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> Depending on who you believe, [the] defendant either coldly knelt down, aimed, and shot his neighbor through the heart, or recklessly shot him by accident while the two were playing a "drunken game" with a rifle. The jury went with version two, convicting him of the lesser-included offense of involuntary manslaughter.[1]

In brief, this is the story behind *United States v. Benally*.[2] What the jury did not know is that while the version of facts it rejected constituted a violent crime, the version it went with did not.[3]

To promote the government's interest in public safety, the United States limits the rights of those who have committed a "crime of violence."[4] While it seems it would be simple to ascertain which crimes fall into this category, the last nine years of case law have opened the door to a bizarre world that upends nearly every inherent belief we have about what constitutes violence.[5]

In *Benally*, the Ninth Circuit considered whether the defendant committed a "crime of violence."[6] Joe Benally had been convicted of involuntary manslaughter, a crime that necessarily includes the death of a human being,[7] in the U.S. District Court for the District of Arizona.[8] The trial court imposed a ten-year minimum sentence upon finding that Benally discharged a firearm in connection with a "crime of violence."[9] However, the *Benally* court, using the "categorical approach,"[10] held that because the crime of involuntary manslaughter does not require intentional conduct, it could not constitute a "crime of violence."[11]

This case comment contends that the Ninth Circuit erred when it held that the elements of involuntary manslaughter are inconsistent with a "crime of violence." First, the court should have conducted its analysis under the conduct-specific approach instead of the categorical approach. Second, the court inaccurately expanded a law

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1. *9th Circuit Defense Wins: "Crimes of Violence", Self-Authentication and Indian Tribes, Sentencing Remand*, Fed. Crim. Appeals Blog (Aug. 5, 2016), https://www.federalcriminalappealsblog.com/2016/08/9th-circuit-defense-wins-crimes-violence-self-authentication-indian-tribes-sentencing-remand.html.

2. 843 F.3d 350 (9th Cir. 2016).

3. *See id.*

4. *See* 18 U.S.C. § 924(c) (2012).

5. *See* David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 Conn. L. Rev. 209, 209, 211 (2010).

6. *Benally*, 843 F.3d at 351–52.

7. *See* 18 U.S.C. § 1112(a) (2012).

8. *Benally*, 843 F.3d at 351.

9. Judgment in a Criminal Case, United States v. Benally, 2013 WL 12191083 (D. Ariz. Dec. 16, 2013) (No. 13-08095).

10. Under the categorical approach, the court does "not look to the particular facts underlying the conviction, but 'compare[s] the elements of the statute forming the basis of the defendant's conviction with the elements of' a 'crime of violence.'" *Benally*, 843 F.3d at 352.

11. *Id.* at 352–54.

that exclusively serves immigration purposes. Third, the court failed to consult the U.S. Sentencing Commission Guidelines (the "Guidelines"). Finally, the court erred in not implementing the substantial risk analysis. The court's holding undermines the purpose of sentencing enhancements for crimes committed with firearms.

On the afternoon of January 17, 2013, Carlos Harvey was drinking alcohol with brothers Daryl, Brian, and Donovan Levi.[12] At some point, Joe Arviso Benally, the Levis' uncle, rode up to the group on horseback and began to drink with them.[13]

According to witnesses Daryl Levi and a friend, at around 5:00 p.m., Benally and Harvey began arguing outside of Benally's house, and Harvey pushed Benally to the ground.[14] Harvey apologized, but Benally refused to accept the apology.[15] Instead, Benally told Harvey that he was going to kill him and then went inside his home.[16] He returned carrying a black Zastava .270 caliber hunting rifle.[17] Benally then fiddled with and loaded his gun.[18] Daryl yelled for Harvey to come to the Levi home.[19] Harvey, who was intoxicated, waved him off, and Benally fired his gun into Harvey's chest, bringing Harvey to the ground.[20]

Immediately after the shot was fired, Daryl ran to tell his brother Brian what happened.[21] The brothers returned to Harvey's body and saw Benally nearby.[22] They confronted Benally, who then threw a punch at Brian.[23] Unsure of whether Benally had another weapon and knowing that he had just shot Harvey, the brothers struck, hit, and kicked Benally several times.[24]

On January 19, 2013, an autopsy of Harvey's body revealed that he died of a single gunshot wound to the chest.[25] The medical examiner concluded that "the wound perforated [Harvey's] upper left chest, causing massive injury to the heart,

12. Gov't's Trial Memorandum at 4, United States v. Benally, 843 F.3d 350 (9th Cir. 2016) (No. CR-13-08095).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*; *see also Red Valley Man Sentenced to 153 Months for Involuntary Manslaughter and Use of a Firearm in a Crime of Violence*, U.S. Dep't Just., https://www.justice.gov/usao-az/pr/red-valley-man-sentenced-153-months-involuntary-manslaugther-and-use-firearm-crime (last updated Jan. 7, 2015).

