Appendix D – Crime of Violence Chart Before Full Effect of Begay – some may still be correct but beware

This chart compares the offense-by-offense effect of the each of the following three definitions of "crime of violence:"

Type of Offense	**18 USC § 16:** The term "crime of violence" means-- **(a)** an offense that has as an element the 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.	**18 USC § 924(e)(2)(B):** The term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that— **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another; or **(ii)** is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.	**USSG § 4B1.2(a):** The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that -- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.[1]

The chart does not purport to reflect every case in every circuit on each of the listed offenses. Rather, it is an attempt to review whether the same offense would be treated the same or different under each of the above definitions. As a result, particular focus was placed on cases analyzing the same statute under different definitional provisions, or cases in which different results occurred for the same offense depending on which definitional provision was being applied (meaning the offense did not qualify as a crime of violence under § 16 but did qualify under § 4B1.2(a). For ease of reference, the chart is divided into categories of offenses. Blank spaces indicate that cases on point could not be located within the time allowed.

[1] This version of § 4B1.2 was created in 1989 by amendment 268; before that amendment, the guideline stated that "crime of violence" was defined in 18 USC § 16.

TABLE OF CONTENTS

Offenses Enumerated in § 4B1.2 or Its Commentary ……..3

Negligent/Reckless Offenses ……...23

Sex Offenses / Offenses Against Minors ……33

Theft Offenses ……41

Assault, Escape and Other Offenses …….. .44

OFFENSES ENUMERATED IN § 4B1.2, OR ITS COMMENTARY

	18 U.S.C. § 16	**18 U.S.C. § 924(e)(2)(B)**	**U.S.S.G. § 4B 1.2**
Burglary	**Yes**, under § 16(b) *Leocal v. Ashcroft*, 543 US 1, 10 (2004) ("burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime") Note that this definition **includes** both burglary of a non-residential building or structure, which does not fall under § 4B1.2 in some circuits, and burglary of a vehicle, which does not fall under § 924(e)(2)(B) and may not fall under § 4B1.2. *United States v. Rodriguez-Guzman*, 56 F.3d 18, 20 (5th Cir. 1995) (burglary of a non-residential building and burglary of a vehicle "often involves the application of destructive physical force to the property of another," and thus fits § 16(b)'s standard) (analyzing Tex. Penal Code §§ 30.02 & 30.04). *United States v. Guzman-Landeros*, 207 F.3d 1034, 1035 (8th Cir. 2000) (holding without analysis that burglary of a vehicle fits within § 16(b)) (analyzing Tex. Penal Code § 30.04).	**Yes**, under 18 USC § 924(e)(2)(B)(ii), if the conduct constitutes "generic burglary," meaning an unlawful or unprivileged entry into, or remaining in, a building or other structure with intent to commit a crime. *Taylor v. United States*, 495 U.S. 575, 598 (1990) (citing LaFave & Scott). This **does not include** burglary of a boat or a motor vehicle. *See Shepard v. United States*, 544 U.S. 13, 15-16 (2005) (§ 924(e)(2)(B) "makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle").	**Yes** if it is burglary of a dwelling, USSG § 4B1.2(a)(2) & n. 1. **NOTE** there is a circuit split on whether burglary of non-dwellings can constitute crimes of violence under § 4B1.2(a)(2)'s "otherwise" clause: The following courts say **no**: *United States v. Harrison*, 58 F.3d 115, 119 (4th Cir. 1995) (defendant could not be treated as a *de facto* career offender because "his post-1984 breaking and entering convictions all involved burglaries of commercial structures, and thus do not qualify as crimes of violence") (citing § 4B1.2, comment. (n.2)). *United States v. Smith*, 10 F.3d 724, 732-33 (10th Cir. 1993) (commercial burglary does not fit under the "otherwise" clause because the Commission "intend[ed] that the clause be narrowly interpreted and applied" and because by excluding commercial burglary from § 4B1.2(a)(2)'s description of "burglary," it made clear that it did

	United States v. Alfaro-Gramajo, 2008 WL 331176, *4 (11th Cir. Feb. 7, 2008) (where statute proscribes "breaking into or entering" a vehicle, it presents a substantial risk that physical force will be used against the vehicle in the course of committing the offense) (analyzing Tex. Penal Code § 30.04). *But see Ye v. INS*, 214 F.3d 1128, 1133-34 (9th Cir. 2000) (vehicle burglary does not categorically fit § 16(b) because court requires that the "force" be "violent in nature," there are numerous ways to commit vehicle burglary short of applying violent force, and there is little to no risk a vehicle thief will stumble upon an unexpected occupant upon entry) (analyzing Cal. Penal Code § 459).		*not* think commercial burglaries qualified as "crimes of violence" as a matter of policy). *United States v. Spell*, 44 F.3d 936, 938-39 (11th Cir. 1995) ("[b]y explicitly including the burglary of a dwelling as a crime of violence, the Guidelines intended to exclude from the violent crime category those burglaries which do not involve dwellings and occupied structures") (analyzing Fla. Stat. § 810.02). The following courts say **yes**: *United States v. Delgado*, 399 F.3d 49, 56 n.8 (1st Cir. 2002) (citing with approval prior First Circuit cases holding that burglary of a commercial building is a "crime of violence" under § 4B1.2 because it poses a sufficiently substantial risk of "episodic violence" that it fits within § 4B1.2's "otherwise" clause not withstanding the Application Note) (analyzing Mass. Gen. Laws. ch. 266, § 16 and citing *United States v. Fiore*, 983 F.2d 1, 4 (1st Cir. 1992) and *United States v. Sawyer*, 144 F.3d 191, 195-96 (1st Cir. 1998)).[2]

[2] The First Circuit has granted rehearing *en banc* to reconsider its holding in *Fiore*. *See United States v. Giggey*, No. 07-2317, June 10, 2008.

			United States v. Brown, 514 F.3d 256, 268-69 (2nd Cir. 2008) (because cases under § 924(e)(2)(B) have held that "burglary itself is a crime that involves a risk of personal injury," court concludes that burglary of non-dwelling "inherently poses that same risk within the meaning of the identically worded residual clause of Guidelines § 4B1.2(a)(2)") (analyzing N.Y.P.L. § 140.20). *United States v. Jackson*, 22 F.3d 583, 585 (5th Cir. 1994) (a burglary that does not constitute a "burglary of a dwelling" may nonetheless count as a "crime of violence" under § 4B1.2's "otherwise" clause) (analyzing Tex. Penal Code § 30.01). *United States v. Wilson*, 168 F.3d 916, 929 (6th Cir. 1999) (holding that "it is possible that the burglary of a non-dwelling may be a crime of violence under § 4B1.2's residual clause") (analyzing 720 Ill. Comp. Stat. 5/19-1). *United States v. Hoults*, 240 F.3d 647, 652 (7th Cir. 2001) (each burglary of a non-dwelling must be judged individually to see whether it

			fits within § 4B1.2's "otherwise" clause) (analyzing 720 Ill. Comp. Stat. 5/19-1). *United States v. Hascall*, 76 F.3d 902, 905 (8th Cir. 1996) (second-degree burglary of a commercial building involves conduct that presents a serious potential risk of physical injury to another under the "otherwise" clause of § 4B1.2(a)(2)).[3] *United States v. Matthews*, 374 F.3d 872 (9th Cir. 2004) (following 5th, 6th, and 7th Circuits and taking a "case by case approach" in determining whether particular burglaries of non-dwellings constitute "crimes of violence" under § 4B1.2's "otherwise" clause) (analyzing Nev. Rev. Stat. § 205.060).
Arson	**Yes** *United States v. Patrick V.*, 359 F.3d 3, 9 (1st Cir. 2004) (arson is a crime involving the use of physical force against the property of another under § 16(a) and that, by its nature,	**Yes**, 18 USC § 924(e)(2)(B)(ii).	**Yes**, USSG § 4B1.2(a)(2) & n. 1

[3] The Eighth Circuit has stated that because the Commission based § 4B1.2 on § 924(e)(2)(B)'s definition of violent felony, and because the Supreme Court in *Taylor* later defined "burglary" under § 924(e)(2)(B) to include burglary of commercial buildings, it would have used *LaBonte* to invalidate the term "of a dwelling" in § 4B1.2(a)(2) as inconsistent with the Supreme Court's subsequent interpretation of the governing statute if it were necessary to resolve the case, but that *Hascall* rendered it unnecessary. *See United States v. Bell*, 445 F.3d 1086, 1090 (8th Cir. 2006).

	involves a substantial risk that physical force against the property of another may be used under § 16(b)); *United States v. Mitchell*, 23 F.3d 1, 2 n.3 (1st Cir. 1994) (noting that any attempt to argue that arson is not a crime of violence under § 16 would be "unavailing"). *Mbea v. Gonzales*, 482 F.3d 276, 280 (4th Cir. 2007) (fire is a "physical force" that satisfies § 16(a) when it is used against property) (analyzing D.C. Code § 22-401).		
Extortion	**Yes**, if it has as an element the use of actual or threatened force. *Strelchikov v. Attorney General*, 242 Fed.Appx. 789, 791-92 (3rd Cir. 2007) (analyzing 18 USC § 1951(b)(2)).	**Yes**, 18 USC § 924(e)(2)(B)(ii).	**Yes**, USSG § 4B1.2(a)(2) & n. 1
Involves use of explosives	**Yes**, at least where the underlying crime was itself a crime of violence, 18 U.S.C. § 924(c)(1)(A). *United States v. Hildenbrandt*, 378 F.Supp.2d 44, 48 (N.D. N.Y. 2005) (rejecting Eighth Amendment and other challenges to 37-year sentence under § 924(c) for throwing a molotov cocktail into an apartment building, resulting in conviction for maliciously attempting to damage or destroy any property used in	**Yes**, 18 USC § 924(e)(2)(B)(ii). This would include an unsuccessful attempt to blow up a government building under 18 USC § 844(f)(1). *See James v. United States*, 127 S.Ct. 1586, 1592 (2007) (citing statutory language criminalizing attempts to damage or destroy enumerated buildings by means of fire or explosives).	**Yes** (including any explosive material or destructive device), USSG § 4B1.2(a)(2) & n. 1. Mere possession would likely not meet the requirement that the offense involve the *use* of explosives. *United States v. Hull*, 456 F.3d 133, 141 (3rd Cir. 2006); *United States v. Fish*, 368 F.3d 1200, 1204-05 (9th Cir. 2004).

	interstate commerce) (analyzing 18 U.S.C. § 844(i)).[4] *United States v. Smith*, 502 F.3d 680, 690-91 (7th Cir. 2007) (same for 30-year sentence under § 924(c) for mailing a pipe bomb to another person, resulting in conviction for maliciously attempting to damage or destroy any property used in interstate commerce) (analyzing 18 U.S.C. § 844(i)). Mere possession would likely not meet the requirement that the offense involve the *use* of explosives. *See United States v. Hull*, 456 F.3d 133, 137-40 (3rd Cir. 2006) (simple possession of a pipe bomb does not constitute a crime of violence under § 16(b) because there is no risk that a person will use physical force in the course of committing the act of possession).		
Aiding and abetting a crime of violence	**Sometimes**, depending upon the statute at issue and the degree of risk of force attendant to the inchoate	**Sometimes**, depending upon the statute at issue and the degree of risk of injury attendant to the inchoate crime:	**Always**, n. 1, USSG § 4B1.2.

