PRACTICE ADVISORY[1]
Overview of *Borden v. United States* for Immigration Counsel

June 22, 2021

On June 10, 2021, the U.S. Supreme Court issued *Borden v. United States*, __ U.S. __, No. 19-5410 (June 10, 2021), a federal sentencing enhancement case with important implications for immigration law. In *Borden*, the Court held that crimes that include a mens rea of recklessness cannot qualify as "violent felonies" under the Armed Career Criminal Act's (ACCA) elements clause. In doing so, the Court effectively held that the similarly-worded definition of a "crime of violence" under 18 U.S.C. § 16(a) excludes crimes with a recklessness mens rea. Section 16(a) is referenced in the aggravated felony crime of violence and crime of domestic violence definitions in the Immigration and Nationality Act (INA).

Although *Borden* addressed the scope of the definition of a "violent felony" under the ACCA, the Court's plurality decision expressly noted that it is reaching a question left open by two prior Supreme Court decisions: whether reckless crimes qualify as crimes of violence under 18 U.S.C. § 16. Slip op. at 7. *Borden* reverses adverse case law in the Fifth, Sixth, Eighth, and Tenth Circuits. **The decision effectively abrogates case law supporting the proposition that crimes of violence under § 16(a) encompass crimes with a recklessness mens rea**.

This advisory reviews the mens rea requirement for crimes of violence prior to *Borden* (Section I) and the holding in the case (Section II). It also covers immigration law considerations post-*Borden* (Section III). Finally, it covers suggested strategies for individuals whose cases are affected by *Borden* (Section IV) and includes a sample motion to reconsider such cases, **which should be filed by July 12, 2021.**[2] (Appendix).

---

[1] Released under a Creative Commons Attribution 4.0 International License (CC BY 4.0). The authors of this advisory are Khaled Alrabe of the National Immigration Project of the National Lawyers Guild (NIPNLG), Andrew Wachtenheim of the Immigrant Defense Project (IDP), and Trina Realmuto of the National Immigration Litigation Alliance (NILA). The authors would like to thank Matt Vogel, Nabilah Siddiquee, Cristina Velez, Kristin MacLeod-Ball, Ryan Muennich, Dan Kesselbrenner, and Katie McCoy for their contributions. Practice advisories identify select substantive and procedural immigration law issues that attorneys, legal representatives, and noncitizens face. They are based on legal research and may contain potential arguments and opinions of the authors. Practice advisories do not replace independent legal advice provided by an attorney or representative familiar with a client's case.

[2] A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, 8 U.S.C. § 1229a(c)(6)(B). If the time for filing has elapsed, motions should be filed within 30 days of June 10, 2021, the date the Court issued its decision in *Borden*, i.e., July 10, 2021. Because July 10 is a Saturday, the deadline is construed to fall on the next business day.

PRELIMINARY NOTE ON DIVISIBILITY: In this advisory, when we state that reckless crimes are categorically not crimes of violence, we are assuming the statute at issue covers reckless conduct exclusively, or is indivisible between mental states. In determining whether a statute of conviction that includes a reckless mens rea is a crime of violence, it is crucial for advocates to analyze divisibility under *Mathis v. United States*, 136 S. Ct. 2243 (2016). If a statute of conviction exclusively includes reckless (or less than reckless) mens rea, then it is categorically not a crime of violence under a properly applied categorical approach analysis. A statute of conviction that lists a recklessness mental state as well as higher mens rea, such as knowledge or intent, may in some cases still trigger the crime of violence immigration consequences if the various mental states listed are describing *separate* criminal offenses (divisible statute) rather than a single crime (indivisible statute).[3]

I. Pre-*Borden*: "Crimes of Violence" and Mens Rea

Congress defined a "crime of violence" in 18 U.S.C. § 16(a) as "an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another."[4] The reach of § 16(a) is extremely important for immigration law. Convictions that fall under § 16(a) are deportable offenses as aggravated felonies under 8 U.S.C. § 1101(a)(43)(F) if a sentence of one year or more is imposed and also trigger the "crime of domestic violence" deportability ground, regardless of the sentence imposed, if the victim and perpetrator share a qualifying domestic relationship. 8 U.S.C. § 1227(a)(2)(E)(i). Additionally, convictions that qualify as an aggravated felony "crime of violence" enhance criminal sentences for illegal reentry. 8 U.S.C. § 1326(b)(2).