18. Gov't's Trial Memorandum at 4, *Benally*, 843 F.3d 350 (No. CR-13-08095).

19. *Id.*

20. *Id.*

21. *Id.* at 5.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 6.

severing his spinal cord and thoracic aorta."[26] On February 5, 2013, Benally made several admissions about killing Harvey to a special agent and a criminal investigator.[27]

On April 30, 2013, Benally was indicted by a federal[28] grand jury for the second-degree murder[29] of Harvey and for discharging a firearm in connection with a "crime of violence"[30] in violation of 18 U.S.C. § 924(c).[31] At trial in the U.S. District Court for the District of Arizona, the jury convicted Benally of involuntary manslaughter,[32] the lesser-included offense to second-degree murder.[33] Benally was also found guilty of discharging a firearm in connection with a "crime of violence" under § 924(c), which imposed a ten-year minimum sentence[34] and brought his full sentence to 153

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26. *Id.*

27. *Id.*

28. When an "Indian" is suspected of committing murder or manslaughter in "Indian country," she is subject to applicable federal criminal laws. 18 U.S.C. § 1153(a) (2012 & Supp. I 2014).

29. Murder is defined as:

> the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.

18 U.S.C. § 1111(a) (2012).

30. A "crime of violence" is a felony offense requiring the threatened, attempted, or actual use of physical force or involving the substantial risk that force will be used while committing the offense. 18 U.S.C. § 924(c)(3) (2012).

31. *Benally*, 843 F.3d at 351–52.

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A) (2012).

32. Involuntary manslaughter is the "unlawful killing of a human being without malice . . . [i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." 18 U.S.C. § 1112 (2012).

33. *Benally*, 843 F.3d at 352.

34. *Id.*; 18 U.S.C. § 924(c)(1)(A)(iii) (2012).

months.[35] He appealed both convictions.[36]

The issue before the court on appeal was whether involuntary manslaughter resulting from the use of a firearm could be considered a "crime of violence" under § 924(c).[37] The court analyzed this issue using the categorical approach laid out in *Taylor v. United States*.[38] Under the categorical approach, the court only considers whether the generic statutory elements of the defendant's crime fulfill the elements of a "crime of violence."[39] The court does not consider the underlying conduct involved.[40]

At the onset of its analysis, the *Benally* court emphasized that the Ninth Circuit previously held in *United States v. Springfield*[41] that involuntary manslaughter was considered a "crime of violence" using the categorical approach.[42] Under § 924(c)(3), a "crime of violence" is defined as:

> An offense that is a felony and (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) 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.[43]

The *Springfield* court reasoned that involuntary manslaughter inherently involves a substantial risk that physical force will be used because the resulting death is likely to stem from violence.[44]

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35. U.S. Dep't Just., *supra* note 17. Benally's full prison sentence included thirty-three months for involuntary manslaughter. Judgment in a Criminal Case, *supra* note 9.

36. *Benally*, 843 F.3d at 351. The appeal concerning the involuntary manslaughter conviction was not addressed in this opinion. *Id.* To review the court's separate opinion affirming the conviction, see United States v. Benally, 656 F. App'x 858 (9th Cir. 2016).

37. *Benally*, 843 F.3d at 351–52.

38. *Id.* at 352. In *Taylor*, the court held that burglary was a "crime of violence." *See* Taylor v. United States, 495 U.S. 575 (1990). In doing so, the Supreme Court established the categorical approach and ultimately held that it is the elements of the offense rather than the facts underlying the conviction that are to be considered in determining whether a conviction is a "crime of violence." *See id.* at 600. Because statutory definitions vary across jurisdictions, the Court's first step in its analysis is to determine the "generic" offense, and then it determines whether those elements are within the purpose of the sentencing enhancement. *See id.* at 599–600. In this context, a generic offense means "the offense category's 'generic, contemporary meaning,'" is derived "from its 'common usage as stated in legal and other well-accepted dictionaries.'" Kristin Kimmelman, *New "Plain-Meaning" Approach for Non-Common Law Enumerated Offenses Under § 2L1.2 Crimes of Violence*, Fifth Cir. Blog (Mar. 19, 2013 1:03 PM), http://circuit5.blogspot.com/2013/03/new-plain-meaning-approach-for-non.html. The generic, contemporary meaning of involuntary manslaughter is "homicide in which there is no intention to kill or do grievous bodily harm, but that is committed with criminal negligence or during the commission of a crime not included within the felony-murder rule." *Involuntary Manslaughter*, Black's Law Dictionary (10th ed. 2014).

