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PRACTICE ADVISORY:¹

Crimes of Violence
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How federal courts and the Board of Immigration Appeals interpret the phrase “crimes of violence” can have life-altering significance for immigrants facing possible deportation for criminal convictions, but the correct legal interpretation is far from certain and the subject of much litigation. This practice advisory identifies legal strategies for both criminal defense lawyers and immigration lawyers seeking to avoid a ruling that a client has been convicted of a crime of violence aggravated felony. This advisory is not legal advice, but merely a starting point for attorneys seeking to explore these legal issues. Of course, in this fast-changing area of law, attorneys must advise their clients based on the specific facts and applicable law, including legal developments that may arise after the date of this advisory.

I. Introduction

The Department of Homeland Security can remove a noncitizen if he or she comes within a ground of deportability. There are several criminal grounds of deportability in the federal immigration statute.³ One ground of deportability involves a conviction of an aggravated felony.⁴ “Aggravated felony” is an immigration law term that includes a long list of offenses defined in 8 U.S.C. § 1101(a)(43). Offenses that constitute “crimes of violence” under 18 U.S.C. § 16 are aggravated felonies if a court imposes a sentence of imprisonment of one year or more.⁵ Since a suspended sentence counts as a sentence of

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³ See 8 U.S.C. § 1227, INA § 237.

⁴ A noncitizen is deportable if convicted of an aggravated felony any time after admission. 8 U.S.C. § 1227(a)(2)(A)(iii), INA § 237(a)(2)(A)(iii).

⁵ 8 U.S.C. § 1101(a)(43)(F), INA § 101(a)(43)(F).

imprisonment under the immigration laws, whenever this advisory refers to a sentence imposed, the reference includes a sentence whether active or suspended.⁶

The focus of this practice advisory is avoiding a conviction for an aggravated felony based on a crime of violence. Avoiding an aggravated felony is important because of its severe impact on noncitizens including: 1) almost certain deportation; 2) a permanent bar to returning to the U.S.; 3) a bar to many forms of relief from deportation; 4) mandatory detention pending removal; 5) significant due process restrictions; and 6) increased sentence enhancements if prosecuted under 8 U.S.C. 1326 for illegal reentry.

II. Definition of Crime of Violence

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

- (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 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.

It is important to understand the similarities and differences between the two subsections because of the effect on defense counsel's strategy. In a nutshell, § 16(b) involves a broader test.

A. What do subsections (a) & (b) have in common?

The United States Supreme Court has held that the term "force" in both subsections of 18 U.S.C. § 16 means active, purposeful, and violent force.⁷ Both subsections include force used against person *or* property. Both subsections require a one-year prison sentence (active or suspended) for the offense to constitute an aggravated felony.

B. How do subsections (a) & (b) differ?

§ 16(a) can be satisfied by either a felony or misdemeanor conviction, but § 16(b) requires a felony conviction. While § 16(a) covers both misdemeanors and felonies, the following differences make it narrower in important respects.

⁶ 8 U.S.C. § 1101(a)(48)(B), INA § 101(a)(48)(B).

⁷ *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

First, § 16(a) requires that the force (whether used, attempted, or threatened) be an element of the offense.⁸ In § 16(b), in contrast, the violent force need not be an element of the offense; rather, the offense by its nature need only involve a substantial risk that violent physical force be used during the commission of the offense. This, as interpreted by the Board of Immigration Appeals, is a more subjective test and covers any felony with an inherent risk that violent force will be used.⁹ For example, classical *felony* burglary¹⁰ of a residence is a crime of violence under § 16(b) because there is an inherent risk of violent confrontation between the burglar and the homeowner. *Misdemeanor* burglary is not a crime of violence under § 16(a) because it lacks the element of intent to use or threaten violent force.

Second, § 16(a) requires a higher degree of intent than recklessness. Under § 16(b), recklessness sometimes may suffice.¹¹

18 U.S.C. § 16(a)	18 U.S.C. § 16(b)
Covers felony or misdemeanor conviction	Requires felony conviction
Requires element of use, attempted use or threatened use of violent force	Covers offenses with no element of use of force if substantial risk that defendant will use violent force in the commission of the offense
Requires higher degree of intent than recklessness	May cover offense that is recklessly committed

C. “Crime of Violence” under Sentencing Guidelines

The U.S. Sentencing Guidelines, which apply to sentencing for federal offenses, also use the term “crime of violence.” It is important to distinguish between the language of the Guidelines and that of 8 U.S.C. § 16. The Guidelines define “crime of violence” to include any felony that has as (1) “an element the use, attempted use, or 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.”¹² The language of subsection (1) (known as the force

⁸ *Matter of Velasquez*, 25 I&N Dec. 278, 282 (BIA 2010).

