

[127] *Id.* at 1223.

constituted a crime of violence for purposes of the Sentencing Guidelines.[128]

b. Eleventh Circuit

In *Le v. U.S. Attorney General*,[129] the court found that DUI is a crime of violence under § 16(a).[130] Le, a citizen of Vietnam, was convicted of two counts of felony for his accident while driving under the influence and with a suspended license.[131] The BIA determined that his conviction was grounds for an aggravated felony and ordered his removal. Le appealed the determination that his DUI conviction was a crime of violence and thus an aggravated felony.[132]

In this case, the court held that the BIA's determination that DUI is a crime of violence was a reasonable interpretation of the statute and therefore dismissed the petitioner's appeal.[133] The court found that DUI was a crime of violence because the offense included the actual use of force.[134] The court focused on the effect of the crime (which includes force) rather than the risk an offender assumes in the commission of the crime.[135] This case is particularly important to this Note because the court's holding forms the basis for the lower court opinion in *Leocal*.

III. *LEOCAL V. ASHCROFT*

A. THE FACTS

Josue Leocal, a native citizen of Haiti, arrived in the United States in 1980 and became a lawful permanent resident in 1987.[136] Leocal was married to a U.S. citizen, and they had four children, all of whom were U.S. citizens.[137] Prior to the conviction in question, Leocal had been residing in the U.S. for nineteen years with no criminal record.[138]

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[128] *Id.* at 1222-23.

[129] Le v. U. S. Attorney Gen., 196 F.3d 1352 (11th Cir. 1999).

[130] *Id.* at 1353.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 1354.

[134] *Id.*

[135] *Id.*

[136] Brief of Respondent-Appellee at 4, Leocal v. Ashcroft, 543 U.S. 1 (2004) (No. 03-583).

[137] *Id.*

[138] *Id.*

In 2000, Leocal was convicted of two counts of DUI causing serious bodily injury in violation of Florida state law.[139] Two individuals were injured in the accident; one was treated and released at the site of the accident and the other was transported to a medical center for treatment.[140] Leocal was sentenced to two and one-half years of incarceration, and two and one-half years of probation.[141] During his sentence, Leocal underwent a ten-month program for alcohol abuse treatment.[142] Leocal served more than two years of his sentence, during which the INS initiated deportation proceedings.[143]

B. PROCEDURAL HISTORY

The immigration judge said that authority to remove Leocal was derived from INA § 237(a)(2)(A)(iii)[144] for the commission of an aggravated felony as defined in INA § 101(a)(43)(F).[145] The INS had deemed Leocal's conviction for DUI with serious bodily injury under Florida law[146] a crime of violence under § 16. The immigration judge based its ruling on the Eleventh Circuit precedent, *Le v. Attorney General.*[147] Therefore, the immigration judge in the *Leocal* case likewise held that Leocal's DUI conviction was a crime of violence warranting Leocal's removal to Haiti.[148]

In his appeal of the BIA decision, Leocal's counsel submitted a supplemental brief urging the court to reconsider its decision on the basis of its holding in *In re Ramos.*[149] In *Ramos*, the BIA concluded that DUI offenses did not constitute crimes of violence as defined under § 16(b).[150] The opinion also stated, however, that the BIA would continue to follow the

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[139] Leocal v. Ashcroft, 543 U.S. 1 (2004).

[140] Brief for the Respondent, *supra* note 136, at 4.

[141] *Id.* at 4.

[142] *Id.* at 5.

[143] *Leocal*, 543 U.S. at 1.

[144] INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2000); *see Leocal*, 543 U.S. at 3.

[145] INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(f).

[146] FLA. STAT. § 316.193(3)(c)(2) (2005).

[147] Le v. U.S. Attorney Gen., 196 F.3d 1352 (11th Cir. 1999). As previously noted, the *Le* court analyzed the BIA's determination that DUI with serious bodily injury was a crime of violence and therefore an aggravated felony within the confines of the INA. *Id.* at 1354.

[148] *Leocal*, 543 U.S. at 8.