39. *Benally*, 843 F.3d at 352.

40. *Id.*

41. 829 F.2d 860 (9th Cir. 1987), *overruled by Benally*, 843 F.3d at 354.

42. *See Benally*, 843 F.3d at 353.

43. 18 U.S.C. § 924(c)(3) (2012).

44. *Benally*, 843 F.3d at 353.

However, in light of intervening Supreme Court and en banc Ninth Circuit decisions, the *Benally* court reexamined the holding in *Springfield*.[45] In *Leocal v. Ashcroft*, the Supreme Court determined that a Haitian citizen, lawfully residing in Florida and convicted under Florida law for driving under the influence, did not commit a "crime of violence" as defined by 18 U.S.C. § 16.[46] Deportation proceedings may be instigated against any alien who is convicted of an aggravated felony.[47] Pursuant to the Immigration and Nationality Act (INA), under 8 U.S.C.A. § 1101(a)(43)(F), an aggravated felony includes a "crime of violence" as defined by 18 U.S.C. § 16.[48] The Court held that a "crime of violence," specifically, the "use of physical force" requirement of § 16(b), suggests a higher degree of intent than negligent or merely accidental conduct.[49]

In *Fernandez-Ruiz v. Gonzalez*, the Ninth Circuit held that reckless conduct is essentially accidental and therefore cannot constitute a "crime of violence" as defined in § 16(a) under the INA.[50] Although neither of these decisions reference § 924(c), the *Benally* court determined the wording of the INA and § 924(c) to be virtually identical and therefore justified interpreting them in the same manner.[51]

Accordingly, the *Benally* court compared the elements in the involuntary manslaughter statute to the definition of a "crime of violence" in § 924(c).[52] In interpreting these statutes, the court found that the holding in *Springfield* was inconsistent with the holdings in *Leocal* and *Fernandez-Ruiz* because the statutory offense of involuntary manslaughter results from accidental conduct.[53] The court

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45. *Id.*

46. 543 U.S. 1 (2004).

47. *Id.* at 4.

48. *Id.* Section 16 states:

> 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 U.S.C. § 16 (2012).

49. *See Leocal*, 543 U.S. at 18.

50. 466 F.3d 1121, 1130 (9th Cir. 2006) (holding that a conviction for misdemeanor domestic violence was not a "crime of violence" under § 16(a)).

51. United States v. Benally, 843 F.3d 350 (9th Cir. 2016). The *Benally* court looked to the definition of a violent felony under § 16. *Id.* However, the cases it relied on, *Fernandez-Ruiz* and *Leocal*, specifically defined violent felonies in the context of immigration proceedings under the INA. *See Fernandez-Ruiz*, 466 F.3d 1121; *see also Leocal*, 543 U.S. 1. Under the INA, an aggravated felony is defined as a violent felony in § 16. 8 U.S.C. § 1101(a)(43)(F) (2016). The INA is a civil immigration statute, specifically referring to § 16, a generally applicable criminal statute, for the sole purpose of defining an aggravated felony. § 1101(a)(43)(F). *Benally* relied entirely on the definition of a violent felony in the context of civil immigration matters, rather than in a criminal context.

52. *Benally*, 843 F.3d at 353.

53. *Id.* at 354.

held that a "crime of violence" requires the intentional use of force or a substantial risk that force will be intentionally used and, as such, cannot be the result of a mere accident.[54] Therefore, the court overruled *Springfield* and found that the mental state of gross negligence,[55] the minimum culpability required for involuntary manslaughter, prohibits the offense from being a "crime of violence."[56] The court reversed Benally's conviction under § 924(c).[57]

This case comment contends that the Ninth Circuit erred when it reversed Benally's conviction and held that the elements of involuntary manslaughter are inconsistent with a "crime of violence." Rather, it should have upheld Benally's conviction. First, the court should have conducted its analysis using the conduct-specific approach. Second, the court erroneously expanded a law construed specifically for immigration purposes. Third, the court should have consulted the Guidelines. Finally, even in using the categorical approach, the court neglected the substantial risk analysis. The court's decision that involuntary manslaughter is not a violent crime undermines the very purpose of implementing firearm regulations.