⁹ *Matter of Singh*, 25 I&N Dec. 670 (BIA 2012).

¹⁰ In this context, “burglary” means an unlawful breaking or remaining in a structure with the intent to commit a crime.

¹¹ *Matter of Singh* at 676. Many federal courts, however, have held that reckless crimes do not satisfy § 16(b). *See infra* n.21.

¹² United States Sentencing Guidelines § 4B1.2(a)(1), (2). Almost identical language appears in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), which sets minimum sentences for firearms offenders who have been convicted of “violent felonies.” Because of the commonality of

clause) is substantially similar to that of 16(a), but subsection (2) (known as the residual clause) covers a greater range of conduct than under § 16(b). The residual clause of the Guidelines covers cases involving a serious potential risk of physical injury and is not limited, as under § 16(b), to cases involving the use of violent force. Thus, cases interpreting its residual clause do not control the immigration determination of what is a crime of violence.¹³

III. How to Avoid a Crime of Violence Aggravated Felony

Counsel can prevent a crime of violence aggravated felony in various ways. A person can avoid this aggravated felony by avoiding a sentence of one year or more (see III.A).

Whether a person can avoid a crime of violence depends on whether the conviction is for a misdemeanor or felony. Each type of offense is therefore discussed separately below (see III.B. and C.).

A. Avoid a One-Year Sentence

By far, the safest way to avoid a crime of violence aggravated felony is to avoid a one-year prison sentence, active or suspended, on any one count. Even if the offense is found to fall within the “crime of violence” definition, it does not constitute an aggravated felony if a court imposes a sentence of less than one year, active or suspended. Avoiding a one-year sentence is not subject to judicial interpretation or dispute, as some of the other strategies discussed below may be.

B. How to Avoid a Crime of Violence when Pleading to a Misdemeanor

1. Plead to a misdemeanor

Generally, a misdemeanor offense will qualify as a crime of violence only under the narrower requirements of § 16(a). In other words, a misdemeanor plea ordinarily cannot be considered a crime of violence under § 16(b), which requires a felony conviction.

language in the residual clauses of the ACCA and USSG § 4B1.2(a), courts have interpreted them identically.

¹³ See, e.g., *Jobson v. Ashcroft*, 326 F.3d 367, 372-373 (2d Cir. 2003) (“We have held, in accord with a number of other courts, that the risk that a defendant will use physical force in the commission of an offense is materially different from the risk that an offense will result in physical injury ... The risk of serious physical injury concerns the likely effect of the defendant's conduct, but the risk in section 16(b) concerns the defendant's likely use of violent force as a means to an end”); *United States v. Chapa-Garza*, 243 F.3d 921, 926-927 (5th Cir.2001) (finding § 16(b) is interpreted differently than residual clause of sentencing guidelines); *Bazon-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001).

Beware, however, that federal law classifies an offense as a felony if the maximum term of imprisonment authorized is more than one year.¹⁴ In some states, such as Massachusetts and Maryland, misdemeanor offenses are punishable by more than one year. Immigration courts treat such offenses as *felony* offenses for federal immigration law purposes, despite state categorization as a “misdemeanor.”¹⁵ These offenses therefore could qualify as a crime of violence under § 16(b).

2. Plead to a misdemeanor that does not have the use of violent force as an element
Section 16(a) of 18 U.S.C. requires the use of violent force and that the use of violent force be an element of the offense. Defense counsel therefore can avoid a crime of violence offense by pleading to a misdemeanor offense that does not contain the use, attempted use, or threatened use of violent force as an element.

a. Violent force

The United States Supreme Court has held that the term “force” in 18 U.S.C. § 16 means active, violent force. *Leocal v. Ashcroft*, 543 U.S. 1 (2004). The Supreme Court again interpreted the meaning of “violent force” in a case involving the Armed Career Criminal Act (“ACCA”).¹⁶ *Johnson v. United States*, 130 S. Ct. 1265 (2010). In *Johnson*, the Court held that to qualify as a “violent felony” the level of “physical force” required for a conviction must be “*violent force*—that is, force capable of causing physical pain or injury to another person.” *Id.* at 1271. In *Johnson*, the Court found that the crime of battery by offensive touching does not require violent force. Because the ACCA’s definition of a “violent felony” is almost identical to 18 U.S.C. § 16(a), in interpreting whether an offense

¹⁴ 18 U.S.C. § 3559(a); *see also Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577, 2581 (2010).

