

From: (b)(5)
To: OPLA HO Personnel; OPLA Field Personnel
Subject: Broadcast Message: Impact of *Borden v. United States*, 141 S. Ct. 1817 (2021)
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Disseminated on behalf of Ken Padilla and Adam V. Loiacono. . .

On June 10, 2021, the U.S. Supreme Court issued *Borden v. United States*, 141 S. Ct. 1817, 2021 WL 2367312 (2021), holding that an offense requiring a mens rea of recklessness cannot qualify as a “violent felony” under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i), because such an offense does not, as required by the statute, have “as an element the use, attempted use, or threatened use of physical force against the person of another.” In so holding, the Court resolved a circuit split and overruled contrary caselaw in the Fifth, Eighth, Tenth, and D.C. Circuits. *See* 2021 WL 2367312, at *4 n.1–2.

Although a criminal sentencing case, *Borden* is significant to our practice because the “violent felony” definition is analogous to the “crime of violence” definition at 18 U.S.C. § 16(a), which is the basis for finding an offense to be an aggravated felony under section 101(a)(43) (F) of the Immigration and Nationality Act (INA). Unlike a “violent felony,” a “crime of violence” includes offenses where property, not a person, is the recipient of the actual or intended use of force. But as noted by the Court, the “crime of violence” definition is “relevantly identical” to the “violent felony” definition. 2021 WL 2367312, at *5. Indeed, the Court’s prior decision in an immigration case, *Leocal v. Ashcroft*, 543 U.S. 1 (2004), which held that the “crime of violence” definition at 18 U.S.C. § 16(a) does not encompass offenses with a negligent mens rea, figured prominently in *Borden*, as did the Court’s prior decision in another criminal case, *Voisine v. United States*, 579 U.S. 686 (2016), which held that the definition of a “misdemeanor crime of domestic violence” at 18 U.S.C. § 922(g)(9) covers reckless offenses. Moreover, the Court observed that in *Borden* it was reaching a question it had reserved in both *Leocal* and *Voisine*. 2021 WL 2367312, at *5.

In *Borden*, the Court found critical the fact that text of the “violent felony” definition at 18 U.S.C. § 924(e)(2)(B)(i) requires the use of force to be “against the person of another” and thus “demands that the perpetrator direct his action at, or target, another individual”—a characteristic absent in reckless conduct. *See id.* The Court contrasted this text with the “misdemeanor crime of domestic violence” definition at 18 U.S.C. § 922(g)(9), which has no similar phrase. *See id.* Importantly, the Court found support for its textual analysis in *Leocal*, which emphasized the inclusion in the “crime of violence” definition the virtually identical phrase “against the person or property of another.” *See id.* at *7–8, 11. In light of *Borden*, therefore, an offense requiring a mens rea of recklessness does not fall within the “crime of violence” definition at 18 U.S.C. § 18(a) and will not be an aggravated felony under INA § 101(a)(43)(F).

In light of *Borden*, OPLA attorneys should consider the following practice pointers regarding new or pending cases:

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Thank you,

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