The *Benally* court should have used the conduct-specific approach rather than the categorical approach to analyze Benally's involuntary manslaughter conviction. The Tenth Circuit applies the conduct-specific approach to determine whether an instant offense, as opposed to a past offense, is a "crime of violence."[58] Under this approach, the court is permitted to examine any facts relating to the defendant's conviction, review the entire record prior to the proceeding, and hold evidentiary hearings to determine whether the defendant's conduct that gave rise to the conviction presented a risk of force or physical injury.[59]

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54. *Id.*

55. Gross negligence is defined as "a wanton or reckless disregard for human life." *Id.* at 353.

56. *Id.* at 354. In *Voisine v. United States*, the Supreme Court looked at a related statute, 18 U.S.C. § 921(a)(33)(A), and concluded that reckless conduct is sufficient to constitute a "crime of violence." Voisine v. United States, 136 S. Ct. 2272 (2016). After the Supreme Court issued its opinion in *Voisine*, the *Benally* court amended its decision to clarify that recklessness can constitute a "crime of violence," but declined to change its holding, stating that involuntary manslaughter only requires a mental state of gross negligence. *Benally*, 843 F.3d at 354.

57. *Benally*, 843 F.3d at 354.

58. Samantha Rutsky, United States v. Mobley*: Another Failure in Crime of Violence Analysis*, 47 Akron L. Rev. 851, 861 (2014). The Ninth Circuit rejected the distinction between instant and prior offenses in *United States v. Piccolo* under the Guidelines. 441 F.3d 1084, 1086 (9th Cir. 2006), *amended by* No. 04-10577, 2006 U.S. App. LEXIS 12075, at *1 (9th Cir. 2006). However, the Supreme Court has yet to rule on whether this distinction should apply to § 924(c). Therefore, this case comment contends that the court should apply a conduct-specific approach to all instant offenses under § 924(c).

59. Rutsky, *supra* note 58; *see also* United States v. Perez-Jiminez, 654 F.3d 1136, 1140–42 (10th Cir. 2011) (using the factual findings of the case to determine that the defendant's possession of a shank in prison was a "crime of violence"); United States v. Riggans, 254 F.3d 1200, 1203–04 (10th Cir. 2001) (holding that although the defendant did not have a firearm when he robbed a bank, his conduct was sufficient for a "crime of violence" conviction because the bank teller thought he had a gun); United States v. Walker, 930 F.2d 789, 793–95 (10th Cir. 1991) (looking to the conduct underlying the defendant's conviction of unlawful possession of a firearm to determine that the crime was a "crime of violence"); United States v. Coble, 756 F. Supp. 470, 474 (E.D. Wash. 1991) (looking into the defendant's conduct

The Tenth Circuit has justified its use of the conduct-specific approach by explaining that it produces the most fair results because its conclusion is based on the defendant's own conduct rather than "the arbitrary determination of whether a statute describes conduct that involves a risk of violence."[60] Additionally, the requirement of applying the categorical approach to past offenses arises from the "practical difficulties of conducting an ad hoc mini-trial" and such concerns are not presented when examining the instant offense.[61]

In *United States v. Perez-Jiminez*, the defendant, an inmate, was found with two homemade shanks in his pockets when he was searched by Bureau of Prisons officers.[62] Perez-Jiminez pleaded guilty to one count of possessing a prohibited object in prison.[63] The court had to determine whether this offense was a "crime of violence."[64] Rejecting the categorical approach of simply looking at the words of the statute, the *Perez-Jiminez* court instead applied the conduct-specific approach to consider the underlying facts of the conviction.[65] The court concluded that the defendant's possession of the two shanks, each five-and-a-half inches in length and sharpened to a point, presented a "serious potential risk of physical injury to another" and, therefore, was a "crime of violence."[66]

Here, the *Benally* court had to determine whether the instant conviction by the trial court for involuntary manslaughter constituted a "crime of violence." As such, it should have analyzed the specific conduct giving rise to the conviction because these facts were readily presented to the court on appeal.[67] The court did not need to conduct a mini-trial to examine the underlying conduct. Had the court taken the conduct-specific approach, it would have analyzed whether Benally's conduct presented a substantial risk of force or injury to another when he fired his gun at Harvey's chest, rather than simply looking at the elements listed in the statute. Similar to *Perez-Jiminez*, the *Benally* court should have found that Benally's action of shooting a gun at another person creates a substantial risk of injury to another and, therefore, that Benally committed a "crime of violence."[68]

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underlying his conviction for being a felon in possession of a firearm, the court ignored precedent and found that the conduct was insufficient to present a substantial risk to others and, therefore, was not a "crime of violence").

60. Rutsky, *supra* note 58.

61. *Perez-Jiminez*, 654 F.3d at 1140–41.

62. *Id.* at 1138.

63. *Id.* at 1139.

64. *Id.* at 1140.

65. *Id.* at 1140–41.

66. *Id.* at 1142.

67. *See generally United States v. Benally*, 843 F.3d 350 (9th Cir. 2016).

68. *Id.* at 352.

