PRACTICE ALERT:

IN *VOISINE V. UNITED STATES*, SUPREME COURT CREATES NEW UNCERTAINTY OVER WHETHER "INA"-REFERENCED "CRIME OF VIOLENCE" DEFINITION EXCLUDES RECKLESS CONDUCT[1]

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[1] Practice Alerts 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 Alerts do NOT replace independent legal advice provided by an attorney or representative familiar with a client's case.

INTRODUCTION

On June 27, the Supreme Court issued a criminal law decision, *Voisine v. United States*, No. 14-10154 (U.S. June 27, 2016), that the government may attempt to use in immigration cases to argue that the 18 U.S.C. § 16 "crime of violence" definition referenced in the "aggravated felony"[2] and "crime of domestic violence"[3] provisions of the Immigration and Nationality Act ("INA") reaches reckless conduct offenses. However, the Supreme Court expressly provided that its ruling in *Voisine*—finding that a differently worded federal criminal law definition reaches reckless behavior—does not resolve whether the 18 U.S.C. § 16 definition includes such conduct. Thus, immigrants and their **immigration lawyers should resist any attempt by the government to argue in immigration proceedings that *Voisine* now undermines the nearly universal case law that has found that the 18 U.S.C. § 16 definition does *not* reach reckless conduct** (see below "Guidance for immigration lawyers"). At the same time, however, immigrants in criminal proceedings and their **criminal defense lawyers should take into account that there is now an increased risk that immigration adjudicators will find, based on *Voisine*, that offenses that reach reckless conduct may be deemed "crimes of violence" under the 18 U.S.C. § 16 definition** (see below "Guidance for criminal defense lawyers").

In *Voisine*, the Court addressed the question of whether a reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" for purposes of the federal crime of possession of a firearm by a person who has previously been convicted in any court of a misdemeanor crime of domestic violence, 18 U.S.C. § 922(g)(9). The statutory definition of "misdemeanor crime of domestic violence" includes any misdemeanor that has, as an element, "the use . . . of physical force." 18 U.S.C. § 921(a)(33)(A). The Court found that this "use of physical force" language may extend to reckless conduct that is volitional even if any resulting harm was not intended, but instead resulted from reckless behavior. Slip Op. 6 ("[T]he word 'use' . . . 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.").

Here is a link to the Supreme Court's decision in *Voisine*:
http://www.supremecourt.gov/opinions/15pdf/14-10154_19m1.pdf

GUIDANCE FOR IMMIGRATION LAWYERS

Prior to *Voisine*, the U.S. Courts of Appeals almost universally found that the 18 U.S.C. § 16 "crime of violence" definition cross-referenced in the INA "aggravated felony" and "crime of domestic violence" provisions does not reach reckless conduct. The Supreme Court recognized this two years ago in *United States v. Castleman*, 134 S. Ct. 1405, 1414, n.8 (2014), when it stated that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to satisfy the requirements for a "crime of violence," citing cases addressing either 18 U.S.C. §

[2] INA § 101(a)(43)(F) ("crime of violence" aggravated felony).
[3] INA § 237(a)(2)(E)(i) ("crime of domestic violence).

16 or the similarly worded 2L1.2 Sentencing Guideline provision: *United States* v. *Palomino Garcia*, 606 F. 3d 1317, 1335–36 (11th Cir. 2010); *Jimenez-Gonzalez* v. *Mukasey*, 548 F. 3d 557, 560 (7th Cir. 2008); *United States* v. *Zuniga-Soto*, 527 F. 3d 1110, 1124 (10th Cir. 2008); *United States* v. *Torres-Villalobos*, 487 F. 3d 607, 615–16 (8th Cir. 2007); *United States* v. *Portela*, 469 F. 3d 496, 499 (6th Cir. 2006); *Fernandez-Ruiz* v. *Gonzales*, 466 F. 3d 1121, 1127–32 (9th Cir. 2006) (en banc); *Garcia* v. *Gonzales*, 455 F. 3d 465, 468–69 (4th Cir. 2006); *Oyebanji* v. *Gonzales*, 418 F. 3d 260, 263–65 (3d Cir. 2005); *Jobson* v. *Ashcroft*, 326 F. 3d 367, 373 (2d Cir. 2003); *United States* v. *Chapa-Garza*, 243 F. 3d 921, 926 (5th Cir. 2001).

The *Voisine* decision is not intervening Supreme Court authority for the purpose of modifying this existing circuit caselaw interpreting 18 U.S.C § 16. Each circuit has caselaw and standards for determining when one panel can overrule another panel without going en banc. *See, e.g.*, *Miller v. Gammie*, 355 F.3d 889, 893 (9th Cir. 2002) (en banc) (treating Supreme Court decision as intervening authority when it is "irreconcilable" with reasoning or theory of panel decision); *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir.2000) (requiring decision to "invalidate" or be "contrary" to circuit decision). The decision in *Voisine* would not satisfy such strict tests. As a result, the existing decisions interpreting 18 U.S.C. § 16 remain good law.

Indeed, the *Voisine* Court expressly left unresolved the question of whether the 18 U.S.C. § 16 definition addressed in the Court's earlier immigration law decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) reaches reckless conduct. The Court stated:

> Like Leocal, our decision today concerning §921(a)(33)(A)'s scope does not resolve whether § 16 includes reckless behavior. Courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states.

Slip op. 7, n.4. Thus, the favorable circuit case law on the reckless conduct question can hardly be said to be irreconcilable with, or invalidated by, *Voisine*.