¹⁵ *Matter of Velasquez*, 25 I&N Dec. 278, 280 (BIA 2010); *see also Lopez v. Gonzalez*, 549 U.S. 47 (2006) (holding that “drug trafficking” for aggravated felony purposes includes only conduct punishable as a felony under the federal Controlled Substances Act, regardless of whether state law classifies such conduct as a felony or a misdemeanor); *Blake v. Gonzales*, 481 F.3d 152, 160 (2d Cir. 2007) (finding that Massachusetts misdemeanor punishable by more than one year was considered a felony under federal law and thus qualified as crime of violence under 18 U.S.C. § 16(b)); In the Third Circuit, however, immigration attorneys may be able to continue to argue that the state-law designation trumps for federal immigration law purposes. *Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001) (finding that Pennsylvania misdemeanor punishable by more than one year was not a crime of violence under 18 U.S.C. § 16(b)). *Cf. Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1052 (9th Cir. 2011) (“We have yet to establish whether the word “felony” in § 16(b) is defined as an offense punishable by more than one year in prison, or alternatively as an offense that is characterized as a felony under state law).

¹⁶ The Court was interpreting 18 U.S.C. § 924(e)(2)(B)(i)(2006), which reads “has as an element the use, attempted use, or threatened use of physical force against the person of another.”

is a “crime of violence” under § 16(a), the Board of Immigration Appeals treats the rule in *Johnson* as controlling authority.¹⁷

Under *Johnson*, a battery statute that covers only a non-violent, offensive touching is not a crime of violence because it lacks the requisite element of violent force. It is not a crime of violence even if the offender’s actual conduct involved violent force because the fact finder looks to the elements, not the particular facts relating to the crime.

b. Violent force as an element

Violent force, as so defined, also must be an actual “element” of the offense.¹⁸ In theory, defense counsel should be able to look to the statute, jury instructions and case law to determine whether an offense has the use of violent force as an element and therefore qualifies as a crime of violence. Published decisions do not consistently follow the logic of this theory, however. The Board in *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002) ignored the common, ordinarily understood meaning of the term “element”—something that must be proven to sustain a conviction. There, the Board found Connecticut third-degree assault, where a person with the intent to cause physical injury to another causes such injury, to be a crime of violence under § 16(a) even though the statute does not require proof of the actual, attempted, or threatened use of physical force to sustain a conviction. Nevertheless, the Board reasoned that use of physical force was an “inherent” element of the offense because force could be *inferred* from the conduct proscribed.¹⁹ In doing so, the Board failed to differentiate between the causation of an injury and an injury’s causation by the “use of physical force.” For example, slipping a drug into the victim’s drink will support a conviction for second degree assault in Connecticut because it results in physical injury, but that injury is not *caused by a use of physical force* and thus should not constitute a crime of violence under § 16(a).

¹⁷ *Matter of Velasquez*, 25 I&N Dec. 278, 282 (BIA 2010) (“we conclude that the “physical force” necessary to establish that an offense is a “crime of violence” for purposes of the [INA] must be “violent” force, that is, force capable of causing physical pain or injury to another person”). The Board in *Velasquez* found that the U.S. Supreme Court did not limit *Johnson* to the context of the ACCA and acknowledged that its ruling would be applied in the immigration context as well.

¹⁸ 18 U.S.C. § 16; *See Leocal*, 543 U.S. at 7 (“language [of § 16] 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”); *Matter of Velasquez*, 25 I&N Dec. 278, 282 (BIA 2010) (“An offense cannot therefore be classified as a ‘categorical’ crime of violence unless it includes as an element the actual, attempted, or threatened use of violent force that is capable of causing pain or injury.”); *see also U.S. v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006); *Szucz-Toldy v. Gonzalez*, 400 F.3d 978 (7th Cir. 2005); *Singh v. Ashcroft*, 386 F.3d 1228 (9th Cir. 2004).

¹⁹ *Matter of Martin*, 23 I&N Dec. 491, 498 (BIA 2002).