Second, the *Benally* court's reliance on the INA and its subsequent analysis in *Leocal* and *Fernandez-Ruiz* was misplaced.[69] Although the INA and § 924(c) define "crime of violence" in the same manner, "statutes and rules created in different contexts and for different purposes may have different meanings, notwithstanding the use of similar words."[70] Immigration proceedings involving the INA differ from matters involving the use of firearms under § 924(c) because immigration proceedings are civil rather than criminal.[71] Additionally, it is important to construe a "crime of violence" narrowly under the INA because the consequence of deportation is severe in comparison to mandatory minimum sentences under § 924(c).[72] Courts should not rely on immigration law outside of the immigration context.[73] Two cases demonstrate why the Ninth Circuit's reliance on *Leocal* and *Fernandez-Ruiz* was inaccurate.

In *Atalay v. Grondolsky*, the court held that involuntary manslaughter was a "crime of violence."[74] Inmates sentenced by the District of Columbia for "crimes of violence" are not eligible for reductions in their sentences upon completion of certain substance abuse rehabilitation programs, whereas inmates convicted of nonviolent crimes are eligible for such reductions.[75] Kadri Atalay, convicted of involuntary manslaughter, petitioned the court to consider his conviction a nonviolent crime.[76] Rejecting the analysis of *Leocal,* the *Atalay* court reasoned that Josue Leocal's conviction for driving under the influence (DUI) was less severe than a conviction for involuntary manslaughter.[77] The court found that *Leocal* provided guidance exclusively for immigration proceedings.[78] It further stated that *Leocal's* holding should be narrowly

69. Although *Voisine* held that reckless conduct can constitute a "crime of violence," that distinction is irrelevant to this argument because the *Benally* court did not change its analysis or holding as a result. *See* Voisine v. United States, 136 S. Ct. 2272, 2280 (2016); *see also Benally*, 843 F.3d at 354.

70. United States v. Powers, 318 F. Supp. 2d 339, 344 (W.D. Va. 2004) (citing United States v. Dillard, 214 F.3d. 88, 98 n.17 (2d Cir. 2000) (comparing the definition of a "crime of violence" under the Bail Reform Act and the Guidelines)).

71. *See* Katheryn Harrigan Christian, *National Security and the Victims of Immigration Law: Crimes of Violence After* Leocal v. Ashcroft, 35 Stetson L. Rev. 1001, 1039 (2006); *see, e.g.*, Atalay v. Grondolsky, No. 09-0139, 2010 WL 2540394, at *6 (D.N.J. June 16, 2010) (rejecting the expansion of *Leocal's* holding past immigration law); s*ee also* United States v. Booker, 555 F. Supp. 2d 218, 222 (D. Me. 2008) (rejecting the expansion of immigration law to illegal firearm possession); United States v. Allen, 409 F. Supp. 2d 622, 630–31 (D. Md. 2006) (rejecting the extension of *Leocal* to interpret a "crime of violence" in the context of being a felon in possession of a firearm because of the practical and legal differences between immigration law and firearm regulations).

72. Christian, *supra* note 71, at 1038–39.

73. *See id.* at 1046–47.

74. 2010 WL 2540394, at *5.

75. *Id.* at *1–2.

76. *Id.* at *1.

77. *Id.* at *6.

78. *Id.*

applied to "crimes of violence" and its application outside of immigration law raises serious doubt.[79]

In *United States v. Booker*, the court upheld Russell Booker's conviction for reckless assault as a "crime of violence," rejecting the majority opinion in *Fernandez-Ruiz*.[80] Ultimately, the court held that committing a crime recklessly does not preclude it from being one of violence.[81] The *Booker* court attributed much of its reasoning to the significant differences between the firearm regulations at issue in *Booker* and immigration laws at issue in *Fernandez-Ruiz*.[82] The court also addressed *Leocal* and stressed that there, the Supreme Court discussed a separate statutory provision that differentiated a DUI offense from "crimes of violence."[83] The Court found "its separate treatment carried 'significant weight in the particular context of [*Leocal*].'"[84] *Booker* concluded that the Court in *Leocal* was influenced by Congress's desire to differentiate between crimes that justify deportation and crimes that do not, and that such a consideration is not present outside the immigration context.[85]

Here, the *Benally* court's conclusion relied entirely on prior analysis of the INA—specifically, *Leocal*.[86] This erroneously expanded the holding of *Leocal* beyond its anticipated effect and took immigration law far from its intended context. The *Benally* court should have relied on the reasoning employed by *Atalay* and *Booker*, under which the court's analysis of § 924(c) would have considered the significant differences between violent crimes in the context of firearms and in the context of immigration.[87] Because deportation was not an issue here and involuntary manslaughter is a severe crime, the *Benally* court should have relied on Ninth Circuit precedent, *Springfield*, in holding that involuntary manslaughter is a "crime of violence" under § 924(c) instead of using immigration law to overrule it.[88]

Third, the court failed to consult the Guidelines in its analysis. The Guidelines provide parameters for federal courts in determining appropriate punishment.[89] Though only advisory, federal judges are required to take account of the Guidelines, and courts continue to employ sentences consistent with those offered by the

79. *Id.*

80. 555 F. Supp. 2d 218, 225, 227 (D. Me. 2008).