[149] Petition for Writ of Certiorari at 1a-4a, Leocal v. Ashcroft, 543 U.S. 1 (No. 03-583) (citing *In re* Ramos, 23 I. & N. Dec. 336 (B.I.A. Apr. 4, 2002) (en banc))

[150] *Ramos*, 23 I. & N. Dec. 336.

precedent in circuit courts that had decided the issue.[151] Therefore, in the *Leocal* case, the BIA said they were compelled to apply the *Le* holding and again affirmed the immigration judge's finding that Leocal's DUI conviction was a crime of violence.[152]

Leocal then appealed the BIA decision to the Eleventh Circuit.[153] The court determined that it lacked full authority over the matter based on the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[154] This act limits the judicial review authority over removal decisions.[155] Therefore, the court could not reexamine the facts of the case in light of *Ramos* and solely faced the question of whether the BIA's determination was a reasonable interpretation of the statute. The court reviewed the BIA's interpretation of the INA *de novo* and deferred to the Board's interpretation because the court found that interpretation to be reasonable.[156] Therefore, the court dismissed Leocal's petition for review of the BIA's order for deportation based on its prior holding and upheld the removal order.

C. MAJORITY OPINION

In *Leocal,* the Supreme Court unanimously held that state DUI offenses that either lack a mens rea component or can be satisfied by mere negligence in the operation of a vehicle are not crimes of violence under § 16.[157] In *Leocal,* the Court was asked to determine whether DUI is a crime of violence under § 16(a) because the lower court focused entirely on § 16(a).[158] In this analysis, the Court looked to the underlying facts of the conviction. However, because the wording of both § 16(a) and § 16(b) include the idea of "use" of force, the analyses of the Court are essentially the same.

The Court examined § 16(a) and § 16(b) separately and determined that neither of these provisions are triggered by DUI convictions.[159] Additionally, the Court looked at the ordinary meaning of "crime of violence" and found that the term refers to violent, active crimes that do not

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[151] *See id.*

[152] *See Leocal*, 543 U.S. at 5-6.

[153] *See id.* (citing Petition for Writ of Certiorari, *supra* note 149, at 5a-7a).

[154] *See id.* at 6 n.3 (citing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009).

[155] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

[156] *Leocal*, 543 U.S. at 8.

[157] *Id.* at 15.

[158] *Id.* at 5.

[159] *Id.* at 16-18.

include DUI offenses.[160] Finally, the Court refrained from addressing whether an offense requiring reckless use of force against another qualifies as a crime of violence under § 16.

The Court noted that the language of § 16(a), which defines a crime of violence as an offense involving "the use . . . of physical force against" another's person or property, suggests the use of active employment of force.[161] The Court noted that it is unnatural to think of an accident as an active employment of force against another.[162] The Court therefore found that the phrase implies a higher mens rea requirement than negligent or accidental conduct.[163] The Court therefore held that Leocal's DUI offense is not a crime of violence under § 16(a).[164]

The Court noted that the definition is more broad under § 16(b), but still held that Leocal's DUI offense is not a crime of violence under this provision.[165] This provision covers offenses whereby an offender acts in disregard of the risk that force will be used against a victim in furtherance of his crime.[166] The Court noted that the classic example of this type of crime is burglary.[167] DUI is distinguished from burglary because, in burglary, an offender disregards a substantial risk that he will use force against a victim in furtherance of his crime.[168] The Court used a construction identical to that employed in their analysis of § 16(a) and found that a mens rea higher than accidental or negligent conduct *as to the risk of the use of force* is necessary for the classification of a crime of violence under § 16(b).[169]

The Court also looked at the ordinary meaning of the term "crime of violence." The Court found that this term, in addition to the use of physical force against another that is emphasized in § 16, refers to "violent, active crimes that cannot be said naturally to include DUI offenses."[170] The Court further noted that this construction is in accordance with INA § 101(h), which lists an injury-causing DUI offense[171] separately from a crime of

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[160] *Id.* at 18.
[161] *Id.* at 15.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at 18-19.
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.* at 18.
[171] INA § 10(h)(3), 8 U.S.C. § 1101(h)(3) (2000).