Even though the U.S. Supreme Court has since distinguished the risk of injury from the use of physical force under 18 U.S.C. § 16,²⁰ some federal courts continue to follow the reasoning in *Matter of Martin*. These courts have inferred a use of force where it is not a formal element of the statute if the offense necessarily entails threatened or actual forceful conduct.²¹

Immigration attorneys should argue that this reasoning is inconsistent with the Supreme Court's decision in *Kawashima v. Holder*.²² In *Kawashima*, the Court held that Mr. Kawashima was deportable under 8 U.S.C. § 1101(a)(43)(M)²³ for a tax conviction "involving fraud or deceit" because the offense "necessarily entail[s] fraudulent or deceitful conduct," even though there was no express element of fraud or deceit.²⁴ In so holding, the Court found that when Congress uses the word "involves" in the aggravated felony definition it is not limited to the formal elements, but refers more broadly to conduct that necessarily entails fraud or deceit. For crimes of violence, however, Congress did not choose the broader term "involves," but chose instead to require the narrower "elements" of force test under § 16(a). Immigration counsel should therefore argue that it is error for courts to use the "necessarily entails" test where the generic definition Congress specifically provided requires "elements."

²⁰ *Leocal*, 543 U.S. at 10 ("§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").

²¹ See, e.g., *Damasco-Mendoza v. Holder*, 653 F.3d 1245 (10th Cir. 2011) (finding that a threat that creates a fear of imminent serious bodily injury is a threat of physical force for purposes of §16(a)); *De Leon Castellanos v. Holder*, 652 F.3d 762, 766 (7th Cir. 2011) (holding that battery by intentionally causing bodily harm "entails physical force because some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent, is required to convict ... [t]he degree of injury has a logical relation to the use of physical force under § 16(a)."); *Camacho-Cruz v. Holder*, 621 F.3d 941, 943 (9th Cir. 2010) (finding that Nevada assault with a deadly weapon "necessarily entails the threatened use of force against the person of another" because "the defendant must create a reasonable fear of harm in the victim and because that fear is accomplished by means of a deadly weapon."); but see *U.S. v. Andino-Ortega*, 608 F.3d 305 (5th Cir. 2010) (finding that the offense of injury to a child does not meet the definition of a crime of violence because it can be committed by an intentional act without the use of physical force such as by putting poison or another harmful substance in the child's food or drink); *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (rejecting reasoning in *Matter of Martin* and finding that the offense of intentionally causing injury to another does not satisfy § 16(a) where use of force is not a formal element).

²² __U.S.__, 132 S.Ct. 1166 (2012).

²³ 8 U.S.C. § 1101(a)(43)(M)(i) classifies as an aggravated felony an offense that "(i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000."

²⁴ *Kawashima*, 132 S.Ct. at 1172.

The following examples should not satisfy the definition of crime of violence (if the law is interpreted correctly by the fact finder):

- Misdemeanor offenses that do not have force as an element such as theft, fraud, or trespass.²⁵
- Misdemeanor offenses that do not require violent force such as battery offenses covering offensive touching, spitting, or *de minimis* force. In Virginia, misdemeanor battery is defined at common law and can be committed by the “slightest touching of another . . . if done in a rude, insolent, or angry manner.” This subsection of battery is insufficient to constitute violent force.

In contrast, a plea to the following offense may be particularly problematic:

- Menacing (placing someone in fear of bodily injury by threat) with a deadly weapon is the prototypical example of an offense being found to be a crime of violence under § 16(a) even where there is no formal element of threatened use of force. A number of circuits have found this type of offense to be a crime of violence, including the Ninth Circuit.

If pleas to “safe” offenses are not available, as a last resort, defense counsel can try to structure a plea to a misdemeanor that covers multiple offenses, some of which may require violent force and others that do not, and limiting the plea agreement to the statute without specifying the offense of conviction. Under the categorical approach, the burden of proof is on the government to establish that the defendant is deportable for a crime of violence conviction, provided, however that there is a “realistic probability” that a defendant would be prosecuted for the non-deportable conduct.²⁶ If the record of

²⁵ These offenses may however carry other immigration consequences.

²⁶ *Matter of Lanferman*, 25 I&N Dec. 721, 723 (BIA 2012) (adding “realistic probability” test). If the record is silent and thus inconclusive to the offense of conviction, the noncitizen may be able to defeat the aggravated felony deportability charge. He or she, however, may still need to establish eligibility for relief from removal to remain in the U.S., and in that context bears the burden of proof. 8 U.S.C. § 1229a(c)(4)(A)&(B); INA § 240(c)(4)(A)&(B). In many jurisdictions, an inconclusive record will disqualify the noncitizen from cancellation of removal and other relief. *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011) (holding that a noncitizen does not satisfy her burden of demonstrating eligibility for cancellation of removal where the record of conviction is inconclusive as to whether she was convicted of an aggravated felony); *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009); *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009); *but see Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008) (concluding that noncitizen satisfies “burden of proving that he is eligible for cancellation relief” by presenting an inconclusive record of conviction as to whether the conviction qualified as an aggravated felony); *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1130 (9th Cir. 2007), authority affirmed in *Rosas-Castaneda v. Holder*, 630 F.3d 881, 888 (9th Cir. 2011) (same).

conviction is silent as to the particular offense of conviction, the immigration attorney may be able to argue that the government has not met its burden.

