

## CASE NOTE

### *Leocal v. Ashcroft:*

## When Immigration Meets Criminal Law

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### I. Introduction

Conviction of certain offenses can have severe immigration penalties resulting in deportation of lawful permanent residents. Such measures can separate family members across national borders and have drastic consequences on lawful immigrant families remaining within the United States. Often these consequences depend on whether the unlawful conduct is deemed an “aggravated felony” at law. The definition of an aggravated felony and its consequences in the immigration context has gone through many changes in the last twenty years. The United States Supreme Court granted certiorari in *Leocal v. Ashcroft* 125 S. Ct. 377 (2004) to resolve a conflict amongst the Circuit Courts. The conflict concerned whether a conviction under a statute that does not require intent may constitute a “crime of violence” and therefore an aggravated felony. The conviction of an aggravated felony virtually ensures deportation of an immigrant who has lawful permanent resident status. The Supreme Court held that crimes without an intent element do not qualify as a “crime of violence.”<sup>1</sup> They found under Title 18 U.S.C. §16 (1984) a “crime of violence” involves the use of violent physical force, not merely causation of injury.<sup>2</sup>

The *Leocal* decision has impacted immigration cases by retroactively repealing convictions, nullifying removal orders, and it has successfully been used to defeat new charges of illegal reentry into the United States.<sup>3</sup> Outside the immigration context, *Leocal* has been used to argue against the

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1. *Leocal v. Ashcroft*, 125 S. Ct. 377, 382 (2004).

2. *Leocal*, 125 S. Ct. at 383-84.

3. *United States v. Rodriguez-Chavez*, 153 Fed. Appx. 524, 526 (10th Cir. 2005); *United States v. Camacho-Lopez*, 2006 U.S. App. LEXIS 13321 (9th Cir. 2006).

classification of a “crime of violence” where the underlying statute does not categorically present a substantial risk of violence.<sup>4</sup>

## II. Facts and Procedural History

Josue Leocal, a citizen of Haiti, had been a lawful permanent resident of the United States since 1987 with no criminal record. In January 2000, he caused an accident while driving under the influence, resulting in injury to two people. He pled guilty under Florida law to two counts of driving under the influence causing serious bodily injury and was sentenced to two and a half years in prison.<sup>5</sup> While Mr. Leocal was serving his sentence, removal proceedings were initiated by the Immigration and Naturalization Service. An immigration judge found that Mr. Leocal’s driving under the influence conviction qualified as an aggravated felony, thus making him subject to removal from the United States. The Board of Immigration Appeals (BIA) affirmed the immigration judge’s decision.

Under Section 237(a) of the Immigration and Nationality Act (INA), “[a]ny alien who is convicted of an aggravated felony. . . is deportable” and may be removed upon an order of the Attorney General.<sup>6</sup> Aggravated felonies are defined in the INA<sup>7</sup> to include, among other things, crimes of violence for which the term of imprisonment is at least one year. The question in this case was whether Mr. Leocal’s conviction of driving under the influence causing serious bodily injury constituted an aggravated felony as a “crime of violence”. The definition of “crime of violence” for the purposes of aggravated felonies is located in Title 18 U.S.C. §16 (1984) and has two subparts:

- (a) an offense that has as an element of 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.<sup>8</sup>

After Mr. Leocal served his sentence and was deported to Haiti, the United States Court of Appeals for the Eleventh Circuit dismissed his petition for review. They relied on their decision in *Le Duan v. United States Attorney General*, 196 F.3d 1352 (11th Cir. 1999) which held a conviction under the Florida DUI statute qualified as a “crime of violence” because driving under the influence involved a substantial risk of the use of physical force.<sup>9</sup> The United States Supreme Court granted certiorari to resolve a dispute amongst the Courts of Appeals as to whether state DUI offenses

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4. *United States v. Johnson*, 399 F.3d 1297 (11th Cir. 2005).

5. Fla. Stat. § 316.193(3)(c)(2) (2003).

6. Immigration and Nationality Act § 237(a)(2)(A)(iii) (1988).

7. Immigration and Nationality Act § 101(a)(43) (1996).

8. 18 U.S.C. §16 (1984).

9. *Le Duan v. United States Attorney General*, 196 F.3d 1352, 1354 (11th Cir. 1999).

that do not have a *mens rea* element, or only require a showing of negligence, qualify as a “crime of violence” under Title 18 U.S.C. §16.<sup>10</sup>

### III. Aggravated Felonies

The definition of an aggravated felony and its consequences in the immigration context has gone through many changes in the last twenty years. Aggravated felonies first appeared in the Anti-Drug Abuse Act of 1988<sup>11</sup> under the INA as part of an effort to combat narcotics trafficking. Originally, aggravated felonies were limited to murder, drug trafficking, and illegal trafficking in firearms or destructive devices.<sup>12</sup> The definition has been expanded under several subsequent acts to include additional felonies and even misdemeanors depending on the facts of the particular case.<sup>13</sup>

The most dramatic change came in 1996 with two new Acts. The first was the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>14</sup> It expanded the list of enumerated crimes under the definition of aggravated felony, but required a minimum sentence of five years for most of those crimes to qualify. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) followed.<sup>15</sup> This lowered the threshold of the imposed sentences in most cases from five years to one year. For example, before IIRAIRA, a theft offense of receiving stolen property with a term of imprisonment of five years was considered an aggravated felony. After IIRAIRA, a theft offense that carried a sentence of one year or more would qualify as an aggravated felony. However, the same theft that carried a sentence of less than one year would not qualify as an aggravated felony.