[4] The *Hildenbrandt* court also expressed its "serious reservations" about the 37-year statutory mandatory minimum sentence it was obligated to impose despite the fact that no one was actually harmed by the defendant's conduct, noting that although justice "demands consistency, rationality, and proportionality," the statute does not distinguish between types of offenses or offenders, there is "no greater injustice than to treat unequal things equally," and it is "terribly wrong" that the "increment of harm in this case bears no rational relationship to the increment of punishment that the court must impose." *See Hildenbrandt*, 378 F.Supp.2d at 48-49.

	crime: *United States v. Mitchell*, 23 F.3d 1, 2-3 (1st Cir. 1994) (aiding and abetting is treated the same as the substantive crime (here, arson) for purposes of determining whether it is a crime of violence under Bail Reform Act, which uses same standard as § 16). *United States v. Aragon-Ruiz*, 2008 WL 706590, *17-18 (D. Minn. Mar. 14, 2008) (aiding and abetting second degree assault is a crime of violence under § 16(b) where assault offense requires intent to put someone in fear of harm or to cause bodily harm and a dangerous weapon, thereby satisfying the risk that physical force will be "actively employed" in the commission of the offense) (analyzing Minn. Stat. §§ 609.02, subd. 10 & 609.222, subd. 1). *Ortiz-Magana v. Mukasey*, __ F.3d __, 2008 WL 1849155, * (9th Cir. April 28, 2008) (where the	*United States v. Hathaway*, 949 F.2d 609, 610-11 (2nd Cir. 1991) (where aiding and abetting arson is treated the same as the substantive crime by most states and the federal government, it satisfies the term "arson" as used in § 924(e)). *United States v. Sawyers*, 409 F.3d 732, 738-40 (6th Cir. 2005) (facilitation of aggravated burglary, which is a lesser included offense of aiding and abetting because it does not require intent to commit the crime but only knowledge that another intends to commit the crime and knowingly furnishing substantial assistance, nonetheless presents a serious potential risk of physical injury to another person under § 924(e) because it necessarily involves a completed burglary and because, unlike § 16's definition of crime of violence, the risk that conduct will cause physical harm does not require any particular mental state) (analyzing Tenn. Code Ann. §§ 39-11-401, 39-14-402, & 39-14-403).[5]	

[5] The first reason given has been undermined by *James v. United States*, 127 S.Ct. 1586, 1591, 1595-96 (2007) (finding that attempted burglary has a serious potential risk of physical injury where the statute required the defendant to commit an overt act toward entering or remaining in a structure with intent to commit a felony, and expressly withholding judgment on whether the "more attenuated conduct encompassed by [attempt statutes that do not require the defendant to take an overt act toward entering or remaining in the structure with wrongful intent] presents a potential risk of serious injury under ACCA") , and the second reason has been undermined by *Begay v. United States*, 128 S.Ct. 1581, 1586-87 (2008) (§ 924(e)'s "otherwise clause" requires "purposeful, violent, and

	substantive crime is a crime of violence, the state convicts both principal actors and aiders and abettors under the same statute, and there is little support left for distinguishing between the two theories of culpability, the aider and abettor will be treated as if he had personally committed the offense for purposes of determining whether he committed a crime of violence under § 16) (analyzing Cal. Penal Code § 245(a) and citing *Gonzales v. Duena-Alvarez*, 549 U.S. 183 (2007) (treating aiders and abettors of generic theft as falling within the scope of the term "theft" as it appears in the statute defining "aggravated felony").	*United States v. Groce*, 999 F.2d 1189, 1191-92 (7th Cir. 1993) (burglary conviction based on aiding and abetting falls within definition of "generic burglary" and thus is properly counted under § 924(e)(2)(B)(ii)).	
Conspiracy to commit a crime of violence	**Sometimes**, depending upon the statute at issue and the degree of risk of force attendant to the inchoate crime: *United States v. Turner*, 501 F.3d 59, 68 (1st Cir. 2007) (Hobbs Act conspiracy counts under § 16 if the object is to commit an act of violence, even though the Hobbs Act does not require proof of an overt act).	**Sometimes**, depending upon the statute at issue and the degree of risk of injury attendant to the inchoate crime: *United States v. Hawkins*, 139 F.3d 29, 34 (1st Cir. 1998) (following § 4B1.2 case law to hold that conspiracy to commit a crime of violence is a qualifying predicate under ACCA).. *United States v. Griffith*, 301 F.3d 880, 85 (8th Cir. 2002) (conspiracy to	**Always**, n. 1, USSG § 4B1.2.

aggressive conduct"); *see also id*. at 1587-88 (listing crimes that are outside of § 924(e)'s reach, including two forms of reckless offenses and holding that DUI does not fall within subclause (ii) because it "differs from a prior record of violent and aggressive crimes *committed intentionally*") (emphasis added)..

	United States v. Mitchell, 23 F.3d 1, 3 (1st Cir. 1994) (conspiracy to commit a crime of violence is itself a crime of violence under Bail Reform Act, which uses same definition as § 16). *United States v. Acosta*, 470 F.3d 132, 136-37 (2nd Cir. 2006) (conspiracy to injure, oppress, threaten or intimidate any person in connection with exercising or enjoying constitutional rights,18 USC § 242, by its nature involves a substantial risk that physical force may be used); *United States v. Doe*, 49 F.3d 859 (2nd Cir. 1995) (RICO conspiracy to commit robbery and extortion was properly treated as a crime of violence under Juvenile Delinquency Act, which uses the same definition as § 16). *Ng v. Attorney General*, 436 F.3d 392 (3rd Cir. 2006) (solicitation to commit murder is a crime of violence because it poses a substantial risk that physical force will be used against another). *United States v. Juvenile Male*, 923 F.2d 614 (8th Cir. 1991) (conspiracy to commit a crime of violence satisfies § 16).	commit theft from a person "[b]y its very nature" involves a "substantial risk that the victims of [the] conspiracy would be harmed when their property was taken from them," although court's reasoning is based purely on cases analyzing the substantive crime rather than the inchoate conspiracy crime) (analyzing Iowa Code § 714.1). United States v. Fell, 511 F.3d 1035, 1039-44 (10th Cir. 2007) (conviction for conspiracy to commit second degree burglary does not satisfy subclause (i) because it does not have as an element the use, threatened use or attempted use of physical force against another, and does not satisfy subclause (ii) because it is not "burglary" and because it does not require an overt act directed toward entering the property as distinguished from *James*, thereby rendering the potential risk of physical harm under the conspiracy statute not comparable to the risk associated with a completed burglary) (analyzing Colo. Rev. Stat. §§ 18-2-201 & 18-4-203(1)). *United States v. Wilkerson*, 286 F.3d 1324, 1325-26 (11th Cir. 2002) ("because robbery as defined by Florida law involves conduct that 'presents a serious potential risk of physical injury to another, . . . a conspiracy that has as	

		its object the offense of robbery likewise presents such a risk" even though the conspiracy statute does not require an overt act) (analyzing Fla. Stat. § 812.13(1)).[6]	
Attempt to commit a crime of violence	**Sometimes**, depending upon the statute at issue and the degree of risk of force attendant to the inchoate crime: *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993) ("A common sense view of the sexual abuse statute, in combination with the legal determination that children are incapable of consent, suggests that when an older person attempts to sexually touch a child under the age of fourteen, there is always a substantial risk that physical force will be used to ensure the child's compliance" and an attempt to do so therefore satisfies § 16(b)) (analyzing Utah Code Ann. § 76-5-404.1(1)). *Ramsey v. INS*, 55 F.3d 580, 583 (11th Cir. 1995) (if an offense carries with it a substantial risk that physical force against the person or property of another may be used in the course of	**Sometimes**, depending upon the statute at issue and the degree of risk of injury attendant to the inchoate crime: *James v. United States*, 127 S.Ct. 1586, 1591, 1594-1600 (2007) (attempted burglary fits § 924(e)(2)(B) because (1) the Florida statute as interpreted by the Florida Supreme Court requires an overt act toward entering or remaining in a structure with intent to commit a felony; (2) many attempted burglaries are "thwarted" burglaries and are thus comparable to the risk posed by the completed offense; (3) the Commission counts attempts in § 4B1.2, presumably because they are empirically risky; and (4) fact that the statute counts entry onto cartilage doesn't matter because, again, the Florida Supreme Court has construed "cartilage" narrowly to require some sort of enclosure) (analyzing Fla. Statute § 777.04(1)). *United States v. Custis*, 988 F.2d 1355,	**Always**, n. 1, USSG § 4B1.2. *United States v. Dickerson*, 77 F.3d 774, 777 (4th Cir. 1996) (attempted escape from custody creates a serious potential risk of physical injury to another) (analyzing 18 USC § 751(a)).

[6] Note that this reasoning is questionable after *James*. *See* n.4, *supra*.

	committing the offense, an attempt to commit that offense likewise satisfies § 16(b)).	1363-64 (4th Cir. 1993) (where statute requires that breaking and entering be of a dwelling, attempted breaking and entering categorically satisfies subclause (ii) because, in most cases, attempted breaking and entering will be charged when the defendant is interrupted in the midst of breaking into a home, thus creating "a risk of confrontation nearly as great as finding him inside the home"). *United States v. Kaplansky*, 42 F.3d 320, 324 (6th Cir. 1994) (*en banc*) (because court finds that "kidnapping is the 'type' of offense where the risk of physical injury to the victim is invariably present" and that merely failing to complete the offense "does not diminish the potential risk," attempted kidnapping categorically counts under subclause (ii) even where statute prohibits kidnapping by deception) (analyzing Ohio Rev. Code § 2905.01).[7]	
Murder	**Yes**	**Yes**	**Yes**, n. 1, USSG § 4B1.2.

[7] *But see Kaplansky*, 42 F.3d at 330 (Merritt, J., dissenting) (asserting that the court has "created a legal fiction" because "[w]e know as a matter of fact that such deception will not 'invariably' lead to violence or create any more risk of violence than many activities we describe as nonviolent"); *see also id*. at 330-31 (Martin, J., dissenting) (noting that Congress and the court is "missing the boat" and that "[w]e have again used expediency over good judgment" by condemning to prison for 15 years at a cost of over $1 million a man who clearly needs mental health treatment in order not to recidivate).

	Mbea v. Gonzales, 482 F.3d 276, 280 (4th Cir. 2007) (analyzing D.C. Code § 22-2101).	*United States v. Price*, 2006 WL 850930, *5 n.5 (N.D. Okla. March 30, 2006) (noting that defendant was deemed a career criminal based in part on prior murder conviction).	
Manslaughter	**No**, unless the statute requires specific intent to cause death or serious bodily injury. *Jobson v. Ashcroft*, 326 F.3d 367 (2nd Cir. 2003) ("risk" in § 16(b) is risk that force will be used as a means to an end, not that injury will occur, and an unintentional consequence caused by recklessness does not meet this standard because the "risk" referred to in § 16 is that the defendant will intentionally employ physical force) (analyzing N.Y.P.L. § 125.15(1), which requires only a reckless state of mind and the effect of death). *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 446 (4th Cir. 2005) (under *Leocal*, recklessness, like negligence, is not enough to support a determination that involuntary manslaughter is a crime of violence under § 16; moreover, a reckless disregard for human life is not the same thing as a reckless disregard for whether force will need to be used) (analyzing Va. Code Ann. § 18.2-36).	**Previously yes, but likely no after *Begay*** *United States v. Lujan*, 9 F.3d 890, 891-92 (10th Cir. 1993) (holding without analysis that a statute punishing the "unlawful killing of a human being without malice" has as an element the use, threatened use or attempted use of physical force) (analyzing Cal Penal Code § 192); *but see United States v. Bedonie*, 413 F.3d 1126, 1130 (10th Cir. 2005) (noting in an MVRA case that "it is not at all 'clear' whether involuntary manslaughter would even qualify as a crime of violence," because *Leocal* calls court's decision in *Lujan* into "serious question").	**Yes**, n. 1, USSG § 4B1.2. *Jobson*, 326 F.3d at 375 (noting an earlier decision holding that second-degree manslaughter in violation of N.Y.P.L. § 125.15(1) is a "crime of violence under the broader definition of § 4B1.2 of the Sentencing Guidelines") (*citing United States v. Aponte*, 235 F.3d 802 (2nd Cir. 2003)). *United States v. Chauncey*, 420 F.3d 864, 877 (8th Cir. 2005) (following pre-*Leocal* cases and holding that involuntary manslaughter and negligent homicide resulting from DUI are crimes of violence for purposes of § 4B1.2 because the guidelines define "crime of violence" more broadly than § 16).

	United States v. Dominguez-Hernandez, 98 Fed. Appx. 331, 334-35 (5th Cir. 2004) (statute criminalizing involuntary manslaughter does not require intentional conduct and thus does not satisfy the definition of § 16) (analyzing Tex. Penal Code § 19.04). *United States v. Torres-Villalobos*, 487 F.3d 607, 614-17 (8th Cir. 2007) (manslaughter by "culpable negligence," meaning the knowing disregard of a serious risk of injury, is not the same as a serious risk that the defendant will intentionally use force to commit the offense and thus does not qualify as a crime of violence under § 16(b) after *Leocal*) (analyzing Minn. Stat. § 609.205). *Lara-Cazares v. Gonzales*, 408 F.3d 1217, 1221 (9th Cir. 2005) (*Leocal* compels the conclusion that vehicular manslaughter while driving under the influence does not satisfy § 16's requirement that the defendant actively employ force against another, even though statute at issue requires gross negligence and *Leocal* looked only at simple negligence) (analyzing Cal. Penal Code § 191.5(a)).		