3. Plead to an offense that requires no more than a reckless mental state

For an offense to qualify as a crime of violence under § 16(a), it also requires a higher degree of intent than recklessness. Defense counsel can therefore avoid a crime of violence offense by pleading to a misdemeanor offense that requires reckless or negligent use of force.

The Board has recognized this requirement, holding that under § 16(a), the elements of the offense must require the “intentional” use of violent force. *Matter of Velasquez*, 25 I&N Dec. 278, 283 (“The key inquiry is not the alien’s intent for purposes of assault, but rather whether battery, in all cases, requires the *intentional use of “violent force.”*) (emphasis added). Many federal courts of appeals have also held that § 16(a) requires as an element of the offense the intentional use of force.²⁷ While not going as far to hold that § 16(a) requires intentional use of force, a few circuits have held that 18 U.S.C. § 16 requires a higher degree of intent than recklessness.²⁸ In these circuits, a crime committed knowingly may satisfy § 16(a).²⁹

If possible, defense counsel should secure a plea to reckless or negligent conduct to avoid a crime of violence. In removal proceedings, immigration counsel should argue that anything less than intentional conduct would not satisfy 16(a) under *Matter of Velasquez*—the published Board precedent on this issue.

²⁷ See, e.g., *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1053 (9th Cir. 2011) (“offense must require proof of an intentional use of force”); *Garcia v. Gonzales*, 455 F.3d 465, 468 (4th Cir. 2006) (holding that reckless assault is not a crime of violence under § 16(a) because it “does not contain an element that there be the intentional employment of physical force....”); *Singh v. Gonzales*, 432 F.3d 533, 539 (3rd Cir. 2006) (“To qualify as a ‘crime of violence,’ under § 16(a), a criminal statute must require a mens rea of specific intent to use force; mere recklessness is insufficient.”); *U.S. v. Vargas-Duran*, 356 F.3d 598, 605 (5th Cir. 2004) (“use of force” in 16(a) requires intent”).

²⁸ *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008) (holding that crime with a mens rea of recklessness does not satisfy 18 U.S.C. § 16); *U.S. v. Portela*, 469 F.3d 496 (6th Cir. 2006) (same); cf. *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008) (“And we believe that accidental and reckless crimes are not the type of “violent” crimes Congress intended to distinguish as worthy of removal”).

²⁹ See, e.g., *Damasco-Mendoza v. Holder*, 653 F.3d 1245 (10th Cir. 2011) (holding that knowingly placing or attempting to place another person in fear of imminent serious bodily injury was crime of violence under § 16(a), though it does not appear that petitioner argued that intentional use of force was required); *LaGuerre v. Mukasey*, 526 F.3d 1037 (7th Cir. 2008) (holding that domestic battery, which may be committed by intentionally causing harm or by knowingly causing harm, satisfies § 16(a)). Also, “willfully” using force has been found to satisfy § 16(a) where it meant the person “intentionally” used force. See *U.S. v. Laurico-Yeno*, 590 F.3d 818, 821-22 (9th Cir. 2010).

The following examples of offenses should *not* satisfy the definition of crime of violence (if the law is interpreted correctly by the fact finder):

- Assault 3d degree, N.Y.P.L. 120.00(3): With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.
- Misdemeanor Reckless Conduct, O.C.G.A. § 16-5-60(b): A person who causes bodily harm to or endangers the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm or endanger the safety of the other person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation is guilty of a misdemeanor.
- Misdemeanor death by vehicle, N.C. G.S. 20-141.4(a2): The person unintentionally causes the death of another person, (2) the person was engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic, other than impaired driving under G.S. 20-138.1, and (3) the commission of the offense in subdivision (2) of this subsection is the proximate cause of the death.

C. How to Avoid a Crime of Violence when Pleading to a Felony

A felony offense may qualify as a crime of violence under either § 16(a) or § 16(b). The strategies discussed above in Section III.B. explain how to avoid a crime of violence under § 16(a). The strategies below explain how to avoid a crime of violence under the broader requirements of § 16(b).

1. Plead to an offense that covers negligence or strict liability.

§ 16(b) requires purposeful conduct. Defense counsel can therefore avoid a crime of violence conviction by pleading to a strict liability or negligent felony offense.