Prior to *Borden*, the Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held that crimes that require a mental state of negligence or lower mens rea do not qualify as crimes of violence under § 16(a).[5] In *Leocal*, a noncitizen challenged a removal order based on an aggravated felony crime of violence predicated on a Florida conviction for DUI which could be sustained with a negligence mens rea. *Id.* at 3. In a unanimous decision, the Court concluded that

---

[3] The divisibility analysis is beyond the scope of this advisory, for more information see Katherine Brady, ILRC, *How to Use the Categorical Approach Now* (Dec. 2019), https://bit.ly/34fxJ1m.

[4] The definition of a crime of violence includes two sub-sections: § 16(a), referred to as the elements clause or the use of force clause, which is discussed in this advisory, and § 16(b), referred to as the residual clause. In 2018, the Supreme Court struck down the residual clause as unconstitutionally void for vagueness. *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Like § 16, ACCA's definition of a "violent felony" also includes a similarly-worded residual clause, which was found to be unconstitutional prior to *Dimaya*. *See Johnson v. United States*, 576 U.S. 591 (2015).

[5] In determining whether a criminal conviction qualifies as a crime of violence, adjudicators must use the categorical approach which requires that the "least of th[e] acts criminalized" fall under the definition of a crime of violence. *Moncrieffe v. Holder*, 569 U.S. 184, 185 (2013) (internal citations omitted). For more information about the categorical approach, see Brady, *supra* note 3.

negligence crimes cannot qualify as crimes of violence based on the language of § 16(a). Specifically, the Court disagreed with both parties' focus on whether the phrase "use of physical force" dictates a mens rea requirement. *Id.* at 8-10. Rather, the Court explained that the operative language in § 16(a) is that force must be used "*against the person or property of another.*" *Id*. at 9 (emphasis in original). The Court reasoned that given that the term "use" requires active employment, it is not natural to say that a person actively employed physical force against another person by accident. *Id*. Additionally, the Court supported its reading of § 16(a) by looking to the ordinary meaning of the term "crime of violence," which "suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses." *Id.* at 11.

Leocal expressly reserved the question of "whether a state or federal offense that requires proof of the reckless use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16." *Id.* at 13. Every circuit court to address this question had held that reckless crimes do not qualify as crimes of violence,[6] until a circuit split emerged after the Court's 2016 decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016).

In *Voisine*, the Court addressed the question of whether the statutory phrase "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9) included a domestic assault statute with a recklessness mens rea.[7] A "misdemeanor crime of domestic violence" is defined in 18 U.S.C. § 921(a)(33)(A) as a misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse or [person with other specified relationship with the victim]." Significantly, the provision does not include the "against the person or property" language that the Court in *Leocal* found to be dispositive of a mens rea requirement.

In *Voisine*, the Court held that reckless domestic assault qualifies as a misdemeanor crime of domestic violence. The Court found that the ordinary meaning of the term "use of physical force" means the "act of employing" something. *Voisine*, 136 S. Ct. at 2278. Based on this understanding, it held that the term "use" requires a volitional act that is "indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." *Id*. at 2279. Additionally, the Court looked to the purpose and context of the statute to confirm its reading, noting that Congress enacted the provision to address offenders with "run-of-the-mill" domestic violence *misdemeanors* and that

---

[6] *See United States v. Castleman*, 572 U.S. 157, 169 n.8 (2014) (noting that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to satisfy the requirements for a "crime of violence" and citing cases addressing either 18 U.S.C. § 16 or the similarly worded 2L1.2 United States Sentencing Guideline (USSG) provision); *United States v. Moreno*, 821 F.3d 223, 228 (2d Cir. 2016); *Popal v. Gonzales*, 416 F.3d 249, 254 (3d Cir. 2005); *Garcia v. Gonzales*, 455 F.3d 465, 469 (4th Cir. 2006); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc). *See also United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006) (extending *Leocal*'s holding to reckless crimes in the context of the almost identically worded definition of a "crime of violence" under the USSG); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008) (same); *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010) (same); *United States v. Vargas-Duran*, 356 F.3d 598, 603 (5th Cir. 2004) (en banc) (holding similarly a few months prior to *Leocal*), *cert. denied*, 543 U.S. 995 (2004).

[7] Under 18 U.S.C. § 922(g)(9), federal law prohibits any person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm.

Also available as part of the eCourse
Crimmigration (2022)

First appeared as part of the conference materials for the
46th Annual Conference on Immigration and Nationality Law session
"Crimmigration"