

# Practice Alert for New York Criminal Defense Attorneys: N.Y.P.L. § 110-120.05(4), Attempted Reckless Assault



When representing non-citizen clients, the immigration consequences of a plea or conviction may be more important to the non-citizen than the criminal penalty. To mitigate such consequences, you should always consider alternative dispositions. One commonly used felony offense is **N.Y.P.L. § 110-120.05(4)**, attempted reckless assault in the second degree. While most commonly used in assault cases, this plea has also been employed in cases involving force — including robbery — where a reduced charge is being negotiated.

**N.Y.P.L. § 110-120.05(4) avoids two distinct immigration consequences, making it one of the most helpful protective pleas available to criminal defense counsel.**

## 1 NOT A CRIME INVOLVING MORAL TURPITUDE

Because it is legally impossible to "attempt" a reckless act, no coherent mens rea can be discerned from such a conviction. Therefore, offenses with incoherent mens rea are not crimes involving moral turpitude, which require at least a mens rea of recklessness or higher.

See *Gill v. INS*, 420 F.3d 82, 91 (2d Cir. 2005).

**Note:** Immigration consequences depend on applicable case law in the circuit where immigration proceedings are held. Controlling precedent on incoherent mens rea offenses currently only applies in the Second and Third Circuits. See *Gill v. INS*; *Knapik v. Ashcroft*, 384 F.3d 84 (3d Cir. 2004) (analyzing attempted reckless endangerment, P.L. § 110-120.25).

## 2 NOT A CRIME OF VIOLENCE

Because reckless mens rea offenses do not involve the "use of force *against* the person or property of another" under the crimes of violence definition at 18 U.S.C. § 16(a), such offenses do not trigger the aggravated felony crime of violence or crime of domestic violence immigration consequence.

See *Borden v. United States*, 593 U.S. 420, 434 (2021).

**Note:** Many circuits have held that mens rea offenses higher than ordinary recklessness require the use of force. See *U.S. v. Delgado*, 149 F.4th 244, 253-54 (2d Cir. 2026) (citing cases). Consult with *Padilla* counsel **before** negotiating and entering a plea for any non-citizen client facing offenses with such mens rea, including New York depraved indifference offenses.

## ARE LEGALLY IMPOSSIBLE OFFENSES PERMISSIBLE PLEAS UNDER NEW YORK LAW?

**Yes.** Some attorneys mistakenly believe a plea to this charge is impermissible because the offense is a legal impossibility. However, the New York Court of Appeals has repeatedly held that a defendant may plead guilty to a legally impossible crime as part of a negotiated disposition as long as a higher-grade offense is properly charged in the indictment. See *People v. Foster*, 19 N.Y.2d 150, 154 (1967); *People v. Tiger*, 32 N.Y.3d 91, 101 (2018). In fact, New York city courts regularly accept such pleas, as data from DCJS show:

County (2015-2025)	110-120.05(4) convictions
New York	35
Kings	130
Queens	72
Bronx	50
Richmond	2
<b>Total</b>	<b>289</b>

Source: FOIL of DCJS Computerized Criminal History File, 2015-2025 (received 3/15/26)