In *Leocal*, 543 U.S. 1 (2004), the Supreme Court held that an offense committed accidentally or negligently does not qualify as a “crime of violence” under § 16(a) or § 16(b) because it is not sufficiently purposeful. *Leocal* involved a Florida conviction of driving under the influence and causing serious bodily injury. Pleading to a felony covering negligent conduct, even if it involves death or serious injury, will not qualify as a crime of violence under § 16(b).

The following examples of offenses do *not* satisfy the definition of crime of violence (if the law is interpreted correctly by the fact finder):

- Driving under the influence causing serious bodily injury, Fla. Stat. §316.193(3)(c)(2): Any person (a) who is in violation of subsection 1 (driving under the influence); (b) who operates a vehicle; and (c) who, by reason of such operation, causes or contributes to causing serious bodily injury.³⁰
- Criminally negligent homicide, N.Y.P.L. 125.10: A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

If a plea to negligent conduct is not possible, as last resort, defense counsel can try to structure a plea to an offense that covers more than one crime, some of which may cover negligent conduct and others that do not, and limiting the plea agreement and colloquy to the statute without specifying the offense of conviction. Under the categorical approach, the burden of proof is on the government to establish that the defendant was convicted of a crime of violence, provided, however that there is a “realistic probability” that a defendant would be prosecuted for the non-deportable conduct.³¹ If the record of conviction is silent as to the particular offense of conviction, the immigration attorney may be able to argue that the government has not met its burden.

2. Plead to a felony that requires no more than a reckless mental

As described above, § 16(b) requires purposeful conduct. If defense counsel is unable to negotiate a plea to an offense covering only negligent conduct, in certain circuits (as discussed below), he or she may be able to avoid a crime of violence by pleading to an offense covering reckless conduct. Although the law is murky here, immigration counsel can still argue in removal proceedings that reckless conduct does not satisfy 18 U.S.C. § 16(b).

The Court in *Leocal* expressly declined to decide whether a statute requiring more than a negligent use of force, such as the reckless use of force, would qualify as a crime of violence under 18 U.S.C. § 16(b). Since *Leocal*, however, a growing number of federal courts of appeals have held that a crime with a reckless mental state is not sufficiently purposeful and active to constitute a crime of violence under § 16(b).³²

³⁰ Pending legislation would elevate a third DUI conviction to the status of an aggravated felony. See Senator Grassley’s Amendment to S. 1925.

³¹ *Matter of Lanferman*, 25 I&N Dec. 721, 723 (BIA 2012) (adding “realistic probability” test). If the record is silent and thus inconclusive to the offense of conviction, the noncitizen may be able to defeat the aggravated felony deportability charge. In many jurisdictions, however, an inconclusive record will disqualify the noncitizen from cancellation of removal and other relief. See *supra* n.26.

³² See e.g., *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557 (7th Cir. 2008) (holding that reckless crimes are not crimes of violence under Section 16(b)); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008)

The Board has complicated the § 16(b) analysis, however, by holding that “the critical inquiry is not the mens rea required for conviction of a crime, but rather whether the offense, by its nature, involves a substantial risk that the perpetrator will [intentionally] use force in completing its commission.” *Matter of Singh*, 25 I&N Dec. 670, 676 (BIA 2012) (finding that a stalking offense for harassing conduct is a crime of violence under 18 U.S.C. § 16(b)). Under this test, § 16(b) may cover offenses that can be committed *recklessly* as long as there is a substantial risk that violent force may be used *intentionally* during the commission of the offense. To determine whether there is a “substantial risk” that force will be used in the offense of stalking, the Board looked to national statistics and examples of stalking prosecutions in California. Based on this data, the Board concluded that a risk of confrontation is inherent in the crime of stalking by harassment even though the use of violent force is not an element of the offense. In doing so, the Board looked to the U.S. Supreme Court’s use of statistics in an ACCA residual clause case. *Sykes v. United States*, 131 S. Ct. 2267, 2272-73 (2011) (“Although statistics are not dispositive, here they confirm the commonsense conclusion that Indiana’s vehicular flight crime is a violent felony” under the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii)). The Board further found that, in determining this risk, the proper inquiry is not whether physical force must *always* be used, but rather whether the offense presents a substantial risk of the use of physical force in the *ordinary* case.³³

This broader, more subjective test makes it difficult for defense counsel to fashion a “safe” plea and advise noncitizens of the likely consequences of the offense. Under *Singh*, the fact finder does not look to the elements of the offense or the actual conduct of the defendant, but rather to the nature of the offense and to statistics, to determine whether a risk of confrontation is inherent in an offense.³⁴ Thus, even if the use of violent force is not an element of the offense and the defendant’s actual conduct was nonviolent, the offense could qualify under § 16(b).