	Cf. Vargas-Sarmiento v. U.S. Dept. of Justice, 448 F.3d 159, 172-73 (2nd Cir. 2006) (manslaughter statute that requires intent to cause serious bodily harm or death reflects a substantial risk that physical force may be used to achieve the intended result) (analyzing N.Y.P.L. § 125.20); *Ahdab v. Gonzales*, 189 Fed.Appx. 73, 76-77 (3rd Cir. 2006) (same); *Benjamin v. Bureau of Customs*, 383 F.Supp.2d 344, 347 (D. Conn. 2005) (same analysis and result under Conn. Gen. Stat. § 53-55(a)(1)).		
Kidnapping	**Yes** *Choeum v. INS*, 129 F.3d 29, 36 n.4 (1st Cir. 1997) (kidnapping satisfies § 16(a)). *United States v. Green*, 521 F.3d 929 (8th Cir. 2008) ("[w]ithout question, kidnapping is a crime of violence for purposes of § 924(c)," which has the same definition as § 16). *Xu v. Chertoff*, 166 Fed.Appx. 912, 914 (9th Cir. 2006) ("the very nature of kidnapping involves a substantial use of physical force").	**Yes** *United States v. Phelps*, 17 F.3d 1334, 1342 (10th Cir. 1994) (finding it likely that a kidnapping could potentially result in physical injury to an involved party sufficient to categorically satisfy subclause (ii)) (analyzing Mo. Rev. Stat. § 565.110(1)(4)).	**Yes**, n. 1, USSG § 4B1.2.
Aggravated assault	**Yes** *Wilks v. Attorney General of U.S.*, 2008 WL 1732942, *2 (3rd Cir. April		**Yes**, n. 1, USSG § 4B1.2.

	15, 2008) (where aggravated assault conviction requires a mens rea greater than recklessness, it satisfies § 16) (analyzing 18 Pa. Const. Stat. § 2702). *United States v. Mendoza-Mendoza*, 239 Fed.Appx. 216, 220-21 (6th Cir. 2007) (even reckless aggravated assault satisfies § 16(b) because it involves the intentional use or display of a deadly weapon which causes, albeit recklessly, bodily injury to another) (analyzing Tenn. Code Ann. § 39-13-102(a)(2)(B)).		
Forcible sex offenses[8]	*See generally* "Sex Offenses / Offenses Against Minors" chart	*See generally* "Sex Offenses / Offenses Against Minors" chart	**Yes**, n. 1, USSG § 4B1.2. Taking indecent liberties with a child qualifies as a "forcible sex offense." *United States v. Pierce*, 278 F.3d 282, 288-91 (4th Cir. 2002) (constructive force can be inferred in sexual abuse cases involving adult defendants and child victims and such conduct also raises a serious potential risk of physical injury to the child) (analyzing N.C. Gen. Stat. § 14-202.1).
Robbery	**Yes** *See, e.g., United States v. Andino*,	**Yes** *United States v. Lujan*, 9 F.3d 890, 891-	**Yes**, n. 1, USSG § 4B1.2.

[8] It is not clear what this term encompasses for purposes of §§ 16 and 924(e), as it is an irrelevant term to those statutes. *See, e.g., United States v. Bolanos-Hernandez*, 492 F.3d 1140, 1146 (9th Cir. 2007) ("forcible sex offenses . . . require more force than that inherent to penetration but need not require violent force"). At the least, it includes rape, attempted rape and assault with intent to rape. *Id*. at 1148.

	148 Fed.Appx. 828, 830 (11th Cir. 2005) ("no one disputes that robbery is a crime of violence") (citing 18 USC § 16).	92 (10th Cir. 1993) (robbery statute punishing taking property "by use or threatened use of force or violence" satisfies subclause (i)) (analyzing N.M. Stat. Ann. § 30-16-2).	
Extortionate extension of credit	**Yes** *United States v. Digiacomo*, 746 F.Supp. 1176, 1185 (D. Mass. 1990) (noting for purposes of bail hearing that the defendant "is charged with committing crimes of violence, such as extortion and loansharking") *United States v. Cicale*, 2006 WL 2252516, * 3 (E.D. N.Y. Aug. 7, 2006) (noting defendant's concession that two loansharking charges are crimes of violence under the Bail Reform Act, which uses the same definition as § 16). *United States v. Charles*, 1 F.3d 1244, *2 (7th Cir, 1993) (where the indictment expressly charged that the defendant participated in the use of extortionate means to collect an extension of credit "with the threat and use of physical force," the crime met the definition of "crime of violence" under § 924, which is the same as § 16's definition) (analyzing 18 USC § 891)		**Yes**, n. 1, USSG § 4B1.2.

Unlawful possession of a firearm by a felon	**No**, unless the possession statute includes as an element the intent to use the firearm or other weapon. *See, e.g., In re Impounded,* 117 F.3d 730, 738 n.12 (3rd Cir. 1997) (discussing N.Y.P.L. § 265.03); *accord Henry v. Bureau of Immigration & Customs Enforcement*, 493 F.3d 303, 310 (3rd Cir. 2007) (same result post *Leocal*). *United States v. Lane*, 252 F.3d 905, 906-08 (7th Cir. 2001) (the mere act of possessing a firearm does not encompass active use of the firearm and the nature of being a felon does not in itself create a substantial risk of violence sufficient to satisfy the Bail Reform Act, which has the same definition of "crime of violence" as § 16) (analyzing 18 USC § 922(g)(1)). *United States v. Johnson*, 399 F.3d 1297 (11th Cir. 2005) (holding post-*Leocal* that being a felon in possession of a firearm "is simply not the sort of violent, active crime that may be properly characterized, categorically, as a 'crime of violence'" for purposes of the Bail Reform Act). *United States v. Singleton*, 182 F.3d		**No**, unless the possession was of a firearm described in 26 USC § 5845(a) (e.g., sawed-off-shotgun or sawed-off rifle, silencer, bomb, or machine gun), n. 1, USSG § 4B1.2.

	7, 14 (D.C. Cir. 1999) (finding risk of violence inherent in the course of committing the offense of being a felon in possession of a firearm is too attenuated from the offense to satisfy Bail Reform Act's (and thus § 16's) definition).		
Unlawful possession of a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun)	**No** *United States v. Hull*, 456 F.3d 133, 137-40 (3rd Cir. 2006) (simple possession of a pipe bomb does not constitute a crime of violence under § 16(b) because there is no risk that a person will use physical force in the course of committing the act of possession). *United States v. Diaz-Diaz*, 327 F.3d 410, 414 (5th Cir. 2003) (discussing Tex. Penal Code § 46.05 & basing decision on precedent holding that because the crime is complete upon mere possession, it does not contemplate a risk of physical force). *United States v. Barnett*, 426 F.Supp.2d 898, 911-13 (N.D. Iowa 2006) (same result for conviction of possession of firearms described in 26 USC § 5845(a)). *But see United States v. Adams*, 409 F.Supp.2d 622, 630 (D. Md. 2006) (holding that possession of a firearm	**No** *United States v. Amos*, 501 F.3d 524, 528-30 (6th Cir. 2007) (plain language of the statute evinces an intent to include only offenses with more assertive, violent conduct than mere possession and, like felon-in-possession cases, while "shooting a sawed-off shotgun can obviously create a serious potential risk of physical harm to another, [] the same can hardly be said for their mere possession") (analyzing Tenn. Code Ann. § 39-6-1713) (now repealed). **Yes** *United States v. Fortes*, 141 F.3d 1, 8 (1st Cir. 1998) (based on precedent analyzing § 4B1.2).	**Yes**, n. 1, USSG § 4B1.2. *United States v. Johnson*, 246 F.3d 330, 334-35 (4th Cir. 2001) (possession of a sawed-off shotgun is a crime of violence under § 4B1.2 because "the possession of such a weapon always creates a serious potential risk of physical injury to another"). *United States v. Serna*, 309 F.3d 859, 864 (5th Cir. 2002) (because possession is "conduct" and the primary purpose of possessing a sawed-off shotgun is for violence, and because it is more likely than not that violence will occur from unlawful possession of a sawed-off shotgun, such possession by its nature poses a serious potential risk of physical injury to another) (analyzing Tex. Penal Code § 46.05(a)(3)). *United States v. Brazeau*, 237 F.3d 842, 845 (7th Cir. 2001) (possession

	is a crime of violence under § 16(b) for purposes of the Bail Reform Act because by its nature it involves a substantial risk that the felon will use force in the course of his illegal possession and because unexplained "practical and legal differences" between the Bail Reform Act and deportation proceedings justify the court's split from other authority on the issue).		of a sawed-off shotgun always creates a serious potential risk of physical injury to another). *United States v. Allegree*, 175 F.3d 648, 651 (8th Cir. 1999) (sawed off shotguns are "inherently dangerous and lack usefulness except for violent and criminal purposes"). *United States v. Hayes*, 7 F.3d 144, 145 (9th Cir. 1993) ("sawed-off shotguns are inherently dangerous, lack usefulness except for violent and criminal purposes, and their possession involves the substantial risk of improper physical force").
Violation of 18 USC § 924(c) (using or carrying a firearm during and in relation to a COV or possesses a firearm in furtherance of a COV)	**Yes**, 18 USC § 924(c)(3) uses the same definition of "crime of violence" as §16.	**Yes** *United States v. Hammons*, 438 F.Supp.2d 125, 127 n.1 (E.D. N.Y. 2006) (noting that defendant does not dispute that his previous conviction under § 924(c) qualifies as an ACCA predicate). *Owens v. United States*, 2007 WL 222968, *4 (E.D. Tenn. 2007) (noting that defendant's previous conviction under § 924(c) would count as a predicate conviction under § 924(e)).	**Yes** but only if the offense of conviction established that the underlying offense was a "crime of violence", n. 1, USSG § 4B1.2.
Violation of 18 U.S.C. § 929 (using or carrying			**Yes** but only if the offense of conviction established that the

a firearm during and in relation to a COV while possessing armor piercing ammunition capable of being fired by the firearm)			underlying offense was a "crime of violence," n. 1, USSG § 4B1.2.

NEGLIGENT/RECKLESS OFFENSES

	18 U.S.C. § 16	18 U.S.C. § 924(e)(2)(B)	U.S.S.G. § 4B 1.2
Assault and battery by means of wanton or reckless conduct	**No** *Popal v. Gonzales*, 416 F.3d 249, 254-55 (3rd Cir. 2005) (because statute requires only recklessness, it does not fit under § 16(a) and because there is no allegation that the offense involves a substantial risk that the actor will intentionally use physical force to commit the crime, it does not fit under § 16(b)) (analyzing 18 Pa. Const. Stat. § 2701(a)); *cf. Singh v. Gonzales*, 432 F.3d 533, 539-40 (3rd Cir. 2006) (simple assault under 18 Pa. Const. Stat. § 2701(a)(3) does constitute a crime of violence under § 16(a) because "physical menace" is an element of that specific type of assault). *Garcia v. Gonzales*, 455 F.3d 465, 468-69 (4th Cir. 2006) (§ 16(b) requires a	**Previously yes, but likely no after *Begay*** *United States v. Gibson*, 235 Fed.Appx. 656, 657 (9th Cir. 2006) (holding that defendant's argument that his conviction for reckless assault does not constitute a violent felony under § 924(e)(2)(B) is foreclosed by the court's decision in *Rendon-Duarte* (see next column) (analyzing Ore. Rev. Stat. § 163.165(1)).[12]	**Yes** *United States v. Santos*, 363 F.3d 19, 24 (1st Cir. 2004) (where charging documents and statutory definition establish more than a mere "nonconsensual touching" but a "physically harmful" or "potentially physically harmful" touching, § 4B1.2 is satisfied (analyzing Mass. Gen. Laws ch. 265, § 13D). *United States v. Grant*, 235 Fed.Appx. 911 (3rd Cir. 2007) (reaffirming *United States v. Dorsey*, 174 F.3d 331, 333 (3rd Cir. 1999), which held that simple assault even when committed recklessly presents a serious potential risk of physical injury to another) (analyzing 18 Pa. Const. Stat. § 2701(a)). *United States v. Rendon-Duarte*, 490 F.3d

[12] *Begay* significantly undermined *Rendon-Duarte*'s reasoning as applied to § 924(e) cases. *Rendon-Duarte* stated that conduct involving a dangerous instrument (as required by the statute at issue) creates a significant risk of bodily injury or confrontation "[r]egardless of a defendant's mental state." *See Rendon-Duarte*, 490 F.3d at 1147. *Begay* made clear, however, that a defendant's mental state is not only relevant to the § 924(e) analysis, but that the "otherwise" clause requires purposeful conduct. *See Begay*, 128 S.Ct. at 1586-87 (distinguishing DUI from § 924(e)'s example crimes because DUI statutes "do not insist on purposeful, violent, and aggressive conduct" and the conduct for which the driver is convicted "need not be purposeful or deliberate," and noting that "[w]hen viewed in terms of [§ 924(e)'s] basic purposes, this distinction matters considerably"); *see also id*. at 1587 ("crimes involving intentional or purposeful conduct (as in burglary and arson) are different than DUI, a strict liability crime" and listing crimes that are outside of § 924(e)'s reach, including two forms of reckless offenses); 1588 (holding that DUI "differs from a prior record of violent and aggressive crimes *committed intentionally*") (emphasis added).