violence defined by § 16.[172] If § 16's definition of crime of violence encompassed DUI offenses, INA § 101(h)(3) would be devoid of significance.[173] Therefore, DUI is not a crime of violence.[174]

Finally, the Court briefly noted that this case did not present the question of whether an offense requiring a mens rea of recklessness qualified as a crime of violence under § 16.[175] The Supreme Court construed the question presented very narrowly, only addressing the mens rea requirement with respect to the "active application of force against another." Even then, the Court tied its holding only to crimes with no mens rea component or a mens rea of negligence.[176] Therefore, the Court resolved the circuit split only with regard to the narrow area of DUI offenses whereby a drunk driver *negligently* disregards the risk that force will be applied against a victim.

IV. CASE ANALYSIS

The Supreme Court reached the correct decision in *Leocal v. Ashcroft*. By virtue of the plain language of § 16 and the legislative history surrounding the implementation of the definition of a crime of violence, Congress made it clear that § 16 was intended to cover only offenses that carry some specific intent, or risk of specific intent, to use force in commission of a crime. Because DUI offenses with a mens rea of negligence are committed with no specific intent to cause harm, the Court correctly determined that they cannot be appropriately considered crimes of violence.

However, the Court construed its holding to cover only those offenses that could be committed with either no mens rea component or a mens rea of negligence as to the risk that force will be used in the commission of the crime. The Court's failure to address the mens rea of recklessness as to the risk of force leaves open an important and related question: *Does reckless driving constitute a crime of violence under § 16?*

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[172] INA § 10(h)(2), 8 U.S.C. § 1101(h)(2)).

[173] *Leocal*, 543 U.S. at 18.

[174] *Id.*

[175] *Id.* at 12.

[176] *Id.*

A. POTENTIAL SOURCE OF THE SUPREME COURT'S LIMITED ANALYSIS: TRYING TO SIDESTEP THE ISSUE RAISED IN THE NINTH CIRCUIT OPINION OF *TRINIDAD-AQUINO*

As previously mentioned, the Ninth Circuit's decision in *Trinidad-Aquino* is relevant to the analysis of the Supreme Court's decision in *Leocal*.[177] The *Leocal* Court stated that the case at hand did not require that the Court address the question of whether the mens rea of recklessness was sufficient to qualify as a crime of violence under § 16.[178] The Court acknowledged that drunk driving is a widespread problem but claimed that the importance of the ramifications of the offense did not warrant extending its analysis.[179]

The Supreme Court erred with respect to that decision. Because of the importance of the classification of crimes of violence on alien deportability, the Court should have attempted to eliminate as much ambiguity as possible. The Court should have extended the analysis to crimes committed with a mens rea of recklessness because the reasoning is the same as the reasoning behind the Court's decision to exclude crimes committed with a mens rea of negligence. By failing to extend its analysis to crimes with a mens rea of reckless, the Court did not cure the faulty reasoning of the Ninth Circuit in *Trinidad-Aquino*. In fact, the Court may have refrained from answering the question because the proper determination would have been at odds with the Ninth Circuit decision.

In *Trinidad-Aquino*, the court reached the proper conclusion that DUI was not a crime of violence under § 16, but incorrectly based its holding on the narrow conclusion that statutes that could be satisfied by crimes committed with a mens rea of negligence would not constitute crimes of violence.[180] The court correctly analyzed the inclusion of the word "use" in the definition of a crime of violence but only held that the term required some type of volitional conduct not present in DUI offenses.[181] The court did not construe its holding on the mens rea requirement as to the risk of intentional force, but, rather, made a blanket statement that all crimes carrying only a mens rea of negligence could not be considered crimes of violence.[182]

The Ninth Circuit's decision is problematic because the court based its holding on the mens rea needed for the entire commission of the crime.

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[177] *See supra* notes 111-114 and accompanying text.

[178] *Leocal*, 543 U.S. at 122.

[179] *Id.*

[180] *See supra* note 104 and accompanying text.

[181] United States v. Trinidad-Aquino, 259 F.3d 1140, 1444 (9th Cir. 2001).

[182] *Id.* at 1145.