(same for reckless assault on a police officer); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006) (reckless vehicular homicide); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129-31 (9th Cir. 2006) (en banc) (recklessly causing injury to another); *Garcia v. Gonzales*, 455 F.3d 465, 468-69 (4th Cir. 2006) (reckless assault); *Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006) (recklessly endangering another person); *Oyebanji v. Gonzales*, 418 F.3d 260, 263-65 (3d Cir. 2005) (reckless vehicular manslaughter); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005) (involuntary manslaughter).

³³ *Matter of Singh*, 25 I&N Dec. 670, 677 (BIA 2012).

³⁴ The use of such data may be problematic. A few courts have used statistics as an indicator of substantial risk even when they demonstrate a low rate of occurrence. If the immigration court looks to data in a § 16(b) determination, counsel should bring in his or her own studies and consider challenging the court’s data if its methodology is not sound.

In the Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, *Matter of Singh* does not control; those courts have held that as a matter of law reckless conduct is not sufficiently purposeful to qualify as a crime of violence under § 16(b).³⁵ These Circuits do not defer to the Board in interpreting 18 U.S.C. § 16,³⁶ because the Board does not have special expertise in interpreting a criminal statute outside of the immigration statute.³⁷ In the Third Circuit reckless conduct could suffice.³⁸ It is unclear whether *Matter of Singh* would apply in the First, Second, Fifth, and Eighth Circuits, where there is no controlling law. In these circuits, immigration counsel should argue that, by looking to *Sykes*—a residual clause case of ACCA—the Board erroneously conflates cases involving a risk of violent *force* (required under § 16(b)) with cases involving the broader test of risk of *harm* (insufficient under § 16(b)).³⁹

The following are examples of offenses that arguably are not crimes of violence:

- Offenses that cover a crime of omission. For example, a parent who leaves a young child unattended near a pool may risk serious injury to the child, but it is unlikely that the commission of the offense will involve any use of violent force or any sort of confrontation.
- Offenses involving injury due to reckless driving

In contrast, burglary,⁴⁰ stalking by harassment,⁴¹ and non-consensual sexual assault are offenses that satisfy § 16(b) even if the conduct covered is reckless. Assaults resulting in

³⁵ *Covarrubias Teposte v. Holder*, 632 F.3d 1049 (9th Cir. 2011); *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557 (7th Cir. 2008); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129-31 (9th Cir. 2006) (en banc); *Garcia v. Gonzales*, 455 F.3d 465, 468-69 (4th Cir. 2006).

³⁶ *Brand X* allows agencies to offer an interpretation of a statute that differs from a federal circuit court decision, where the underlying statute is ambiguous. *National Cable & Telecommunications Association et al. v. Brand X Internet Services et al.*, 545 U.S. 967 (2005).

³⁷ See, e.g., *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1052 (9th Cir. 2011); *Brooks v. Holder*, 621 F.3d 88, 91-92 (2d Cir. 2010); *Dale v. Holder*, 610 F.3d 294, 301-302 (5th Cir. 2010); *Garcia v. Gonzales*, 455 F.3d 465, 467 (4th Cir. 2006); *Oyebanji v. Gonzales*, 418 F.3d 260, 262 (3d Cir. 2005).

³⁸ *Aguilar v. Attorney General of U.S.*, 663 F.3d 692 (3d Cir. 2011).

³⁹ See *Leocal*, 543 U.S. at 10 (“§ 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”). Cases interpreting the residual clause of the ACCA or USSG do not control when interpreting § 16(b) because they deal with risk of harm and not risk of force. See *supra* n.9.

⁴⁰ In this context, “burglary” means an unlawful breaking or remaining in a structure with the intent to commit a crime.

serious physical injury and crimes involving a foreseeable risk of confrontation between the offender and victim or the offender and the police seem particularly likely to satisfy § 16(b).

IV. The Government Cannot Use Boilerplate Language to Establish that an Offense is a Crime of Violence

When a statute covers multiple offenses, some of which may carry immigration consequences and others which may not, the government must identify the particular offense of conviction through the record of conviction.⁴² To establish the offense of conviction, the government cannot introduce a charging document or other conviction record that simply reflects boilerplate charges under state law.