	substantial risk that force will be employed as a means to an end in the commission of the crime, not merely that reckless conduct could result in injury) (analyzing N.Y.P.L. § 120.05(4)). *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129-30 (9th Cir. *en banc* 2006) (applying *Leocal*'s reasoning to hold that "neither recklessness nor gross negligence is a sufficient *mens rea* to establish a crime of violence under § 16" and concluding that misdemeanor domestic violence conviction could therefore not qualify as a crime of violence under § 16(a)) (analyzing Ariz. Rev. Stat. § 13-1203); *United States v. Kindelay*, 2007 WL 2410343, *2-3 (D. Ariz. 2007) (applying *Fernandez Ruiz* to find that 18 USC § 113, which reaches reckless assaults, does not satisfy § 16).[9] **Yes** *Blake v. Gonzales*, 481 F.3d 152, 160-61 (2nd Cir. 2007) (§ 16(b) is satisfied because the statute at issue requires that the wanton or reckless behavior be intentional and that it cause physical or		1142, 1147-48 & n.2 (9th Cir. 2007) (distinguishing *Fernandez-Ruiz* and holding that reckless assault satisfies § 4B1.2's "otherwise" clause even though it would not satisfy § 16 because "the use of physical force is not an element of subsection 2 of the Guidelines' definition of crime of violence, [so] there is no volitional element implicated in its application" and noting also that the "otherwise" clause is "de-linked" from the enumerated offenses preceding it) (analyzing Alaska Stat. § 11.41.220(a)(1)(A)); *but see United States v. Sandoval*, 390 F.3d 1077, 1081 (9th Cir. 2004) (holding that third degree assault is not categorically a crime of violence under § 4B1.2 because it has been interpreted to permit a conviction through an unlawful touching that does not involve substantial force or seriously risk physical injury).

[9] *Fernandez-Ruiz* did not analyze whether the offense could constitute a crime of violence under § 16(b) because the statute at issue was a misdemeanor and thus did not satisfy § 16(b)'s requirement that the offense be a felony. *See Fernandez-Ruiz*, 466 F.3d at 1125 n.6.

	bodily injury to another, and also requires in this case knowledge that the victim is a police office carrying out official duties) (analyzing Mass. Gen. Laws ch. 265, § 13D & following *Canada* & *Santos*, infra.)[10]. *United States v. Mendoza-Mendoza*, 239 Fed.Appx. 216, 220-21 (6th Cir. 2007) (following *Blake* to find that even reckless aggravated assault satisfies § 16(b) because it involves the intentional use or display of a deadly weapon which causes, albeit recklessly, bodily injury to another) (analyzing Tenn. Code Ann. § 39-13-102(a)(2)(B)).[11] *United States v. Zunie*, 444 F.3d 1230, 1235 n.2 (10th Cir. 2006) (because court interprets *Leocal* to apply only to negligence crimes, 18 USC § 113, which court holds criminalizes assault resulting in serious bodily injury upon proof that a person acted recklessly, is a crime of violence under § 16(a)).		
Driving under the	**No**	**No**	**Yes**[15]

[10] *Blake* also held that intentional assault and battery on a police officer is a crime of violence under § 16(a). *See Blake*, 481 F.3d at 159-160.

[11] Note that both *Blake* and *Mendoza-Mendoza* seem to confuse the issue of intentionally risking the use of force with intentionally acting in a way that carries with it the risk of injury.

influence and causing serious bodily injury to another	*Leocal v. Ashcroft*, 543 US 1, 9-10 & n.7 (2004) ("use of physical force" as used in § 16 requires more than just negligent or accidental conduct; § 16(b) covers only those offenses that naturally involve a person acting in reckless disregard of a substantial risk that physical force may be used against the person or property of another) (analyzing Florida Stat. § 316.193(3)(c)(2), which requires no culpable mental state). "In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk	*Begay v. United States*, 128 S.Ct. 1581, 1584, 1585-87 (2008) (DUI falls outside the scope of clause (ii) because "a prior record of DUI, a strict liability crime, differs from a prior record of violent and aggressive crimes committed intentionally such as arson, burglary, extortion, or crimes involving the use of explosives. The latter are associated with a likelihood of future violent, aggressive, and purposeful 'armed career criminal' behavior in a way that the former are not"). DUI does not fit within clause (i) because it does not have as an element the use, threatened use, or attempted use of physical force.	*Robertson v. United States*, 2006 WL 237077, * 5-6 (S.D. Tex. Jan. 31, 2006) (*Leocal* does not change the conclusion that DUI involves conduct that presents a serious potential risk of physical injury to another as previously found in *United States v. DeSantiago-Gonzalez*, 207 F.3d 261 (5th Cir. 2000)). *United States v. Veach*, 455 F.3d 628, 637 (6th Cir. 2006) (driving while under the influence of intoxicants, at the very least, presents a serious potential risk of physical injury to another person). *United States v. Rutherford*, 54 F.3d 370, 376-77 (7th Cir. 1995) (drunk driving is a reckless act that often results in injury and its risks are well-known, which is enough to satisfy the "otherwise" clause of §

[15] These decisions should be undermined by *Begay* because they rely heavily on an interpretation of § 4B1.2 as being similar to § 924(e)(2)(B), particularly insofar as they distinguish *Leocal* based simply on the difference between § 16"s "risk of force" and § 4B1.2's "risk of injury" language and/or the fact that *Leocal* recognized a *mens rea* standard that need not be met under the "risk of injury" standard. *See McCall*, 439 F.3d at 972 (distinguishing *Leocal* from § 924(e)(2)(B) case because § 16 addresses a "risk of force" instead of a "risk of injury," and relying on the risks identified in *Rutherford* (a § 4B1.2 case) to hold that DUI satisfies § 924(e)(2)(B)'s definition); *McGill*, 450 F.3d at 1280 n. 7 (following *McCall*'s reasoning even though *McCall* was a § 924(e)(2)(B) "because the definition of 'violent felony' under § 924(e)(2)(B)(ii) contains an otherwise clause that is identical to the clause contained in U.S.S.G. § 4B1.2(a)(2)): *Moore*, 420 F.3d at 1224 (relying on the "significant difference" between the "risk of force" and "risk of injury" language); *Robertson*, 2006 WL 237077 at 5-6 (noting that *Leocal* recognized that "the statute's requirement that physical force be *used* implied a *mens rea* that was not necessarily present in the offense of operating a vehicle while intoxicated" and distinguishing *Leocal* because it involved "risk of force" language); *see also* n.11, *supra*. However, *McGill* and *Moore* also relied on the fact that the commentary de-links offenses presenting a risk of force from any enumerated offenses, thus removing the similarity requirement that exists under the statute. *See Moore*, 420 F.3d at 1221; *MicGill*, 450 F.3d at 1280.

	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. . . . Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Id.* at 11 (citations omitted). Note that *Leocal* explicitly did not reach the question of whether a statute that criminalizes the *reckless* use of force would constitute a crime of violence under § 16, but instead held only that the DUI statute, which requires no mental state at all, does not. *Accord Tran v. Gonzales*, 414 F.3d 464, 471 (3rd Cir. 2005) (although drunk driving involves a serious risk of hurting someone, it does not involve any risk of the use of intentional harm or force in the course of committing the offense, as required by § 16(b)) (*citing United States v. Parson*, 955 F.2d 858, 866 (3rd Cir. 1992)). *United States v. Chapa-Garza*, 243 F.3d 921, 926-27 (5th Cir. 2001) (the phrase	DUI does not fit within clause (ii) even though it presents a serious potential risk of injury to another because the examples listed in clause (ii) limit the clause's scope to those offenses that are "roughly similar, in kind as well as in degree of risk posed, to the examples themselves." DUI is not similar in kind to the example crimes because it does not typically involve "purposeful, violent, and aggressive conduct," which are "characteristic of the armed career criminal, the eponym of the statute," but instead "involves conduct (driving under the influence) which need not be purposeful or deliberate." "In this respect-namely, a prior crime's relevance to the possibility of future danger with a gun-crimes involving intentional or purposeful conduct (as in burglary and arson) are different than DUI, a strict liability crime. In both instances, the offender's prior crimes reveal a degree of callousness toward risk, but in the former instance they also show an increased likelihood that the offender is the kind of person who might deliberately point the gun	4B1.2) (analyzing Ala. Code § 13A-6-20(a)(5)).[16] *United States v. Moore*, 420 F.3d 1218, 1220-22, 1224 (10th Cir. 2005) (felony DUI categorically satisfies § 4B1.2 because it "clearly presents a serious potential risk of physical injury to another" and because the "otherwise" clause is "de-linked" from the enumerated offenses; court also discusses the "significant difference" between § 16 and § 4B1.2's definitions in that the former is concerned with the risk that physical force will be used while the latter is concerned with the "risk that an accident may occur") (analyzing Nev. Rev. Stat. § 484.379(1)). *United States v. McGill*, 450 F.3d 1276, 1280-82 (11th Cir. 2006) (felony DUI satisfies "otherwise" clause post-*Leocal* because that clause looks to potential risk of physical injury instead of actual use of force; the clause is "de-linked" from the enumerated offenses and the court has in the past "broadly interpreted § 4B1.2(a)(2)'s definition to include crimes that do not fit neatly into a category of hostile aggressive acts") (analyzing Ala. Code § 32-5A-191).

[16] The *Rutherford* court found this result "somewhat troubling" and invited the Commission to revise its definition of "crime of violence" to ensure that offenders who never intended to harm another person do not get sentenced as career criminals.

	"substantial risk that physical force . . . may be used" contemplates only reckless disregard for the probability that intentional force may be employed, and the force must be used "in the course of committing the offense," not as a result of committing the offense; thus state DUI statute does not satisfy § 16(b)) (analyzing Tex. Penal Code § 49.09). *Bazan-Reyes v. INS*, 256 F.3d 600, 611-12 (7th Cir. 2001) (distinguishing *Rutherford* and § 4B1.2 from § 16(b) because § 16(b) requires intentional, active conduct, and is thus limited in its application only to those offenses in which the defendant is reckless with respect to the risk that intentional physical force will be used in the course of committing the offense, thereby excluding felony DUI).	and pull the trigger. We have no reason to believe that Congress intended a 15-year mandatory prison term where that increased likelihood does not exist." Any other reading of the statute would result in it being applied to a host of offenses which, though dangerous, are "not typically committed by those whom one normally labels 'armed career criminals.' We have no reason to believe that Congress intended to bring within the statute's scope these kinds of crimes, far removed as they are from the deliberate kind of behavior associated with violent criminal use of firearms. The statute's use of examples (and the other considerations we have mentioned) indicate the contrary." (internal citations to statutes criminalizing both negligent and reckless conduct omitted). Court also notes that Congress intended subclause (ii) to cover "certain physically risky crimes *against property*" (emphasis added) and that such unenumerated property offenses must not only present a substantial risk of physical injury to another, but must also "involve	

		purposeful, violent, and aggressive conduct," and do not include reckless, negligent or strict liability crimes. *See id*. at 1586-87. **<u>Previously yes</u>**, but likely no after *Begay*[13] *United States v. McCall*, 439 F.3d 967, 972 (8th Cir. 2006) (drunk driving involves conduct that presents a serious potential risk of physical injury to another under ACCA) (relying on *Rutherford*) (see row to right); **NOTE** this reasoning was affirmed after remand, 507 F.3d 670 (8th Cir. 2007), but the court recently granted a petition for rehearing and the decision has been vacated, __ F.3d __, 2008 WL 1849318 (8th Cir. 2008);[14] *United States v. Sperberg*, 432 F.3d 706, 708-09 (7th Cir. 2005) (same) (analyzing Wis. Stat. § 346.63(1)(b) & 346.65(2)(e) and relying on *Rutherford*) (see column to right).	
Reckless burning or exploding	**<u>No</u>** *Tran v. Gonzales*, 414 F.3d 464, 470-71, (3rd Cir. 2005) (reckless burning or exploding does not satisfy § 16(a)		

[13] These cases have all been abrogated by *Begay*. *See* n.11, *supra.*

[14] *McCall I* rejected an earlier Eighth Circuit decision that driving under the influence is not a violent felony under ACCA. *See McCall*, 439 F.3d at 969, 971 (discussing *United States v. Walker*, 393 F.3d 819 (8th Cir. 2005)).