Moreover, based on the different text, purpose and context of § 16, there is good reason for the Courts of Appeals to have almost uniformly found, and to continue to find even after *Voisine*, that the 18 U.S.C. § 16 "crime of violence" definition does not reach reckless conduct. For example, unlike the 18 U.S.C. § 921(a)(33)(A) "misdemeanor crime of domestic violence" definition ("*has, as an element, the use or attempted use of physical force, committed by a current or former spouse, parent, or guardian of the victim . . .*"), the 18 U.S.C. § 16 definition, in both its (a) and (b) prongs (*"(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*"), requires that the use of force be directed "against the person or property of another." In *Voisine*, the focus was thus only on the term "use." In *Leocal*, however, interpreting

the reach of § 16, the focus was also on the "against the person" requirement and the Court indicated that this was "critical" and "determinative":

> Whether or not the word "use" alone supplies a *mens rea* element, the parties' primary focus on that word is too narrow. Particularly when interpreting a statute that features as elastic a word as "use," we construe language in its context and in light of the terms surrounding it. The critical aspect of § 16(a) is that a crime of violence is one involving the "use . . . of physical force *against the person or property of another*." . . . While one may, in theory, actively employ something in an accidental manner, it is much less natural to say that a person actively employs physical force *against another person* by accident. . . . [and] § 16(b) . . . contains the same formulation we found to be determinative in § 16(a): the use of physical force against the person or property of another.

Leocal, 543 U.S. at 9 (emphasis in original) (citations omitted).

In contrast, in *Voisine*, the Court made clear that it was focusing only on whether the word "use" alone could reach reckless conduct. The Court stated: "Nothing in the word 'use'—which is the only statutory language either party thinks relevant—indicates that § 922(g)(9) applies exclusively to knowing or intentional domestic assaults." Slip. op. 5. Indeed, during the oral argument in *Voisine*, Justice Kagan, the author of the majority opinion in the case, observed that the question in *Voisine* was limited to interpreting "use of physical force" and indicated that the additional "against another person" requirement used in statutes such as 18 U.S.C. § 16 raised a different question. Transcript of Oral Argument at 10, *Voisine v. United States*, No. 14-10154 (U.S. June 27, 2016) ("the question here . . . is just the phrase 'use of physical force,' not against another person . . ."). This is significant because, while the word "use" may be "indifferent" as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the "harmful consequences" of his conduct, Slip Op. 6, one can certainly conclude otherwise with respect to a statute, like 18 U.S.C. § 16, that requires use of physical force "against the person or property of another," and which thus indicates that intentionality or purpose is required as to the specific harmful consequences of the use of force at issue.

Additionally, in interpreting the "misdemeanor crime of domestic violence" provision at issue in *Voisine*, the Court relied on a Congressional purpose specific to this provision: "Congress enacted § 922(g)(9) in order to prohibit domestic abusers convicted under run-of-the-mill misdemeanor assault and battery laws from possessing guns." Slip op. 5. The Court went on to state that "[b]ecause fully two-thirds of such state laws extend to recklessness, construing § 922(g)(9) to exclude crimes committed with that state of mind would substantially undermine the provision's design." *Id.* In contrast, when interpreting the meaning of the term "crime of violence" as defined in 18 U.S.C. § 16, and determining whether the term reaches DUI offenses, the *Leocal* Court found Congressional intent to be narrow in scope and that "[t]he ordinary

meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggest a category of violent, active crimes that cannot be said naturally to include DUI offenses." *Leocal*, 543 U.S. at 11 (citations omitted).

Finally, in interpreting the reach of 18 U.S.C. § 16 in *Leocal*, the Court found instructive Congress' use of the following definition in INA § 101(h), which was enacted in 1990 when Congress first added the 18 USC § 16 cross-reference to the "aggravated felony" definition, , and which defines the term "serious criminal offense" for another purpose:

> (1) any felony;
>
> (2) any crime of violence, as defined in section 16 of title 18; *or*
>
> (3) any crime of *reckless driving* or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another."

8 U.S.C. § 1101(h) (emphasis added). In determining whether the 18 U.S.C. § 16 definition included a DUI offense resulting in injury, the Court stated:

> Congress' separate listing of the DUI-causing-injury offense from the definition of "crime of violence" in § 16 is revealing. Interpreting § 16 to include DUI offenses, as the Government urges, would leave § 101(h)(3) practically devoid of significance. As we must give effect to every word of a statute wherever possible, the distinct provision for these offenses under § 101(h) bolsters our conclusion that § 16 does not itself encompass DUI offenses.

Leocal, 543 U.S. at 12 (citation omitted). Likewise, Congress' separate listing of "reckless driving" from the 18 U.S.C. § 16 "crime of violence" definition supports court decisions finding that § 16 does not reach reckless conduct. *See Oyebanji*, 418 F.3d at 264 (authored by then Judge Alito) ("Following [Leocal's] reasoning, we cannot ignore that § 101(h) also lists "any crime of violence" separately from "any crime of reckless driving.").

GUIDANCE FOR CRIMINAL DEFENSE LAWYERS

Nevertheless, despite the bases discussed above for survival beyond *Voisine* of the near uniform case law finding that 18 U.S.C. § 16 does not reach reckless conduct, criminal defense lawyers should warn their immigrant clients that there is now an increased risk that convictions of offenses that reach reckless conduct may now be deemed "crimes of violence" under 18 U.S.C. § 16 even in those jurisdictions where the U.S. Court of Appeals have previously ruled otherwise. This is because of the *Voisine* ruling that the "use of force" language included in 18 U.S.C. § 921(a)(33)(A) may reach reckless conduct. Since this language is also used in the 18

U.S.C. § 16 “crime of violence” definition cross-referenced in the INA’s “aggravated felony” and “crime of domestic violence” provisions, there is thus an increased risk that convictions reaching reckless conduct may now be found to trigger the adverse deportability and other negative immigration consequences of these designations, at least until further litigation clarifies the uncertainty (see above “Guidance for immigration lawyers”).