

## **Practice Advisory on DUI and Other Offenses Causing Injury Through Negligence or Recklessness**

The Supreme Court and the Ninth Circuit have held that driving under the influence, and other offenses where injury may be caused through negligence, do not come within the definition of crime of violence under 18 USC 16. Under these rulings, the offense will not be an aggravated felony even a sentence of a 365 days or more is imposed. *Leocal v Ashcroft*, 125 S.Ct. 377 (2004); *Montiel-Barraza v INS*, 275 F.3d 1178 (9th Cir. 2002).

*However, some members of Congress are engaging in a concerted effort to legislatively overrule Leocal and make DUI a "crime of violence."* In case they succeed, **criminal defense counsel should act conservatively and do everything possible to obtain a sentence of 364 days or less for any single count of DUI.** For suggestions on sentence strategies to get to 364 days in felony cases, see "Note: Sentence" at the Quick Reference Chart and Notes at [www.ilrc.org/criminal.html](http://www.ilrc.org/criminal.html).

Advocates are fighting to keep the Leocal rule, but we need to be prepared. If Leocal is legislatively overruled, the penalties may apply to past convictions as well.

If Leocal is legislatively overruled, **any felony that involves a negligent or reckless creation of a risk of injury, including child endangerment**, might be termed a crime of violence and become an aggravated felony with a sentence of 365 days. Where there is any risk, counsel must try to avoid a sentence of 365 days or more (including suspended sentence).

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