	because § 16(a) requires the use of intentional force and reckless force does not suffice; similarly, it does not satisfy § 16(b) because that requires a risk that the actor will intentionally use physical force to commit the crime, and recklessly causing damage does not meet that standard either) (analyzing 18 Pa. Const. Stat. § 3301).		
Reckless discharge of a firearm			**Yes** *United States v. Newbern*, 479 F.3d 506, 510-11 (7th Cir. 2007) (state's definition of recklessness also satisfies the "otherwise" clause of § 4B1.2 for purposes of a conviction for reckless discharge of a firearm based on precedent holding that possession of a firearm plus some overt act implying or indicating its use is a crime of violence under § 4B1.2) (analyzing 720 Ill. Comp. Stat. 5/4-6 & 5/24-1.5).
Reckless endangerment	**No** *Singh v. Gonzales*, 432 F.3d 533, 538, 540 (3rd Cir. 2006) (reckless endangerment does not count under § 16(a) because recklessness is not a sufficient *mens rea*, and does not count under § 16(b) because it is not a felony under state law); *Tran*, 414 F.3d at 471 (although reckless endangering involves a serious risk of hurting someone, it does not involve any risk of intentional harm or force) (*citing United States v. Parson*, 955 F.2d 858, 866 (3rd Cir.		**Yes** *United States v. Parson*, 955 F.2d 858, 860-61 (3rd Cir. 1992) (finding that a statute prohibiting "recklessly engag[ing] in conduct which creates a substantial risk of death to another person" fits within § 4B1.2's "otherwise" clause "despite our grave doubts about the wisdom of the Commission's extremely broad definition of 'crime of violence,' which is significantly more expansive than the original, congressional definition of 'crime of violence' that excluded crimes not

	1992)).		actually or potentially involving intentional sue of force") (analyzing 11 Del. Code Ann. § 604).[17]
Reckless or vehicular homicide	**No** *Oyebanji v. Gonzales*, 418 F.3d 260, 261 (3rd Cir. 2005) (finding that *Leocal* and *Tran* compel the conclusion that the reckless standard required for vehicular homicide is insufficient to satisfy § 16(b)) (analyzing N.J. Stat. Ann. 2C:11-5(b)(1)). *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 446 (4th Cir. 2005) (under *Leocal*, recklessness, like negligence, is not enough to support a determination that an offense is a crime of violence under § 16 and a reckless disregard for human life is not the same thing as a reckless disregard for whether force will need to be used) (analyzing Va. Code Ann. § 18.2-36).	**Previously yes, but likely no after *Begay*[18]** *United States v. Washington*, 2008 WL 822257, * 4 (6th Cir. March 25, 2008) (where statute defines "recklessness" as the disregard of a "substantial and unjustifiable risk" of injury, reckless homicide falls within ACCA's serious potential risk of physical injury to another) (analyzing Tenn. Code Ann. § 39-11-106(a)(31)); *United States v. Fleenor*, 212 Fed.Appx. 418, 421 (6th Cir. 2007) (negligent homicide satisfies ACCA's serious potential risk of physical harm to another standard where negligence is defined as a failure to perceive a "substantial and unjustified risk" that a particular result will occur).	**Yes** *United States v. Ludcke*, 231 Fed. Appx. 507, 509-11 (7th Cir. 2007) (720 Ill. Comp. Stat. 5/4-6 defines recklessness as requiring a "conscious disregard of a substantial and unjustified risk" to the "bodily safety of an individual" and thus satisfies § 4B1.2's "otherwise" clause). *United States v. Chauncey*, 420 F.3d 864, 877 (8th Cir. 2005) (following pre-*Leocal*/pre-*Begay* cases to hold that involuntary manslaughter and negligent homicide resulting from DUI are crimes of violence for purposes of § 4B1.2 because the guidelines define "crime of violence" more broadly than § 16).

[17] In a section entitled "A Suggestion for the Commission," which followed a lengthy analysis of the Sentencing Reform Act, § 16, and § 4B1.2, the *Parson* court (including then-Judge Alito) urged the Commission to revise § 4B1.2 to return to § 16's definition "or else in some other way exclude pure recklessness crimes from the category of predicate crimes for career offender status." *See Parson*, 955 F.2d at 874-75. Sixteen years later, the Commission has not yet done so. *See, e.g., United States v. Stubler*, 2008 WL 821071, *2-3 (3rd Cir. Mar. 28, 2008) (reckless endangerment qualifies under *Parson* as a "crime of violence" under § 4B1.2 even though court is "sympathetic" to defendant's argument that it should not because although *Parson* "questioned the wisdom of the possibly inadvertent adoption of a definition for 'crime of violence' that can include offenses that do not involve the intentional use of force . . . neither Congress nor the Sentencing Commission has seen fit to revise that definition").

[18] The reasoning in these cases has been abrogated by *Begay*. See n. 11 *supra*.

	United States v. Portela, 469 F.3d 496, 499 (6th Cir. 2006) (holding that a crime of recklessness does not constitute a "crime of violence" under § 16) (analyzing Tenn. Code Ann. § 39-13-106(a)). *Lara-Cazares v. Gonzales*, 408 F.3d 1217, 1221 (9th Cir. 2005) (*Leocal* compels the conclusion that vehicular manslaughter while driving under the influence does not satisfy § 16's requirement that the defendant actively employ force against another, even though statute at issue requires gross negligence and *Leocal* looked only at simple negligence) (analyzing Cal. Penal Code § 191.5(a)).		

SEX OFFENSES / OFFENSES AGAINST MINORS

	18 U.S.C. § 16	18 U.S.C. § 924(e)(2)(B)	U.S.S.G. § 4B 1.2
Engaging in a sexual act with a person under X [15, 16 or 17] years of age / statutory rape	**Sometimes**, depending on the statute at issue. **No** *Xiong v. INS*, 173 F.3d 601, 606-07 (7th Cir. 1999) (following *Thomas* (*see* column to the right) to find that consensual sex between a boyfriend and his fifteen-year-old girlfriend did not by its nature involve a substantial risk of physical force under § 16(b)) (analyzing Wis. Stat. § 948.02). *Valencia v. Gonzales*, 439 F.3d 1046, 1049 (9th Cir. 2006) (state statute does not satisfy § 16(a) because it does not contain an element of physical force and does not satisfy § 16(b) because it covers even consensual sex between 21 year old and a person one day under 18) (Cal. Penal Code § 261.5(c)). **Yes** *Aguiar v. Gonzales*, 438 F.3d 86, 89 (1st Cir. 2005) (concluding that "sexual penetration involving a person who is eighteen and a person one day shy of the age of sixteen involves a substantial risk of the use of physical force" because (1) a minor cannot	**Sometimes**, depending on the statute at issue. **No** *United States v. Sawyers*, 409 F.3d 732, 741 (6th Cir. 2005) (statutory rape offenses that involve older victims and no aggravating factors are not necessarily crimes of violence under subclause (ii)). *United States v. Thomas*, 159 F.3d 296 (7th Cir. 1998) (state statute criminalizing sex with a woman even one day under 17 and a man at least 22 does not by its nature present a serious potential risk of physical injury to another as a categorical matter given that 16 is the age of consent in most states) (analyzing 720 ILCS 5/12-16(d)). **Yes**, because the conduct poses a serious risk of physical injury. *United States v. Sacko*, 247 F.3d 21, 23 (1st Cir. 2001) (analyzing R.I. Gen. Laws § 11-37-6).	**Yes**. *United States v. Eirby*, 515 F.3d 31, 38 (1st Cir. 2008) (discussing 17-A Me. Rev. Stat. Ann. § 254(1)(A-2), which requires that the defendant be at least 10 years older, and finding (1) there is a significant risk that force will be used to perpetrate the crime; (2) precedent has consistently found a risk of injury in child molestation statutes; and (3) relevant criteria (statutory description of the offense, baseline age of minor and chronological age difference between minor and perpetrator) are all present); *United States v. Meader*, 118 F.3d 876, 884 (1st Cir. 1998) (finding that statutory rape fits under § 4B1.2's "otherwise" clause given that the charging documents listed the "crucial facts" of the age of the girl and age gap between her and the defendant; court also notes that "the language of the 'otherwise' clause is broadly written, presumably to ensure capture of any crime posing a serious risk of physical injury" and expresses concern that its holding "bypassed a number of troubling and complex issues" such as the standard age below which sexual intercourse

	legally consent; (2) the conduct occurs in close quarters and by an adult upon a victim who is usually smaller, weaker and less experienced; and (3) the required age gap shows the statute is about the risk of force and not about stopping teenage sex (e.g., sex between a 15 year old and a 17 year old is not criminal)) (analyzing R.I. Gen. Laws § 11-37-6). *Chery v. Ashcroft*, 347 F.3d 404, 409 (2nd Cir. 2003) (same) (analyzing Conn. Gen. Stat. § 53a-71).		typically may be considered to pose a substantial risk of physical injury and what "physical injury" means, issues which "in light of the growing number of cases in this area, should be handled expeditiously by the Sentencing Commission and Congress"). *United States v. Shannon*, 110 F.3d 382 (7th Cir. 1998) (statute prohibiting sex with a 13 year old presents a serious potential risk of physical injury because a 13 year old is unlikely to appreciate fully or be able to cope effectively with risk of disease or pregnancy). *United States v. See Walker*, 452 F.3d 723, 725-26 (8th Cir. 2006) (a sexual crime against a young child "innately" poses a serious potential risk of physical injury) (analyzing 18 USC § 2241(c)). *United States v. Bauer*, 990 F.2d 373, 374-75 (8th Cir. 1993) (sexual intercourse with a female child under 16 is a crime of violence under § 4B1.2 because it presents a serious potential risk of physical harm) (analyzing Iowa Code § 709.4). *United States v. Asberry*, 394 F.3d 712, 717 (9th Cir. 2004) (statute

			prohibiting sex with a person under 16 poses a serious potential risk of physical injury in the form of pregnancy or a sexually transmittable disease)
Incest			**Yes** *United States v. Campbell*, 256 F.3d 381, 396 (6th Cir. 2001) (statute criminalizing sexual contact with person age 13 to 16 of the same blood affinity as the defendant presents a serious potential risk of physical injury for the same reasons given in *United States v. Sherwood*, 156 F.3d 219, 221 (1st Cir. 1998) (*see* "unlawful sexual contact" row *infra*.), plus the familial relationship may require the defendant to overcome greater resistance). *United States v. Vigil*, 334 F.3d 1215, 1219-24 (10th Cir. 2004) (statute satisfies § 4B1.2(a)(1) because the threat of force can always be implied from the power asymmetry that exists when a parent inflicts sexual penetration on his or her child, and also satisfies § 4B1.2(a)(2) because of the minor's legal inability to consent regardless of whether s/he factually consents) (analyzing Colo. Rev. Stat. § 18-6-302).
Indecent touching / indecent assault &	**Yes** *Jobson v. Ashcroft*, 326 F.3d 327 (2nd	**No** *United States v. Hargrove*, 416 F.3d	**Yes** *United States v. Campbell*, 256 F.3d

battery / criminal sexual contact / sexual battery	Cir. 2003) (indecent touching presents a substantial risk that it will involve the intentional use of physical force and thus fits § 16(b)'s definition); *Sutherland v. Reno*, 228 F.3d 171, 175 (2nd Cir. 2000) (Mass. Gen. Laws ch. 265, § 13H presents a substantial risk that physical force may be used as contemplated by § 16(b) because the statute requires lack of consent and physical force may be used to overcome that lack of consent). *Remoi v. Attorney General*, 175 Fed.Appx. 580, 585 (3rd Cir. 2006) (a sexual crime against a physically helpless victim, unable to give consent, involves a substantial risk that physical force will be used to commit the crime) (analyzing N.J. Stat. Ann. 2C:14-3(b)). *Zaidi v. Ashcroft*, 374 F.3d 357, 361 n.4 (5th Cir. 2004) (sexual battery inherently carries with it a risk that physical force will be used in the commission of the offense) (following *Sutherland v. Reno*, 228 F.3d 171 (2nd Cir. 2000) and *United States v. Mack*, 53 F.3d 126 (6th Cir. 1995)) (analyzing Okla. Stat. Ann. tit. 21, § 1123). *Patel v. Ashcroft*, 401 F.3d 400, (6th Cir. 2005) (aggravated sexual assault	486, 497-98 (6th Cir. 2005) (where sexual battery statute criminalizes sexual contact between a parent and an adult child or step-child, without proof of lack of consent or coercion, it does not present a serious potential risk of physical injury within the meaning of subclause (ii)) (analyzing Ohio Rev. Code § 2907.03(A)(5)). **<u>Yes</u>** *United States v. Leahy*, 473 F.3d 401, 411 (1st Cir. 2007) (analyzing Mass. Gen. Laws ch. 265, § 13H & finding the statute presents a "serious potential risk of physical injury" based on *Sutherland* and *McVicar*, *infra*.). *United States v. Mack*, 53 F.3d 126, 128 (6th Cir. 1995) (sexual battery through deception carries with it the ever-present possibility that the victim will figure out what is going on and try to resist, thus requiring the perpetrator to resort to physical restraint, and this risk satisfies the standard under ACCA).	381, 396 (6th Cir. 2001) (statute criminalizing sexual contact with person age 13 to 16 of the same blood affinity as the defendant presents a serious potential risk of physical injury for the same reasons given in *United States v. Sherwood*, 156 F.3d 219, 221 (1st Cir. 1998)). *United States v. Rowland*, 357 F.3d 1193, 1195-98 (10th Cir. 2004) (because sexual battery presupposes a lack of consent, by its nature it presents a serious potential risk of injury to another sufficient to qualify as a crime of violence under § 4B1.2).

