FOR PUBLICATION
UNITED STATES COURT OF APPEALS

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previously deported after conviction for an "aggravated felo-

glary." Id. We adopted this definition, using it to define "burglary offenses." Id.

Recently in United States v. Corona-Sanchez, 2000 WL 1800619 (9th Cir 2000), we considered the meaning of"theft offense," which is defined as an "aggravated felony" at § 1101(a)(43)(G). We noted the divergent methodologies developed in Baron-Medina and Ye and explained when each should be applied. Id. at *2-*4. We summarized the cases thus:

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ering the ordinary, contemporary, and common meaning of

which the physical force is "use[d] . . . against the person or property of another." (Emphasis added). That means that there must be a volitional feature with regard to the impact or collision, and not simply with regard to the use of the physical force itself. While it might make sense -- we reserve judgment on this question -- to say that a person driving a car is volitionally using physical force just by doing so, it does not make sense to say that person is volitionally using physical force against someone or something when he neither intended to hit the person or thing nor consciously disregarded the risk that he might do so.

> standard of conduct that a law-abiding person would observe in the actor's situation.

§ 2.02(2)(c) (1985) (emphasis added). "The Supreme Court has, moreover, explained that the criminal law generally permits a finding of recklessness only when persons disregard a risk of harm of which they are aware." United States v. Albers, 226 F.3d 989, 995 (9th Cir. 2000) (citing Farmer v. Brennan, 511 U.S. 825, 836-37 (1994)).

Thus, recklessness requires conscious disregard of a risk of a harm that the defendant is aware of -- a volitional requirement absent in negligence. A volitional definition of "use . . . against" encompasses conscious disregard of a potential physical impact on someone or something -- it does not encompass non-volitional negligence as to that impact.

Nor does our holding conflict with the recent decision in Park v. INS, 252 F.3d 1018 (9th Cir. 2001). Park acknowledged, as do we, that recklessness is a sufficient mens rea for a "crime of violence." 252 F.3d at 1024. Park's assertion that "an intentional use of physical force is not required," 252 F.3d at 1025 fn.9 (emphasis in original), is perfectly compatible with our analysis -- the "crime of violence " definitions do not require an intentional use of force, but they do require a volitional act. To use the language of mens rea, the crime need not be committed purposefully or knowingly, but it must be committed at least recklessly.

Our holding is also consistent with the holdings of all other circuits who have substantively considered the issue of an intent requirement. int166 re279ess1 reTj ET 72 459 5323 Tj 81e f BT 0.6 0 TD -0. Tc43s asser51ed," 252,

KOZINSKI, Circuit Judge, dissenting:

Defendant was convicted of drunk driving resulting in bodily injury, in violation of California Vehicle Code§ 23153. The question we must answer is whether--taking a categorical approach--this is an aggravated felony under 18 U.S.C. § 16. My colleagues treat the California statute as if it punished merely neglig 57.SKI85l

ony 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." Does a crime that meets the three criteria above satisfy this definition? Of course it does. Driving a vehicle while intoxicated and then killing or injuring somebody is the classic example of an offense that "by its nature, involves a substantial risk" that physical force will be used against another. Intoxication vastly increases the likelihood that the driver will commit a negligent act resulting in injury or death.

As the Seventh Circuit explained in United States v. Rutherford, 54 F.3d 370, 376 (7th Cir. 1995):

> The dangers of drunk driving are well-known and well documented. Unlike other acts that may present some risk of physical injury, such as pickpocketing (cf. [United States v.] Lee, [22 F.3d 736 (7th Cir. 1994)]) or perhaps child neglect or certain environmental crimes like the mishandling of hazardous wastes or pollutants, the risk of injury from drunk driving is neither conjectural nor speculative. Driving under the influence vastly increases the probability that the driver will injure someone in an accident.

basis of an aggravated felony under 18 U.S.C. § 16. Maj. Op. at 10340. It goes astray by focusing only on the negligent conduct that causes the accident, while ignoring the reckless conduct--drinking and driving--which causes the negligence and turns a civil tort into a criminal offense under California law. When a legally-intoxicated driver causes an accident which injures or kills somebody, he has acted in a criminally negligent or reckless manner. Under Ceron-Sanchez and Park, this is an aggravated felony. Because the majority's contrary conclusion is contrary to the law of the circuit and common sense, I dissent.