81. *Id.* at 225.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. United States v. Benally, 843 F.3d 350, 353–54 (9th Cir. 2016).

87. *Booker*, 555 F. Supp. 2d at 225; Atalay v. Grondolsky, No. 09-0139, 2010 WL 2540394, at *6 (D.N.J. June 16, 2010).

88. *Benally*, 843 F.3d at 353.

89. 18 U.S.C. § 3553(a)(4)(A)(i) (2012).

Guidelines.[90] Several courts have used the Guidelines to conclude that involuntary manslaughter is a "crime of violence."[91]

In *United States v. Sanders*, the court determined that involuntary manslaughter was a violent felony under 18 U.S.C. § 924(e).[92] The *Sanders* court based its conclusion on the definition of "crime of violence" given in application note 1 of U.S.S.G. § 4B1.2, which provides that "crimes of violence" include "murder, *manslaughter*, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling."[93] "Manslaughter," as provided by the Guidelines, necessarily includes both voluntary and involuntary manslaughter.[94] *Sanders* concluded that this finding was consistent with other circuits holding that involuntary manslaughter is a "crime of violence" under § 924 and the Guidelines.[95]

Here, the *Benally* court did not consult or even mention the Guidelines in its analysis. Had the court used the Guidelines in its interpretation, it would have found that involuntary manslaughter necessarily qualifies as a "crime of violence." The *Benally* court should have employed the rationale used in *Sanders*, finding that involuntary manslaughter is enumerated as a "crime of violence" under the Guidelines, and used this to conclude that it is a "crime of violence" in firearm regulations as well. Similar to *Sanders*, the *Benally* court should have considered the Guidelines when determining an appropriate punishment.

Finally, even in using the categorical approach, the *Benally* court erred when it concluded that a "crime of violence" requires intentional conduct, undermining years

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90. Katherine M. Moore, *A Potential Crime of Violence: The Residual Clause and What It Means for Inmates*, 51 Crim. L. Bull., no. 4, 2015, at art. 5; s*ee also* United States v. Crawford, 407 F.3d 1174, 1178 (11th Cir. 2005) (stating that while not bound to apply the Guidelines, courts are required to consult and take them into account).

91. *See* United States v. Butler, 208 F. App'x. 167, 169 (3d Cir. 2006) (holding that a conviction for involuntary manslaughter is a "crime of violence" under U.S.S.B. § 4B1.2); United States v. Sanders, 97 F.3d 856, 858 (6th Cir. 1996) (finding that involuntary manslaughter constituted a "crime of violence" under § 924(e) by relying on the Guidelines's definition of a "crime of violence" under U.S.S.G. § 4B1.2(1) and U.S.S.G. § 2K1.2(a)); United States v. Moore, 38 F.3d 977, 980 (8th Cir. 1994), *abrogated by* United States v. Torres-Villalobos, 487 F.3d 607, 616 (8th Cir. 2007) (relying on prior analysis of U.S.S.G. § 2L1.2(b)(2) to conclude that involuntary manslaughter was a "crime of violence" under § 924(c)).

92. 97 F.3d 856, 860-61 (6th Cir. 1996); s*ee also* 18 U.S.C. § 924(e)(2)(B) (2015) (defining a violent felony as "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"); Cook v. United States, No. 8:10-Cv-252-T-24TGW, 2011 U.S. Dist. LEXIS 129824, at *9 (M.D. Fla. Nov. 9, 2011) (stating that courts may rely on the Guidelines to define a "crime of violence" because the terms "violent felony" and "crime of violence" are "virtually identical").

93. *See Sanders*, 97 F.3d at 860–61; s*ee also* U.S. Sentencing Guidelines Manual § 4B1.2 (U.S. Sentencing Comm'n 2016) (emphasis added).