	is a "crime of violence" under § 16(b) because it requires sexual contact between people of disparate ages, or with a someone who is mentally incapable or physically helpless, or with someone over whom the defendant holds a position of authority and thus carries a substantial risk that physical force will be used). *Lisbey v. Gonzales*, 420 F.3d 930, 931-32 (9th Cir. 2006) (sexual battery is a crime of violence under § 16(b) because statute requires that the touching be committed against the will of the victim and by restraint of the victim, thereby raising a substantial risk of the use of physical force) (analyzing Cal. Penal Code § 243.4(a)).		
Production of child porn			**Yes** *United States v. Champion*, 248 F.3d 502, 506 (6th Cir. 2001) (looking at the legislative history of 18 USC § 2251(a) and concluding that Congress has undertaken the factfinding necessary to conclude that a violation of § 2251(a), by its nature, presents a serious potential risk of physical injury under § 4B1.2). **NOTE**, however, that possession of child porn is not a "crime of violence" under § 4B1.2. *See United States v.*

			McBroom, 124 F.3d 533, 542 (3rd Cir. 1997) (concluding that possession of child porn is a nonviolent offense under § 5K2.13, which distinguishes between nonviolent offenses and "crimes of violence" as defined in § 4B1.2, because it does not have as an element the use, threatened use or attempted use of physical force "and it is not the type of offense listed in § 4B1.2(1) or the application notes to § 4B1.2," and expressing concern that Congress and the Sentencing Commission "chose to define a single term – 'crime of violence' – in very different ways") (analyzing 18 USC § 2252(a)(4) and comparing § 4B1.2's definition with 18 USC § 3156(a)(4), which explicitly includes any felony under chapters 109A or 110 of title 18, including possession of child porn); *accord United States v. Stevens*, 29 F.Supp.2d 592, 610 (D. Alaska 1998) (collection of child pornography is a nonviolent crime in this case because the defendant never had any contact with any of the victims of the pornography and because he played no part in the production or distribution of it) (*overruled on other grounds*, 197 F.3d 1263 (9th Cir. 1999)).
Unlawful imprisonment of incompetent person	**No** *Dickson v. Ashcroft*, 346 F.3d 44 (2nd Cir. 2003) (under state case law		

or child under 16 / child abduction by putative parent	interpreting statute, offense can be committed with the victim's acquiescence and without the use or risk of force) (analyzing N.Y.P.L. § 135.00(1)(b)) (note that *Dickson* found that the unlawful imprisonment of an adult under the same statute *is* a crime of violence). *United States v. Franco-Fernandez*, 511 F.3d 768, 770-72 (7th Cir. 2008) (statute requiring only that putative father conceal, detain, or remove child without mother's consent does not contain an element of force as required by § 16(a) and does not pose a substantial risk that force will be used in the course of committing the offense as required by § 16(b) because it does not require that the child be restrained against its will) (analyzing 720 Ill. Comp. Stat. 5/10-1(a)).		
Unlawful sexual contact with a person under X [13, 14, 16] years of age / taking indecent liberties with a child	**Yes** *Dos Santos v. Gonzales*, 440 F.3d 81, 85-86 (2nd Cir. 2006) (following *Chery*, *infra*., and holding that the deliberate touching of a child carries an inherent risk of the use of force regardless of the age of the defendant at the time because a child cannot consent to the touching) (analyzing Conn. Gen. Stat. § 53a-21(a)(2)). *United States v. Velazquez-Overa*, 100	**Yes** *United States v. Richards*, 456 F.3d 260, 264 (1st Cir. 2006) (analyzing Me. Rev. Stat. Ann. Tit. 17-A, § 255(1)(c) and following *Sherwood*'s assumptions (see next column) and also finding that the minimum age difference between the child and the defendant heightens the risk "inherent in the contact").	**No** *United States v. Bartee*, __F.3d__, 2008 WL 2340224 (6th Cir. June 10, 2008) (In light of Begay, criminal sexual conduct in the second degree under Michigan law, defined in this case as engaging in sexual contact with another person under circumstances involving the commission of any other felony, to wit, solicitation of a minor (under the age of 16) for immoral purposes, is not

	F.3d 418, 422 (5th Cir. 1995) (sexual contact with a child typically occurs in close quarters and is perpetrated by an adult upon a victim who is smaller, weaker, less experienced, and "generally susceptible to acceding to the coercive power of adult authority figures") (Tex. Penal Code § 21.11(a)(1)).		a "crime of violence" under § 4B1.2). **Yes** *United States v. Sherwood*, 156 F.3d 219, 221 (1st Cir. 1998) (analyzing R.I. Gen. Laws § 11-37-4 and assuming that most child molestation offenses occur in close quarters and are generally perpetrated by an adult upon a victim who is smaller, weaker, less experienced, and "generally susceptible to acceding to the coercive power of adult authority figures").[19] *United States v. Pierce*, 278 F.3d 282, 288-91 (4th Cir. 2002) (sexual abuse cases involving adult defendants and child victims "inherently" presents a serious potential risk of physical injury to the child) (analyzing N.C. Gen. Stat. § 14-202.1). *United States v. Wood*, 52 F.3d 272, 276 (9th Cir. 1995) (completed offense of indecent liberties with a minor (here, age 5) presents a serious potential risk of injury and thus falls within the "otherwise" clause of §

[19] The Ninth Circuit has also held that sexual contact with a minor is a crime of violence under § 4B1.2. *See United States v. Granbois*, 376 F.3d 993 (9th Cir. 2004) (relying on precedent involving a different Guideline definition of crime of violence (§ 2L1.2) to hold that a statute prohibiting sexual contact with a person between the ages of 12 and 15 is a "per se" crime of violence under § 4B1.2) (analyzing 18 USC § 2244(a)(3)). The decision's reliance on 2L1.2is wrong as a matter of law because it defines "crime of violence" differently than § 4B1.2 does. *See United States v. Asberry*, 394 F.3d 712, 720-24 (9th Cir. 2005) (Bea, J., concurring). Accordingly, it is mentioned here but not included on the chart.

			4B1.2).

THEFT OFFENSES

	18 U.S.C. § 16	18 U.S.C. § 924(e)(2)(B)	U.S.S.G. § 4B 1.2
Auto theft		**Previously yes, but likely no after *Begay*** These cases are likely not good law after *Begay*.[20] *United States v. Barbour*, 395 F.3d 826, 827-28 (8th Cir. 2005) (following pre-*Leocal*/pre-*Begay* precedent to hold that auto theft or attempted auto theft is a violent felony under § 924(e) "due to the serious risks involved) (citing *United States v. Sun Bear*, 307 F.3d 747 (8th Cir. 2002) (same under § 4B1.2) and *United States v. Sprouse*, 394 F.3d 578 (8th Cir. 2005) (applying *Sun Bear* to § 924(e)).	**Yes** *United States v. Scott*, 413 F.3d 839, 840 (8th Cir. 2005) (following pre-*Leocal* precedent to hold that auto theft involves a number of risks that the perpetrator "will offer violence" to a person and distinguishing *Leocal* on the ground that the risk here is that the defendant *will* intentionally resort to violence and that, in any event, § 4B1.2 is only concerned with a risk of physical injury) (citing *United States v. Sun Bear*, 307 F.3d 747 (8th Cir. 2002)) (analyzing Mo. Rev. Stat. § 570.030).
Larceny of a person, unarmed		**Yes, but unclear after *Begay*.**[21] *United States v. Mobley*, 40 F.3d 668, 696	**Yes** *United States v. DeJesus*, 984 F.2d 21,

[20] These cases have recently been called into question because more recent cases following *Sun Bear, Sprouse*, and *Barbour* have been remanded by the Supreme Court for reconsideration after *Begay*. *See United States v. Miller*, 223 Fed. Appx. 522 (8th Cir. 2007), *vacated by Miller v. United States*, __ S.Ct. __, 2008 WL 1775007 (2008);*United States v. Walker*, 494 F.3d 688 (8th Cir. 2007), *vacated by Walker v. United States*, __ S.Ct. __, 2008 WL 1775014 (2008).

[21] *Begay* stated that Congress intended § 924(e)'s definition to include "both crimes against the person (clause (i)) and certain physically risky property crimes (clause (ii))." *See Begay*, 128 S.Ct. at 1586. Whether larceny of a person is a property crime or a crime against the person depends on state statutory and decisional law. If the larceny offense in the case is a property crime, it would fit, if at all, under subclause (ii), and whether it counts as an ACCA predicate would then depend on whether it is similar both in kind and in degree of risk to the example crimes. *See id*. at 1585.

		(4th Cir. 1994) (where statute requires a "sudden or stealthy seizure or snatching . . . from the person or immediate actual possession of another," it presents a serious potential risk of injury to another under subclause (ii) because "whenever the pickpocketing fails and the criminal is detected, a confrontation is likely") (analyzing D.C. Code § 22-2901). *United States v. Howze*, 343 F.3d 919, 923 (7th Cir. 2003) (pickpocketing and other unarmed thefts nonetheless entail a risk that violence will erupt between the defendant and the victim similar to the risk posed by burglary, and thus satisfy ACCA's serious potential risk of physical injury standard) (analyzing Minn. Stat. §§ 609.52(2)(1) & 609.52(3)(3)(d)). *United States v. Hudson*, 414 F.3d 931, 935 (8th Cir. 2005) (following pre-*Leocal* precedent to find that by its nature, the crime of theft from a person involves a substantial risk that the victims would be harmed when their property is taken from them; *Leocal* does not undermine that precedent because § 16 deals with risk of use of force, not risk of physical injury) (analyzing Minn. Stat. §§ 609.52(2)(1) & 609.52(3)(3)(d)(i)). *United States v. Jennings*, 515 F.3d 980, 988-89 (9th Cir. 2008) (where statute defines	24-25 (1st Cir. 1993) (analyzing the "degree of risk, expressed in terms of the probability of physical harm, presented by the mine-run of conduct that falls within the heartland of the statute," court finds that a "sufficiently serious potential for confrontation and physical injury invariably exists" with larceny of a person offense) (analyzing Mass. Gen, Laws ch. 266, § 25(b) and relying on *United States v. McVicar*, 907 F.2d 1 (1st Cir. 1990) (same regardless of fact that offense typically involves no threat of violence and the victim may even be unaware of the crime).

		theft from a person as requiring that the property be on or attached to the person, it categorically sets forth a crime of violence under subclause (ii)) (analyzing Wash Rev. Code § 9A.56.030(1)(b)); *United States v. Wofford*, 122 F.3d 787, 793-94 (9th Cir. 1997) (same) (analyzing Cal. Penal Code § 487(2)).	
Unauthorized use of a motor vehicle / tampering by operation	**No** *United States v. Sanchez-Garcia*, 501 F.3d 1208, 1210, (10th Cir. 2007) (does not satisfy § 16(a) because statute does not have an element involving the use of force and does not satisfy § 16(b) because it is so broad as to reach conduct without any threat of force at all and "logic and common sense indicate" that Congress did not intend to treat joyriders the same as murderers, rapists, robbers or burglars) (analyzing Ariz. Rev. Stat. § 13-1803(A)(1) & expressly rejecting reasoning in *Galvan-Rodriguez*, cited below). **Yes** *Brieva-Perez v. Gonzales*, 482 F.3d 386, 360-61 (5th Cir. 2007) (following pre-*Leocal* decisions to hold that unauthorized use of a motor vehicle carries a substantial risk that the vehicle might be broken into, stripped or vandalized and thus fits under §	**Yes, but likely not good law after *Begay*.** *United States v. Counts*, 498 F.3d 802, 803-04 (8th Cir. 2007) (following *United States v. Johnson*, 417 F.3d 990, 997-99 (8th Cir. 2005), which held that tampering with an automobile constitutes a crime of violence because it has a "close connection" to automobile theft and the risks associated with it are sufficient to satisfy ACCA, and finding that *Leocal* does not change that result because § 16(b is more limited in scope than § 924(e)) (analyzing Mo. Rev. Stat. § 569.080); *United States v. Smith*, 231 Fed.Appx. 529 (8th Cir. 2007) (same). **NOTE** The Supreme Court GVR'd *Counts* and *Smith* after *Begay*. *See Smith v. United States*, __ S.Ct. __, 2008 WL 1775011 (2008); *Counts v. United States*, __ S.Ct. __, 2008 WL 1775012 (2008).	**Yes** *United States v. Young*, 229 Fed.Appx. 423, 424 (8th Cir. 2007) (following precedent under ACCA to find that tampering with an automobile constitutes a crime of violence under § 4B1.2) (analyzing Mo. Rev. Stat. § 569.080).

