

vehicle are not crimes of violence under 18 U.S.C. § 16. The court reasoned that “[i]n no ‘ordinary or natural’ sense can it be said that a person risks having to ‘use’ physical force against another person in the course of operating a vehicle while intoxicated and causing injury.” *Id.* at 383.

While the statutes at issue here involve recklessness rather than simply negligence, this distinction is not sufficient for the statute at issue to be defined as a crime of violence under *Leocal*. It is true that *Leocal* states that it left open whether an “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.” *Leocal* at 384. However, while this Court believes that whether the reckless use of force constitutes an aggravated felony is an open question under 18 U.S.C. § 16 for most statutes, this Court must conclude based on the wording of *Leocal* that the Supreme Court for all practical purposes did not include the DUI context in this reference.

*Leocal* repeatedly referenced how DUI crimes did not fit as a crime of violence. The same paragraph that includes the quote above warns against “shoehorning [drunk driving] into statutory sections where it does not fit.” *Id.* at 384. The use of physical force for recklessness in the course of operating a vehicle while intoxicated is not sufficiently different from negligence to reach a different result. The 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), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses. *Id.* at 383.

Moreover, *Leocal* noted that a DUI-causing-injury provision that Congress expressly included at Section 101(h) would be “practically devoid of significance” if negligent DUI conduct were an aggravated felony. Similarly, that section would have little significance if reckless DUI were defined as an aggravated felony.

All of the circuits that have considered whether recklessness can constitute a crime of violence in the context of the case at hand subsequent to the *Leocal* decision have found that it does not. *Bejarno-Urrutia v. Gonzales*, 2005 WL 1554805 (4th Cir. 2005); *Lara-Cazares v. Gonzales*, 408 F.3d 1217 (9th Cir. 2005); *Oyebanji v. Gonzales*, 2005 WL 1903812 (3rd Cir. Aug 11, 2005). Cases decided prior to *Leocal* are also informative. *See, e.g., Jobson v. Ashcroft*, 326 F.3d 367 (2nd Cir. 2003) (New York involuntary manslaughter not a crime of violence); *U.S. v Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004) (Texas intoxication assault not a crime of violence); *U.S. v Lucio-Lucio*, 347 F.3d 1202 (10th Cir. 2003) (Texas DUI statute not a crime of violence).

The Government argues that since the Sixth Circuit has not ruled on this question, the Ohio Immigration Court must find that the Respondent’s conviction constitutes a crime of violence and therefore an aggravated felony under the BIA precedent in *Matter of Brieva-Perez*, 23 I&N Dec. 766 (BIA 2004) and *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002). This Court cannot agree. *Matter of Brieva-Perez* interpreted a statute that involved intentional conduct, *i.e.*, unauthorized use of a motor vehicle in violation of Texas Penal Code § 31.07(a), not recklessness. The BIA explained in that case how that offense by its nature involves a substantial risk that physical force may be used. Additionally, *Matter of Ramos* was issued prior to the *Leocal* decision. In any event, the Immigration Court has a general obligation to follow the majority of circuits on issues where a circuit has not ruled on a question. *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002).

This Court’s decision today only concludes that under the facts of this case, the specific statutes