The AEDPA and IIRAIRA Acts significantly expanded the crimes in which deportation is a higher probability once convicted. Furthermore, aliens convicted of an aggravated felony under these Acts may be subject to a bar from the United States, and they are ineligible for virtually all forms of discretionary relief such as suspension of deportation, voluntary departure, asylum, and withholding of deportation.<sup>16</sup>

As applied to Mr. Leocal’s case, driving under the influence with bodily injury is not enumerated as an aggravated felony under INA §237(a).

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10. *Leocal*, 125 S. Ct. at 380.

11. Anti-Drug Abuse Act of 1988, Pub. L. 100-690.

12. *See id.*

13. Immigration Act of 1990, Pub. L. No. 101-649; Nationality Technical Correction Act of 1994, Pub. L. No. 103-416; Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-208; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-132.

14. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-208.

15. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-132.

16. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-208, Title IV, §§ 440-442; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-132, Title II, §§ 238-242.

Thus, it may only be considered an aggravated felony if it fits under the definition of “crime of violence” under Title 18 U.S.C. §16 as defined above.

#### IV. Analysis

The U.S. Supreme Court granted certiorari in *Leocal* to resolve a conflict amongst the Circuit Courts as to whether a conviction under a statute that does not require intent may constitute a “crime of violence” and, therefore, an aggravated felony. The Eleventh Circuit Court of Appeals held in *Le Duan*, a crime that does not require “intent” could qualify as a “crime of violence” if it involved a substantial risk of the use of physical force.<sup>17</sup> The Florida DUI statute in *Le Duan* required that the individual operated a vehicle while under the influence, and as a result of such operation he caused serious bodily injury to another. The Eleventh Circuit held Mr. Le’s conviction met the definition of “crime of violence” under Title 18 U.S.C. §16, despite the absence of a *mens rea* requirement, because the second element of the offense included the actual “use of physical force” as required in Title 18 U.S.C. §16(a).<sup>18</sup>

The Eighth Circuit found a similar result in *Omar v. INS*, 298 F.3d 710 (8th Cir. 2002). They held that the inherent nature of criminal vehicular homicide is such that it involves a substantial risk that physical force may be used against another person.<sup>19</sup> The court rejected Mr. Omar’s claim that Title 18 U.S.C. §16(b) requires an element of intent for a “crime of violence”. The Eighth Circuit’s reasoning was that criminal vehicular homicide always carries a substantial risk that physical force will be used in its commission because it always results in the death of another.<sup>20</sup>

These two courts were at odds with the other federal circuits, which all held that statutes requiring a *mens rea* of negligence or less did not constitute a “crime of violence”. In the Ninth Circuit, *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) was the controlling case on this issue. The Ninth Circuit held that a California conviction for DUI causing serious bodily injury is not a “crime of violence” under Title 18 U.S.C. §16 because the phrase “use. . . against” implies a volitional act and the California statute could be violated through mere negligence.<sup>21</sup>

In *Leocal*, the Court emphasized that judges must engage in an analysis of the elements of the statute violated instead of looking to the result of the crime.<sup>22</sup> To illustrate this, the Court engaged in an analysis of what is

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17. *Le Duan*, 196 F.3d at 1354.

18. *See id.*

19. *Omar v. INS*, 298 F.3d 710, 720 (8th Cir. 2002).

20. *Omar*, 298 F.3d at 720.

21. *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1144-45 (9th Cir. 2001).

22. *Leocal*, 125 S. Ct. at 382.

required by Title 18 U.S.C. §16(a) and Title 18 U.S.C. §16(b) to constitute an aggravated felony as a “crime of violence.”

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.*’ . . . ‘use’ requires active employment. 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. Thus, a person would ‘use. . . physical force against’ another when pushing him; however, we would not ordinarily say a person ‘use[s] . . . physical force against’ another by stumbling and falling into him.<sup>23</sup>

The Court went on to state that in statutory interpretation words must be given their “ordinary or natural” meaning. Therefore, the “use. . . of physical force against the person or property of another” in Title 18 U.S.C. §16(a) suggests a higher degree of intent than negligent or accidental conduct. Petitioner’s crime of a DUI resulting in bodily injury to another was found not to be a “crime of violence” under Title 18 U.S.C. §16(a) because one cannot actively employ physical force against another by accident.