94. United States v. Grant, No. 6:4-cr-3-DCR-EBA-1, 2016 U.S. Dist. LEXIS 49034, at *5–6 (E.D. Ky. Mar. 23, 2016).

95. *Sanders*, 97 F.3d at 860.

of precedent that only requires finding a substantial risk that physical force may be used. A crime does not need to be intentional,[96] and the elements of the underlying offense do not require the explicit use, attempted use, or threatened use of force to be considered a "crime of violence."[97] The crux of the analysis rests upon finding that the *nature* of the offense involves a likely risk of force.[98] The language of "substantial risk" and "may" in the "crime of violence" provision should not be ignored.[99]

In *United States v. Moore*, the court upheld the defendant's conviction of involuntary manslaughter as a "crime of violence" under § 924(c).[100] The *Moore* court reasoned that "it is a crime which, by definition, always results in the unlawful death of another human being" and such death can reasonably be anticipated as a result of the defendant's conduct under the circumstances.[101] Because death is a necessary element of the crime, a substantial risk of physical force is inherent to the offense.[102] Therefore, the statute requires that the offender engage in conduct that necessarily presents a serious risk of force against another.[103] Several other courts have similarly held that involuntary manslaughter is a "crime of violence" due to the risk that force is likely to be used.[104]

Here, the *Benally* court avoided making the substantial risk analysis, concluding that a "crime of violence" requires intentional conduct. Had the court followed its precedent in *Springfield* and other persuasive precedent, it would have used the substantial risk analysis instead of looking into the culpability of the offender.[105] The

96. Holman, *supra* note 5, at 234–35.

97. United States v. Rodriguez, 979 F.2d 138, 141 (8th Cir. 1992).

98. *Id.* (emphasis added).

99. *Id.*

100. 38 F.3d 977, 981 (8th Cir. 1994).

101. *Id.*; *see also* United States v. Sanders, 97 F.3d 856, 860 (6th Cir. 1996).

102. *Moore*, 38 F.3d at 981.

103. *Sanders*, 97 F.3d at 860.

104. *Id.* at 860-61. The *Sanders* court held that involuntary manslaughter is a "crime of violence" because the offender is criminally responsible for causing the death of another under circumstances "where the consequences of his conduct are direct, normal, and reasonably inevitable when viewed in light of ordinary experience." *Id.* at 860. Therefore, his conduct necessarily presents a serious potential risk of injury to another. *Id.*; *see also* United States v. Fry, 51 F.3d 543, 546 (5th Cir. 1995) (holding that involuntary manslaughter is a "crime of violence" because it "clearly . . . present[ed] a serious potential risk of physical injury to another"); *Rodriguez*, 979 F.2d at 141 (stating that courts must focus on the nature of the crime, and that their "scrutiny ends upon finding that the risk of violence is present").

105. The *Benally* court stated that *Springfield* was effectively overruled by the intervening decisions of *Fernandez-Ruiz* and *Leocal*. United States v. Benally, 843 F.3d 350, 354 (9th Cir. 2016). This assertion is misplaced. *Springfield* looked specifically to whether the elements of involuntary manslaughter present a risk of force to another, without any reference to the culpability of the offender. *See* United States v. Springfield, 829 F.2d 860 (9th Cir. 1987), *overruled by Benally*, 843 F.3d at 354. Because the involuntary manslaughter statute at issue does not include a mens rea, the holdings of *Fernandez-Ruiz* and *Leocal* do not change the holding of *Springfield*. 18 U.S.C. § 1112 (2015). Therefore, even after these intervening decisions were rendered, the *Springfield* holding remained unaffected until the *Benally* decision was issued.

Benally court should have only analyzed whether the statute, by its nature, involved a substantial risk that force may be used in the commission of the crime. The involuntary manslaughter statute itself provides no mens rea element, and therefore the court used a nonexistent element of the offense as ammunition to reach its conclusion.[106] The analysis need not go further than the elements listed in the statute to determine that the nature of involuntary manslaughter presents a risk of force.[107] With death as a necessary element of the crime, the commission necessarily includes conduct that presents a substantial risk that force will be used.[108] If the court had applied the substantial risk analysis, Benally's conviction would have been upheld.

The *Benally* court's holding significantly undermines the purpose of firearm regulations and enhancing punishments for violent crimes. For nearly a century, the justification for firearm regulations and their penalties had focused on violent crimes that indicated the offender actually posed some danger of physically harming others.[109] As "crime of violence" is interpreted now, burglary, mere possession of a dangerous weapon, and driving away from the police are considered violent crimes, but involuntary manslaughter is not.[110] To put the implications of this holding into perspective, just three percent of burglaries end in injury[111] while every single involuntary manslaughter offense ends in the death of another person.[112] Additionally, the United States is known for having extremely high rates of gun violence.[113] In 2015, nearly 13,000 people were killed by guns in homicides, which roughly equals 36 people killed by gun violence each day.[114] Over 50,000 additional incidents of gun violence that did not result in death occurred that same year.[115]

106. 18 U.S.C. § 1112 (2015); *see Benally*, 843 F.3d at 354.