This is particularly evident in the case of DUI. The court assumes that the crime of DUI could be satisfied with a mens rea of negligence because the intoxicated driver may be unaware of the risk of harm. However, as Judge Kozinski accurately points out in his dissenting opinion in *Trinidad-Aquino*, the drunk driver acts recklessly in the commission of DUI.[183] The dangers of drunk driving are widely-known and well-documented.[184] If one defines the mens rea of the crime with regard to the mens rea of the conduct as opposed to the mens rea of the desired result, one could easily conclude that DUI encompasses a reckless mental state.[185]

It is also useful to note that in analyzing the commission of a crime under the Model Penal Code section 208, intoxication is one of the two areas that will be subjected to an imputed mens rea regardless of the mens rea that the offender actually possessed.[186] Thus, if recklessness establishes an element of the offense, even where the actor is unaware of a risk because of intoxication that he would have been aware of while sober, this unawareness is immaterial under the Model Penal Code.[187] Despite the fact that intoxication is voluntary, the drunk driver is not aware of the risk of causing harm and thus not reckless in that regard, he will still be presumed to have acted recklessly.[188] The reasoning behind this imputation is the fact that the offender recklessly became intoxicated and took the risk of doing something harmful in that state of mind; this is enough to establish a mens rea of recklessness for the entire commission of the crime.[189]

B. THE ERROR OF THE NINTH CIRCUIT: TRYING TO SIDESTEP ITS PRECEDENT OF *INS V. PARK*

The *Trinidad-Aquino* court was forced to tailor its question very narrowly in order to avoid complicating its previous holding in *INS v. Park*.[190] In *Park*, the Ninth Circuit was asked whether involuntary manslaughter under California law constitutes a crime of violence and thus an aggravated felony for which an alien is deportable.[191]

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[183] *Id.* at 1147 (Kozinski, J., dissenting).

[184] *Id.* (Kozinski, J., dissenting).

[185] *Id.* (Kozinski, J., dissenting).

[186] *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 871-72 (2001) (citing MODEL PENAL CODE § 208 (1985)).

[187] *Id.*

[188] *Id.*

[189] United States v. Trinidad-Aquino, 259 F.3d 1140, 1145 (9th Cir. 2001).

[190] *See* Park v. INS, 252 F.3d 1018 (9th Cir. 2001) (validity questioned but not explicitly overruled).

[191] *Id.* at 1020.

Park was a native citizen of South Korea who entered the United States as a student and became an ordained minister.[192] In May 1996, Park pled guilty and was convicted of involuntary manslaughter for involvement in the battery and subsequent death of a woman during a religious ceremony to exorcise demons.[193]

The defendant argued that the definition under § 16(b) requires that there be a substantial risk that physical force may be used intentionally in the course of committing the offense, an element not present in cases of involuntary manslaughter.[194] The court rejected this argument on the basis that the court had already determined that a reckless mens rea was sufficient for satisfaction of the § 16(b) definition.[195] Although the court specifically acknowledged that its holding that involuntary manslaughter can constitute a crime of violence does not render all crimes of recklessness crimes of violence, it reaffirmed and emphasized the point that the intentional use of physical force is not required.[196]

By holding that no intent element was necessary for a crime of violence, the court was confronted with the difficulty of trying to distinguish the DUI offenses that later appear before the court. Again, as Judge Kozinski noted in his *Trinidad-Aquino* dissenting opinion, the majority in that decision made a very strained, and perhaps unsuccessful, attempt to distinguish *Trinidad-Aquino* from *Park*.[197]

Rather than focusing the distinction on the fact that DUI offenses could be satisfied with a mens rea of negligence (which could arguably also be said of the underlying facts in the *Park* case), the Ninth Circuit should have used the emergence of the DUI issue to clarify and correct its previous analysis. Prior to the DUI cases, fashioning a blanket statement that specific intent to use force is not necessary seemed to cause no problems in determining whether other crimes satisfy the § 16 crime of violence definition. Notably, the blanket statement does not affect the classic example of a reckless crime as a crime of violence.[198] However, a clarification regarding the specific intent to use force is necessary in this case; accordingly, the Supreme Court should have taken the lead in refining this analysis, by which the Ninth Circuit would then have been bound.