The Court recognized that Title 18 U.S.C. §16(b) is broader than Title 18 U.S.C. §16(a), yet applied the same analysis to find that Title 18 U.S.C. §16(b) does not include negligent conduct, but only

offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. The reckless disregard in §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.<sup>24</sup>

Under this interpretation, there must be a risk that the person is likely to use violent force while committing the offense, not that injury is likely to occur as a result of the offense. The most common example is burglary.<sup>25</sup> The possibility that violent force will be used to carry out the act is inherent in the crime and satisfies the *mens rea* element. Applying this to DUI offenses, the Court concluded that “the risk that an accident may occur when an individual drives while intoxicated is simply not the same thing as the risk that the individual may ‘use’ physical force against another in committing the DUI offense.”<sup>26</sup>

The Court held since most states’ DUI offenses either require no *mens rea* at all, or mere negligence, a DUI conviction will generally not qualify as a “crime of violence” aggravated felony for deportation purposes.<sup>27</sup>

The Court also inferred Congress did not intend for DUI’s to fall under “crimes of violence.”<sup>28</sup> Congress distinguished between a “crime of violence” and a DUI offense “involv[ing] personal injury to another, when it

23. *Leocal*, 125 S. Ct. at 382 (alterations in original).

24. *Leocal*, 125 S. Ct. at 383.

25. *Leocal*, 125 S. Ct. at 387 n.7.

26. *Leocal*, 125 S. Ct. at 387 n.7.

27. *Leocal*, 125 S. Ct. at 378.

28. *Leocal*, 125 S. Ct. at 384.

listed them separately in INA § 101(h)(2), (3), 8 U.S.C. § 1191(h)(2), (3) as alternative definitions of ‘serious criminal offense’ for purposes of triggering inadmissibility for a noncitizen who had committed such an offense and exercised diplomatic immunity from prosecution.”<sup>29</sup>

## V. Prologue and Practical Effect

The *Leocal* decision applies retroactively to immigration cases.<sup>30</sup> It has been used to overturn deportation orders based on felony DUI convictions that were found to be a “crime of violence” prior to the *Leocal* decision.<sup>31</sup> It has also been successful in overturning charges of illegal reentry into the United States following a deportation order invalidated by *Leocal*.<sup>32</sup>

The Ninth Circuit Court of Appeals has continued to apply the Court’s reasoning in DUI cases and other criminal cases where there is a question as to whether a *mens rea* was a required element of the statute.<sup>33</sup> *Lara-Cazares v. Gonzalez*, 408 F.3d 1217 (9th Cir. 2004) held that a DUI resulting in bodily injury is not a “crime of violence.” *Lisbey v. Gonzales*, 420 F.3d 930 (9th Cir. 2005) held that sexual battery did qualify as a “crime of violence.” *Penuliar v. Gonzales*, 435 F.3d 961 (9th Cir. 2006) held that evading an officer did not qualify as a “crime of violence.”

*Leocal* has also been applied in cases outside the immigration context involving the classification of crimes.<sup>34</sup> The Eleventh Circuit Court of Appeals found *Leocal* to be instructive in a case regarding possession of a firearm.<sup>35</sup> “The teaching of *Leocal* requires us to ask whether the offense of possession of a firearm by a felon categorically presents a substantial risk of violence.”<sup>36</sup> The court found that possession of a firearm did not categorically present a risk of violence. This is because only active, violent crimes may be classified as a “crime of violence.” Therefore, the active use of a gun is a “crime of violence,” but mere possession is not.

The unanimous decision of the United States Supreme Court in *Leocal* has reoriented the focus of lower courts to the actual elements of a charged offense instead of the underlying conduct to ascertain the applicability of certain federal statutes. The Court was clear that all statutes should be given their “plain meaning” when interpreted by lower courts. This “plain meaning” approach has had a significant impact in limiting the scope of “crime

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29. *See id.*

30. *United States v. Rivera-Nevarez*, 418 F.3d 1104, 1107 (10th Cir. 2005).

31. *United States v. Rodriguez-Chavez*, 153 Fed. Appx. 524, 526 (10th Cir. 2005).

32. *United States v. Camacho-Lopez*, 2006 U.S. App. LEXIS 13321 (9th Cir. 2006).

33. *United States v. Johnson*, 399 F.3d 1297 (11th Cir. 2005); *Lara-Cazares v. Gonzalez*, 408 F.3d 1217 (9th Cir. 2004); *Lisbey v. Gonzales*, 420 F.3d 930 (9th Cir. 2005); *Penuliar v. Gonzales*, 435 F.3d 961 (9th Cir. 2006).

34. *United States v. Johnson*, 399 F.3d 1297 (11th Cir. 2005); *United States v. Carter*, 349 F. Supp. 2d 982 (D Va 2004); *United States v. Sawyers*, 409 F.3d 732 (6th Cir. 2005).

35. *Johnson*, 399 F.3d at 1297.

36. *Johnson*, 399 F.3d at 1302.

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of violence” aggravated felonies that may result in the deportation of lawful permanent residents and may find applicability outside of the immigration context.