	16(b)) (analyzing Tex. Penal Code § 31.07(a)); *Ramirez v. Ashcroft*, 361 F.Supp.2d 650, 655-56 (S.D. Tex. 2005) (following pre-*Leocal* decisions to hold that, like burglary, unauthorized use of a motor vehicle satisfies § 16(b) because it requires intentional conduct and because of the risk that the vehicle will be vandalized while obtaining access to it; court rejects as insufficient after *Leocal* other previously accepted risks that the vehicle will be operated recklessly, be left in a manner that exposes it to vandalism, or engage in a high-speed car chase to evade authorities) (citing *United States v. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999)).		

ASSAULT, ESCAPE & OTHER OFFENSES

	18 U.S.C. § 16	18 U.S.C. § 924(e)(2)(B)	U.S.S.G. § 4B 1.2
Aggravated battery by means of intentional physical contact whereby great bodily harm, disfigurement or death can be inflicted	**No** *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 466-67 (5th Cir. 2006) (aggravated battery statute as written does not fit § 16's definition because intentional physical contact is not the equivalent of physical force and the statute can be violated without intent to injure the victim or to overcome any non-consent) (analyzing Kan. Stat. Ann. § 21-		

	3414(a)(1)(C)).		
Aggravated discharge of a firearm	**Yes** *Quezada-Luna v. Gonzales*, 439 F.3d 403, 406 (7th Cir. 2006) (knowingly or intentionally discharging a firearm into a building that the defendant knows or should know is occupied has as an element the use, threatened use or attempted use of physical force against a person or property under § 16(a) and describes conduct that presents a substantial risk that physical force against the person or property of another will be used) (analyzing 720 Ill. Comp. Stat. 5/24-1.2).		**Yes** *United States v. Rice*, __ F.3d __, 2008 WL 852590, *8 (7th Cir. April 1, 2008) ("[d]ischarging a firearm in the direction of another person or of a vehicle one reasonably should know to be occupied carries with it "a serious potential risk of physical injury to another" which is all that is required to constitute a crime of violence under § 4B1.2(a)") (analyzing 720 Ill. Comp. Stat. 5/24-1.2).
Assault or threatening	**Yes** *United States v. Aragon-Ruiz*, 2008 WL 706590, *17-18 (D. Minn. Mar. 14, 2008) (aiding and abetting second degree assault is a crime of violence under § 16(b) where statute criminalizing assault requires both intent to put someone in fear of harm or to cause bodily harm and a dangerous weapon, thereby satisfying the risk that physical force will be "actively employed" in the commission of the offense) (analyzing Minn. Stat. §§ 609.02, subd. 10 & 609.222, subd. 1). *Rashid v. Gonzales*, 190 Fed.Appx. 676, 679-80 (10th Cir. 2006) (third-degree assault statute is not categorically a	**Yes** *United States v. Sperberg*, 432 F.3d 706, 707-08 (7th Cir. 2005) (threatening a security guard by saying the defendant had a gun constitutes a crime of violence under ACCA because it has as an element the threatened use of force against another) (analyzing Wis. Stat. § 943.30(1)).	**Yes** *United States v. Krejcarek*, 453 F.3d 1290, 1294-95 (10th Cir. 2006) (third degree assault statute, which punishes anyone who "knowingly or recklessly causes bodily injury to another person" and has been interpreted to apply to any "non-trifling injury" satisfies § 4B1.2(a)(2)'s standard of a serious potential risk of physical injury to another") (analyzing Colo. Rev. Stat. § 18-3-204) (relying on *United States v. Paxton*, 422 F.3d 1203, 1206-07 (10th Cir. 2005) (same and noting that "[w]e have concluded that a number of offenses lacking the use of physical force as an element are nonetheless crimes of violence

	crime of violence under § 16(a) or 16(b), but it fits in this case under § 16(b) using modified categorical approach because jury instructions discussed whether defendant was justified in using physical force; refusing to follow *Krejcarek* (see second column to the right) because of the "significant difference" between risk of force and risk of injury and because § 4B1.2 is "obviously broader" than § 16(b)) (analyzing Colo. Rev. Stat. § 18-3-204).		[under § 4B1.2] because of an inherent risk of physical injury")).
Assault and battery, simple	**No** *Fortes v. Mukasey*, 256 Fed.Appx. 715, 718-20 (5th Cir. 2007) (where circuit defines "physical force" under § 16(a) as "violent or destructive force," neither slight force nor indirect force qualifies, so state law permitting conviction for simple assault and battery by such means does not categorically satisfy § 16(a); court did not reach whether it fit under § 16(b)) (analyzing Mass. Gen. Laws ch. 265, § 13A)(a)). *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003) (interpreting § 16(a) to require that the "force" used in the offense be violent in nature, "the sort that is intended to cause bodily injury or at a minimum is likely to do so," and state statute permitting battery conviction for an "offensive touching" does not satisfy that requirement, and		**No** *United States v. Jones*, 235 F.3d 342, 346-48 (7th Cir. 2000) (actual, attempted or threatened force is not an element of the crime, and boilerplate language in the charging document is not sufficient to show that the conduct by its nature presented a serious potential risk of physical injury to another) (analyzing Mass. Gen. Laws ch. 265, § 13A)(a)). **Yes** *United States v. Mangos*, 134 F.3d 460, 464- (1st Cir. 1998) (boilerplate language in the charging document that defendant charged with simple assault and battery "did assault and beat" the complainant is sufficient to demonstrate a serious potential risk of physical injury to another) (analyzing Mass. Gen. Laws ch. 265,

	does not satisfy § 16(b) because it is not a felony or punishable by more than 1 year imprisonment) (analyzing Ind. Code § 35-42-2-1). *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1015-16, 1020 (9th Cir. 2006) (conviction for battery does not satisfy § 16(a) because the phrase "by force or violence" has been interpreted by state courts to require only an offensive touching, which is insufficient to satisfy *Leocal*'s interpretation of § 16 as requiring active, violent conduct, and does not satisfy § 16(b) because the offense is not a felony and is not punishable by more than one year imprisonment) (analyzing Cal. Penal Code § 242). **Yes** *Hernandez v. U.S. Atty Gen*, 513 F.3d 1336, 1340-42 (11th Cir. 2008) (rejecting suggestion that the required force must be "violent" to fit under § 16 and finding that statute that prohibits intentionally causing physical harm to a victim through actual physical contact constitutes a "crime of violence" under § 16(a); government conceded it did not fit under § 16(b)) (analyzing Ga. Code		§ 13A)(a)).

	Ann. § 16-5-23 and citing pre-*Leocal* precedent).[22]		
Assault & battery on a police officer	**Yes** *Canada v. Gonzales*, 448 F.3d 560, 568-69 (2nd Cir. 2006) (assault and battery on a public safety officer fits under § 16(b) because it requires that the defendant specifically intend to prevent the officer from performing her official duties) (analyzing Conn. Gen. Stat. § 53a-167c).		
Assault with a firearm	**Yes** *United States v. Heron-Salinas*, 2008 WL 818496, *2-3 (S.D. Cal. Mar. 25, 2008) (statute defining assault as "willfully [defined as "intentionally"] committed an act which by its nature would probably and directly result in the application of physical force on another person" satisfies both § 16(a) and § 16(b)).		
Carrying a concealed weapon		**No** *United States v. Flores*, 477 F.3d 431, 435-37 (6th Cir. 2007) (carrying a concealed weapon does not involve the type of affirmative and active conduct as § 924(e)(2)(B)'s examples and language require, and state law allows it with an appropriate license, suggesting it's not sufficiently risky conduct to qualify under subclause	**Yes** *United States v. Maysonet*, 199 Fed.Appx. 791, 794 n.5 (11th Cir. 2006) (*Leocal* does not cast doubt on prior precedent holding that carrying a concealed weapon involves active conduct beyond mere possession and thus poses a serious potential risk of physical injury to another under § 4B1.2(a)(2)) (analyzing Fla. Stat. §

[22] This reasoning has been called into question by *Begay*, which had not been decided at the time the Eleventh Circuit issued its opinion, and by *Leocal*, which had been decided but was not discussed in the opinion.

		(ii)) (analyzing Mich. Comp. Laws § 750.227). *United States v. Whitfield*, 907 F.2d 798, 800 (8th Cir. 1990) ("[a]lthough carrying an illegal weapon may involve a continuing risk to others, the harm is not so immediate as to present a serious potential risk of physical injury to another") (analyzing Mo. Rev. Stat. § 571.030) (internal punctuation omitted). **Yes** *United States v. McCarty*, 213 Fed.Appx. 859, 862 (11th Cir. 2007) (*Leocal* does not alter prior finding that carrying a concealed firearm is a "violent felony" under subclause (ii) because it involves active conduct and the statutory language in § 16 "is narrower than the language of 18 USC § 924(e)(2)") (analyzing Fla. Stat. § 790.01); *United States v. Maysonet*, 199 Fed.Appx. 791, 794 n.5 (11th Cir. 2006) (carrying a concealed weapon involves active conduct beyond mere possession and thus poses a serious potential risk of physical injury to another under § 924(e)(2)(B)) (analyzing Fla. Stat. § 790.01 & relying on *United States v. Hall*, 77 F.3d 398 (11th Cir. 1996)).	790.01 & *United States v. Gilbert*, 138 F.3d 1371 (11th Cir. 1998)).
Escape / walkaway	**Yes**	**No**	**No**

escape / failure to report	*United States v. Aragon*, 983 F.2d 1306, 1313-14 (4th Cir. 1993) (attempting to instigate or assist in the escape of a federal prisoner satisfies § 16(b) because of the "intrinsic" risk that physical force may be used to evade capture) (analyzing 18 USC § 752).	*United States v. Collier*, 493 F.3d 731, 734-(6th Cir. 2007) (distinguishing *Harris* (*see* column to the right) and finding that escape statute that criminalizes a failure to report does not categorically constitute a crime of violence under § 924(e) at least where the statute at issue does not make escape a continuing offense that lasts until recapture) (analyzing Mich. Comp. Laws § 750.193). **Yes**[23] *United States v. Jackson*, 301 F.3d 59, 63 (2nd Cir. 2002) (escape qualifies as an ACC predicate because it "invites pursuit; and the pursuit, confrontation, and recapture of the escapee entail serious risks of physical injury to law enforcement officers and the public") (analyzing Fla. Stat. § 944.40). *United States v. Hairston*, 71 F.3d 115, 117-18 (4th Cir. 1995) (even though most felony escapes in North Carolina are undertaken by stealth and	*United States v. Piccolo*, 441 F.3d 1084, 1089-90 (9th Cir. 2006) ("walk-away escapes that involve no violence or potential violence . . . . [do] not present[] a serious potential risk of physical injury to another" under § 4B1.2(a)(2)) (analyzing 18 USC § 751(a)) **Yes** *United States v. Winn*, 364 F.3d 7, 12 (1st Cir. 2004) (following *Gosling*'s "powder keg" rationale to find that escape from custody is categorically a crime of violence under § 4B1.2(a)) (analyzing N.H. Rev. Stat. Ann. § 642:6). *United States v. Grant*, 235 Fed.Appx. 911 (3rd Cir. 2007) (reaffirming *United States v. Luster*, 305 F.3d 199, 202 (3rd Cir. 2002), which held that escape from a halfway house presents a serious potential risk of physical injury to another under the "powder keg"