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[192] *Id.*

[193] *Id.*

[194] *Id.* at 1021.

[195] *Id.* at 1023-24.

[196] *Id.* at 1022.

[197] *Id.*

[198] *See supra* note 105 and accompanying text.

C. THE CORRECT DETERMINATION[199]

The Supreme Court should have concluded that specific intent to use physical force under § 16(a) or the substantial risk of the specific intent to use physical force under § 16(b) is necessary to determine that an offense qualifies a crime of violence under § 16. It is important to note that framing the crime of violence analysis in this manner would not upset the involuntary manslaughter determination as a crime of violence in *Park* nor the determination that DUI is not a crime of violence under *Leocal.*

The most difficult distinction to make, of course, stems from the *Park* scenario. In that case, the main distinction comes from the fact that the intent element is relevant not to the result but to the conduct surrounding the result. This means that in cases of involuntary manslaughter, it does not matter that the offender does not intend the result. It is enough that the offender intended the physical force which brought about the result. This analysis creates two types of involuntary manslaughter offenses: one in which the offender either uses intentional force or has a risk of using intentional force, and the other in which there is neither use of intentional force nor a risk of the use of intentional force.[200]

D. THE IMPORTANCE OF THIS DISTINCTION—THE NEED TO EXCLUDE RECKLESS DRIVING AS A CRIME OF VIOLENCE

The importance of holding that a crime of violence requires either the use or the risk of use of intentional force is that it makes clear that crimes which are satisfied with a mens rea of recklessness as to the risk of use of force are not covered under § 16's crime of violence definition, a question left unclear after the Supreme Court's *Leocal* decision. Failure to address this question leaves open the issue of whether felony reckless driving constitutes a crime of violence under § 16.

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[199] For additional comments analyzing the topic of DUI as a crime of violence, see generally Kathleen O'Rourke, *Deportability, Detention and Due Process: An Analysis of Recent Tenth Circuit Decisions in Immigration Law*, 79 DENV. U. L. REV. 353 (2002); Mark Bradford, Note and Comment, *Deporting Nonviolent Aliens: Misapplication of 18 U.S.C. § 16(B) to Aliens Convicted of Driving Under the Influence*, 52 DEPAUL L. REV. 901 (2003); Lauren K. Lofton, Note, *Drunk Driving and Deportation—Should DUI Convictions Be Treated as Crimes of Violence for Removal Purposes?* 81 WASH. U. L.Q. 591 (2003); Julie Anne Rah, Note, *The Removal of Aliens who Drink and Drive: Felony DWI as a Crime of Violence Under § 18 U.S.C. 16(b)*, 70 FORDHAM L. REV. 2109 (2002); Michael G. Salemi, Comment, *DUI as a Crime of Violence Under § 18 U.S.C. § 16(b): Does a Drunk Driver Risk "Using" Force?* 33 LOY. U. CHI. L.J. 691 (2002).

[200] Note that the inclusion of some types of involuntary manslaughter does not change the analysis under DCRP. *See supra* note 38 and accompanying text.

Reckless driving is a serious issue facing the United States. Reckless driving is defined as the "driv[ing] [of] any vehicle in willful or wanton disregard for the safety of persons or property . . . ."[201] The base charge of reckless driving, like DUI, is a misdemeanor. Misdemeanors are not considered aggravated felonies, and thus are not deportable offenses. The exception, however, occurs when bodily injury results, elevating misdemeanor DUI and reckless driving charges to felonies.[202] Reckless driving, therefore, is essentially the "sober equivalent" of DUI and is treated accordingly. It is illogical that under the post-*Leocal* state of the law, DUI offenses are excluded as crimes of violence because offenders are too intoxicated to consciously disregard risk, yet felony reckless driving offenses are not. It is important that this unsound result be rectified.