For example, the Massachusetts general assault and battery statute covers multiple offenses,⁴³ including offensive touching, which is not a crime of violence.⁴⁴ Under Massachusetts statutory law, the language “did assault and beat” is sufficient to charge an

⁴¹ In this context, stalking means to intentionally harass another person and to makes a credible threat with the intent to place that person in reasonable fear for his or her safety.

⁴² The immigration court or other fact finder employs the categorical approach, as approved by *Nijhawan v. Holder*, 557 U.S. 29 (2009), to determine whether the elements of the state or federal offense meet the definition of a crime of violence under 18 U.S.C. § 16. See *Johnson v. United States*, 130 S.Ct. 1265, 1273 (2010). If the conviction is under a statute that covers multiple offenses, the fact finder may apply the modified categorical approach and look to the record of conviction, and not the underlying facts, to determine the specific offense of conviction. *Matter of Velazquez*, 25 I&N Dec. 278; *Matter of Sweester*, 22 I&N Dec. 709, 715 (BIA 1999). In *Matter of Lanferman*, 25 I &N Dec. 721 (BIA 2012), the Board recently suggested a broader test, permitting it to use the modified categorical approach even in cases where the statute was not divided into discrete subsections and essentially defined one offense. For example, the Board may now try to apply the modified approach in an assault case that was previously considered non-divisible. Under *Matter of Lanferman*, the Board would apply the categorical approach differently than the federal government in 18 U.S.C. § 1326 cases (illegal reentry prosecutions) when determining whether the defendant has a conviction of an aggravated felony based on a crime of violence for sentence enhancement purposes. Immigration counsel should argue that such a policy flies directly in the face of the Supreme Court’s statement in *Leocal v. Ashcroft*, 543 U.S. 1, 11, n. 8 (2004) (“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.”)

⁴³ Mass. Gen. Laws c. 265, § 13A

⁴⁴ See *U.S. v. Holloway*, 630 F.3d 252, 260 (1st Cir. 2011) (“Massachusetts’s simple assault and battery statute, covers multiple offenses. Specifically, the statute encompasses three types of battery: (1) harmful battery; (2) offensive battery; and (3) reckless battery ... So far, we have held only that the first of these three types, harmful battery, qualifies as a violent felony under the ACCA.”).

assault and battery.⁴⁵ This language is used indistinguishably for all offenses covered under the statute, including offensive battery and reckless battery. The First Circuit held that a court may not rely on the boilerplate “did assault and beat” charging language to determine that a violation of the Massachusetts assault and battery statute is a crime of violence because it does not identify which particular battery offense served as the offense of conviction. *U.S. v. Holloway*, 630 F.3d 252, 260 (1st Cir. 2011).

Other examples:

- In a manslaughter case, the nightclub owner was convicted for not having enough exits but the indictment charged “did beat and kill.”
- In Rhode Island, the charging documents use boilerplate language for R.I. Gen. Laws § 11-5-3 (“assault *or* battery”), as “assault *and* battery,” regardless of whether the charge is simple assault, simple battery or assault and battery. These offenses carry different immigration consequences.

The implications of boilerplate language differ for criminal and immigration counsel. Defense counsel faced with the State’s use of boilerplate language generally will not aid their immigrant clients by objecting to this language and asking for further specificity.

Immigration counsel, by contrast, should argue that form language in the charging document is insufficient to demonstrate that an individual has been convicted of a crime of violence aggravated felony. *See e.g., Hamdan v. INS*, 98 F.3d 183, 189 (5th Cir. 1996) (“The use of archaic boilerplate ... is virtually irrelevant to whether [a charge] is brought under any particular section of [a statute].”). Boilerplate language does not elucidate the elements of the conviction or the specific offense for which the defendant has been convicted. It is good practice to include an affidavit from experts, law professors, or defense counsel that the charging language is boilerplate unless it is established by case law or statute.

V. Summary

The definition of crime of violence has been the subject of much litigation and is far from certain. By far, the safest way to avoid an aggravated felony based on a crime of violence is to avoid a one-year prison sentence, active or suspended, on any one count. Defense counsel may also be able to avoid crime of violence offenses by pleading to 1) a misdemeanor offense that does not have violent force as an element, such as an offensive touching; 2) a misdemeanor offense that requires only reckless or negligent use of force; 3)

⁴⁵ Mass. Gen. Laws ch. 277, § 79.

a strict liability or negligent felony offense; and 4) reckless felonies only in certain federal circuits (as explained in III.C.2). For the latest legal developments or litigation support on issues discussed in this advisory, or other future advisories further developing or expanding on the issues discussed here, contact the National Immigration Project at 617.227.9727 or sejal@nationalimmigrationproject.org.