[23] The Supreme Court has granted cert on this issue, which *Begay*'s focus on "purposeful, violent and aggressive conduct" has called into question. *See Chambers v. United States*, __ S.Ct. __, 2008 WL 1775023 (April 21, 2008); *see also Begay*, 128 S.Ct. at 1586. The Seventh Circuit had affirmed treating the defendant's prior walkaway escape conviction as a violent felony but had also noted that "it is an embarrassment to the law when judges base decisions of consequence on conjectures" and that "[t]he Sentencing Commission, or if it is unwilling a criminal justice institute or scholar, would do a great service to federal penology by conducting a study comparing the frequency of violence in escapes from custody to the frequency of violence in failures to report or return." *United States v. Chambers*, 473 F.3d 724, 726-27 (7th Cir. 2007)

		conducted at minimum security prisons, escape nonetheless presents a serious potential risk of physical injury to another because of the chance that the escapee will use physical force to evade capture) (analyzing N.C. Gen. Stat. § 148-45(b)(1)). *United States v. Moudy*, 132 F.3d 618, 620 (10th Cir. 1998) (following *Gosling* (*see* column to the right) in the context of § 924(e)); *but see United States v. Adkins*, 196 F.3d 1112, 1119 (10th Cir. 1999) (McKay, J., concurring) (stating that "[t]here is a quantum difference between the assumptions about the intrinsic danger of unauthorized departure from actual custody, as in this case, and of failure to return from authorized departure from actual custody" and that presuming the latter to be a "crime of violence" under § 924(e)(2)(B)(ii) would be "an abuse of languagte and a departure from the text of the statute").	theory) (analyzing 18 Pa. Const. Stat. § 5121(a)). *United States v. Dickerson*, 77 F.3d 774, 777 (4th Cir. 1996) (following *Hairston* to find that attempted escape from custody creates a serious potential risk of physical injury to another) (analyzing 18 USC § 751(a)); *United States v. Carter*, 349 F.Supp.2d 982, 990 (E.D. Va. 2004) (escape from custody is not a crime of violence due to the risk of accidental injury that may occur to another person in the course of a prison break, but rather because an escapee confronted with an obstacle to escape may choose to dispel the interference by means of physical force). *United States v. Mitchell*, 180 F.3d 675, 677 (5th Cir. 1999) (applying the "powder keg" theory to find that walkaway escape is a crime of violence under § 4B1.2(a)) (analyzing 18 USC § 751(a)). *United States v. Harris*, 165 F.3d 1062, 1067-68 (6th Cir. 1999) (following *Gosling*, *infra*., and finding that escape creates a serious potential risk of physical injury under the "powder keg" theory even when

			accomplished by stealth) (analyzing Tenn. Code Ann. § 39-5-706). *United States v. Bryant*, 310 F.3d 550, 553 (7th Cir. 2002) (escape by failure to return to a halfway house creates a serious potential risk of physical injury to another person under the "powder keg" theory). *United States v. Nation*, 243 F.3d 467, 472-73 (8th Cir. 2001) ("every escape, even a so-called 'walkaway escape,' involves a potential risk of injury to others" under the powder-keg theory). *Unites States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) (escape presents a serious potential risk of physical injury to another under the "powder keg" theory) (analyzing N.D. Cent. Code § 12-16-05). *United States v. Gay*, 251 F.3d 950, 955 (11th Cir. 2001) (even walk-away escape from an unsecured facility qualifies because it "present[s] the potential risk of violence") (analyzing Ga. Code Ann. § 16-10-52). *United States v. Thomas*, 333 F.3d 280, 281-83 (D.C. Cir. 2003)

			(recognizing that the categorical approach to escape offense adopted by some circuits "proves too much" because the "powder keg" rationale could apply to any lawbreaker whom the police attempt to arrest, but nonetheless finding that where the defendant escaped from a police officer, the risk of a violent confrontation is sufficient to satisfy § 4B1.2(a)(2)) (analyzing D.C. Code § 22-2601).
Fleeing or eluding a police officer / failing to stop for a blue light	**No** *Penuliar v. Mukasey*, __ F.3d __, 2008 WL 1792649, * 3-5 (9th Cir. Apr. 22, 2008) (because state statute makes it possible to engage in "willful or wanton disregard for the safety of persons or property" while fleeing police officer by negligently committing three Vehicle Code violations, it is broader than § 16 as interpreted by *Leocal*) (analyzing Cal. Vehicle Code § 2800.2). **Yes** *United States v. Moses*, 2005 WL 3454317, * 5 (E.D. Wis. Dec. 16, 2005) (applying reasoning of *United States v. Bryant*, 310 F.3d 550, 553 (7th Cir. 2002) (escape/powder keg theory) to offense knowingly fleeing or eluding a police officer and finding the conduct presents a substantial risk that the person will use	**No** *United States v. Jennings*, 515 F.3d 980, 988-89 (9th Cir. 2008) (where statute does not require proof of an actual or potential risk to others for a conviction, it is missing an element of the generic crime of fleeing a police officer and therefore categorically cannot serve as a predicate under subclause (ii) and Ninth Circuit precedent) (analyzing Wash Rev. Code § 9A.56.030(1)(b) & citing *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007)). **Yes, but unclear after *Begay*** *Powell v. United States*, 2005 WL 1412418, *1 (D. Me. June 9, 2005) (following *James*, *Martin*, and *Howze*, *infra*, to find that eluding a police office counts as a crime of violence under § 924(e)(2)(B)(ii)) (analyzing	**No** *United States v. Kelly*, 422 F.3d 889, 893-94 (9th Cir. 2005) (where statute has been interpreted to permit conviction even without actual danger or serious risk of harm to any person so long as a risk to property exists, it cannot satisfy § 4B1.2(a)(2)) (analyzing Wash Rev. Code § 46.61.024). **Yes** *United States v. Dixon*, 224 Fed. Appx. 264, 267 (4th Cir. 2007) (speeding to elude arrest creates serious potential risk of physical injury to another, following *James* (see column to left), thus a crime of violence under § 4B1.2) (analyzing N.C. Gen. Stat. § 141.5).

	force or violence to avoid apprehension within the meaning of § 16(b)) (analyzing Wis. Stat. § 346.04(3)).	Me. Rev. Stat. Ann. Tit. 29, § 2501-A). *United States v. James*, 337 F.3d 387 (4th Cir. 2003) (failure to stop for a blue light counts under subclause (ii) because it involves a deliberate choice to disobey the officer's signal, thereby posing a threat of confrontation between the officer and the occupants of the vehicle, which in turn creates a serious potential risk of injury to all involved and bystanders) (analyzing S.C. Code § 56-5-750(B)(1)) *United States v. Young*, 2007 WL 4118965, *6-7 (6th Cir. Nov. 16, 2007) (applying *Martin* (*see* column to the left) to find that fleeing and eluding is categorically a crime of violence under § 924(e), and reading Supreme Court's decision in *James* to require courts determine whether a serious potential risk of physical injury exists in an "ordinary" case under a given statute, and not whether the statute could) (analyzing Mich. Comp. Laws § 257.602A3). *United States v. Howze*, 343 F.3d 919, 921-22 (7th Cir. 2003) (following *Bryant*'s reasoning to find that because all escapes must be classified as crimes of violence based on the risk	*United States v. Martin*, 378 F.3d 578, 582-83 (6th Cir. 2004) (fleeing police officer in a vehicle "creates a conspicuous potential risk of injury to pedestrians, vehicles sharing the road, passengers in the fleeing car and the pursuing officer" and also "provokes an inevitable, escalated confrontation with the officer," thereby creating a serious potential risk of injury to another, even though the statute at issue may be violated by "passive, non-violent and non-threatening conduct") (analyzing Mich. Comp. Laws § 750.479a)) *United States v. Albritton*, 135 Fed.Appx. 239, 243 (11th Cir. 2005) (where state statute requires injury to person or damage to property, the crime presents a serious potential risk of physical injury to another under § 4B1.2(a)(2)) (analyzing Fla. Stat. § 316.1935(4))

		that someone will get hurt during recapture or during flight to avoid recapture, which risk is always present regardless of the manner of escape, and noting that flights to avoid arrest are also violent crimes) (analyzing Wis. Stat. § 346.04(3)).	
Harassment	**No** *Singh v. Ashcroft*, 386 F.3d 1228, 1231 n.3, 1233-34 (9th Cir. 2004) (state statute does not satisfy § 16(a) because it requires only an offensive touching and thus does not require that the "force" required by the statute be violent in nature and does not satisfy § 16(b) because it is neither a felony nor punishable by more than 1 year imprisonment) (analyzing Ore. Rev. Stat. § 166.065(1)(a)(A)).		
Hit and run			**No** *United States v. Carter*, 349 F.Supp.2d 982, 987-90 (E.D. Va. 2004) (hit and run is not a crime of violence under § 4B1.2 because (1) the statute imposes a duty to stop on a person involved in an accident regardless of the person's culpability in the accident, (2) the statute is located in the Motor Vehicles chapter of the state code, not the violent crimes chapter, and (3) *Leocal* requires a line between violent and other crimes by looking to the

			volitional nature of the conduct giving rise to the injury versus accidental or negligent conduct) (analyzing Va. Code Ann. § 46.2-894).
Hostage taking	**Yes** *Acero v. United States*, 2005 WL 615744, * 7 (E.D. N.Y. Mar. 16, 2005) (hostage taking is analogous to unlawful imprisonment and kidnapping in that it carries a risk that physical force will be used as required by § 16(b)).		
Menacing	**No** *United States v. Salinas-Armendariz*, 492 F.Supp.2d 682, 684-85 (W.D. Tex. 2007) (statute does not satisfy § 16(a) where it does not categorically require as an element the use of physical force, and does not satisfy § 16(b) because knowingly placing a person in fear of bodily injury through physical action and the use of a deadly weapon does not by its nature present a substantial risk that physical force will be intentionally used) (analyzing Colo. Rev. Stat. § 18-3-206)		
Resisting arrest	**Yes** *Estrada-Rodriguez v. Mukasey*, 512 F.3d 517, 521-22 (9th Cir. 2007) (resisting arrest qualifies as a crime of violence under § 16(b) because the statute's intent requirement satisfies *Leocal*'s focus on intentional action and state supreme		**No**, under § 4B1.2(1): *United States v. Fowles*, 225 Fed.Appx. 713, 714-15 (9th Cir. 2007) (resisting arrest conviction in this case does not satisfy § 4B1.2(1) because it does unequivocally establish that the defendant actively

	court interpreted statute to require actual opposition or resistance (as opposed to nonviolent nonsubmission or flight), meaning that offenders take the chance that the incident will escalate and the use of physical force against another might be required in committing the crime) (analyzing Ariz. Rev. Stat. § 13-2508).		and intentionally directed physical force against the officers as required by *Leocal* and *Fernandez-Ruiz*) (analyzing Cal. Penal Code § 69).
Stalking	**No** *Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1083-84 (9th Cir. 2007) (statute does not categorically satisfy § 16(a) under *United States v. Jones*, 231 F.3d 508, 519-20 (9th Cir. 2000) and does not categorically satisfy § 16(b) because it permits conviction on the basis of "long-distance harassing, which created no substantial risk of application of physical force against his victim or her property") (analyzing Cal. Penal Code § 646.9).		**No**, under § 4B1.2(a)(1) *United States v. Jones*, 231 F.3d 508, 519-20 (9th Cir. 2000) (vacating sentence where element of "threat to safety" in stalking statute as interpreted by state appeals court does not necessarily involve a threat of physical force) (analyzing Cal. Penal Code § 646.9).
Unlawful restraint	**Yes** *Dickson v. Ashcroft*, 346 F.3d 44 (2nd Cir. 2003) (unlawful imprisonment of an adult satisfies § 16 where statute requires either the use or risk of force) (analyzing N.Y.P.L. § 135.00(1)(b)) (note that *Dickson* found that the unlawful imprisonment of a child or incompetent is *not* a COV under this statute because it dose not contain the same requirement for those types of victims).	**Yes** *United States v. Wallace*, 326 F.3d 881, 887 (7th Cir. 2003) ("a situation where one person restrains another against his or her will presents a 'serious potential risk of physical injury,' whether it be in the initial restraint or the possible resulting confrontation") (analyzing 720 Ill. Comp. Stat. 5/10-3).	**Yes** *United States v. Roberts*, 47 F.3d 1172 (6th Cir. 1995) (analogizing to kidnapping to find that the crime of unlawful imprisonment categorically involves a serious potential risk of physical injury to another because the risk of injury is "invariably present") (analyzing Ky. Rev. Stat. § 509.020).

Witness intimidation		**No** *United States v. Sherbondy*, 865 F.2d 996, 1010-11 (9th Cir. 1988) (state statute defining both actual assault on a person and defacing of property cannot be said to create a narrow category of criminal offenses that "intrinsically" involve conduct that presents a serious potential risk of physical injury to another) (analyzing Cal. Penal Code § 136.1(c)(1)). **Yes** *United States v. Sawyers*, 409 F.3d 732, 742-43 (6th Cir. 2005) (state statute requiring "harm or threat to harm" another person, which court interprets to mean "threats or force made against a person," establishes a serious potential risk of physical injury to another) (analyzing Tenn. Code Ann. § 39-16-510(a)(1)).	