This importance is evident when examining the Third Circuit's decision in *Oyebanji v. Gonzales*.[203] In *Oyebanji*, the defendant was a lawful permanent resident from Nigeria.[204] In February 1998, Oyebanji pled guilty to vehicular homicide and DUI (under New Jersey state law) for causing a car accident that killed another person.[205]

An immigration judge ordered her removal on the basis that the vehicular homicide conviction constituted an aggravated felony.[206] The Third Circuit, therefore, was faced with the question of whether vehicular homicide under New Jersey state law constituted a crime of violence as was necessary for an aggravated felony. The New Jersey state law in question required proof of recklessness in satisfying a vehicular homicide conviction.[207] Noting that the *Leocal* court failed to determine whether an offense that requires proof of the reckless use of force qualifies as a crime of violence, the court was faced with "decid[ing] the very question that the *Leocal* Court did not reach."[208]

The *Oyebanji* court focused on the reasoning underlying the *Leocal* decision and suggested that the crime in question did not constitute a crime of violence under the Supreme Court reasoning. The court based this

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[201] UNIF. VEHICLE CODE § 11-901(a) (2004).

[202] *See, e.g.*, NEV. REV. STAT. § 484.377(2) (2005) ("Reckless driving is a Category B Felony if it involved willful or wanton disregard of the safety of persons or property that resulted in either death or substantial bodily injury.").

[203] Oyebanji v. Gonzales, 418 F.3d 260 (3d Cir. 2005).

[204] *Id.* at 261.

[205] *Id.* at 262.

[206] *Id.*

[207] "Criminal homicide constitutes vehicular homicide when it is caused by driving a vehicle or vessel recklessly." N.J. STAT. ANN. § 2C:11-5(a) (2005); *see* State v. Stanton, 820 A.2d 637 (N.J. 2003).

[208] *Oyebanji*, 418 F.3d at 263.

finding on the Supreme Court's reliance on the ordinary meaning of the term "use" as requiring active employment of force and the Court's suggestion that accidental crimes fall outside the reach of § 16.[209] The *Oyebanji* court also found it persuasive, as did the Supreme Court, that section 101(h) of the INA separately lists a crime of violence from the crime of reckless driving and DUI as a serious criminal offense.[210]

The *Oyebanji* court reached the proper decision that crimes committed without a risk of the intentional use of force are not crimes of violence. However, by not explicitly addressing this question, the Supreme Court left the area open to error and allowed the possibility of another circuit court split. If this case had occurred in the Ninth Circuit, for instance, it is quite possible that, based on the Court's holding in *Park*, the case would have come out differently. It is plausible that the Ninth Circuit would have decided that, because there is no specific intent requirement for a crime of violence in that circuit, reckless driving that results in the death or serious injury of another constitutes a crime of violence.

As we have seen in the case history of DUI offenses, circuit court splits result in disparate treatment of aliens and make the law awkward and confusing. Because of the importance of these laws and the ramifications of crime of violence convictions on aliens, the Supreme Court should have done everything in its power to eliminate possible circuit court splits that could arise in the future. Furthermore, the reasoning employed by the court could have easily been extended to exclude crimes committed with a mens rea of recklessness as to the use of force. This would have clearly excluded reckless driving as a crime of violence, thus clarifying any potential ambiguities.

V. CONCLUSION

The Supreme Court reached the correct decision in *Leocal v. Ashcroft*, but failed to extend its analysis far enough. By failing to address whether offenses that require proof of the reckless use of force against a person or property of another constitute crimes of violence, the Supreme Court did not cure the faulty Ninth Circuit decision in *Trinidad-Aquino* and left open the determination of whether reckless driving may constitute a crime of violence. Such determinations have significant ramifications on the

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[209] *Id.*

[210] *Id.* at 264. The definition of "serious criminal offense" under the INA includes, "any crime of violence as defined in section 16 of title 18 of the United States Code; or any crime of reckless driving, or driving while intoxicated under the influence of alcohol or of prohibited substances if such crime involves personal injury to another." INA § 10(h)(3), 8 U.S.C. § 1101 (2000).

treatment of lawful resident aliens. Furthermore, the Supreme Court could have extended the reasoning to exclude acts committed with a mens rea of recklessness as to the use of force. Therefore, the Supreme Court should have specified that crimes of violence require a specific intent to use force.

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