107. *Moore*, 38 F.3d at 981.

108. *Id.*

109. C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 728 (2009).

110. United States v. Fuentes-Rivera, 323 F.3d 869, 872 (11th Cir. 2003) (holding that the defendant's burglary conviction was a "crime of violence"); Holman, *supra* note 5, at 211.

111. Moore, *supra* note 90.

112. *Criminal Law — Sentencing Guidelines — Seventh Circuit Holds that Involuntary Manslaughter Is Not a Crime of Violence for Sentencing Guidelines' Recidivism Enhancement*, 123 Harv. L. Rev. 760, 763 (2010).

113. *See generally* Kevin Quealy & Margot Sanger-Katz, *Compare These Gun Death Rates: The U.S. Is in a Different World*, N.Y. Times (June 13, 2016), http://www.nytimes.com/2016/06/14/upshot/compare-these-gun-death-rates-the-us-is-in-a-different-world.html (displaying various statistics of gun violence in the United States).

114. Jennifer Mascia, *15 Statistics That Tell the Story of Gun Violence This Year*, Trace (Dec. 23, 2015), https://www.thetrace.org/2015/12/gun-violence-stats-2015/. These number exclude suicides committed with firearms, which average 20,000 deaths every year. *Id.*

115. *Id.*

Imposing enhanced punishments on those who arm themselves reduces the number of crimes committed with firearms.[116] The courts must play their part in reducing these astonishing statistics and carrying out the purpose of the legislature.[117] The *Benally* court failed in addressing the issue of gun violence by dismissing the conviction for discharging a firearm in connection with a "crime of violence." While justice was partially served in Benally's manslaughter conviction, the act itself of firing a gun was made irrelevant because it did not meet the *Benally* court's standard of violence.[118] If firing a gun is not considered violent, then it is difficult to understand why Congress created § 924(c) in the first place. It is doubtful that it was written to punish every burglar carrying a gun, whether fired or just loaded,[119] while ignoring every death caused by an actor with a wanton disregard for human life who actually pulls the trigger. Yet, this is the effect of § 924(c) after *Benally*. With other courts following this precedent, the deterrent effect of imposing higher sentences for crimes committed with firearms will be significantly reduced because it is now possible to shoot and kill someone while receiving no additional punishment for using a gun. Society needs to do all it can to prevent gun deaths, which includes judicial efforts in severely punishing this sort of conduct.[120]

The *Benally* court erred when it held that involuntary manslaughter is not a "crime of violence" under § 924(c) and dismissed Benally's conviction for discharging

116. *See generally* Robert Vanneste, *Incarceration and Deterrence: Do Sentence Enhancements Prevent Crime?*, Chi. Pol'y Rev. (Nov. 21, 2013), http://chicagopolicyreview.org/2013/11/21/incarceration-and-deterrence-do-sentence-enhancements-prevent-crime/ (noting a study which found that crimes committed with guns decreased once laws were passed which automatically added a fixed number of years to a prison sentence if a gun was used in the commission of a felony).

117. *Reducing Gun Violence*, Off. Just. Programs, https://www.crimesolutions.gov/PracticeDetails.aspx?ID=33 (last visited Jan. 31, 2018).

118. *See generally* United States v. Benally, 843 F.3d 350 (9th Cir. 2016).

119. *See* 18 U.S.C. § 924(c) (2012) (imposing punishments on those who carry, brandish, or discharge a firearm in connection with a "crime of violence").

120. *Reducing Gun Violence, supra* note 117. Congress enacted the National Firearms Act of 1934, the first federal legislation regulating firearms in the United States. Robert Longley, *See a Timeline of Gun Control in the United States*, Thought Co., https://www.thoughtco.com/us-gun-control-timeline-3963620 (last updated Nov 3, 2017). Four years later, Congress enacted the Federal Firearms Act of 1938, which prohibited gun sales to any person convicted of a violent felony. *Id.* Later, Congress passed the Gun Control Act of 1968 for the purpose of "keeping firearms out of the hands of those not legally entitled to possess them because of . . . criminal background." *Id.* The Armed Career Criminal Act was enacted in 1986 to further the efforts of the Gun Control Act of 1986. *Id.* In the last six years, Congress has proposed over 100 gun control proposals in response to a rise in mass shootings. Rebecca Shabad, *Why More Than 100 Gun Control Proposals in Congress Since 2011 Have Failed*, CBS News (June 20, 2016, 6:00 AM), http://www.cbsnews.com/news/how-many-gun-control-proposals-have-been-offered-since-2011/. However, also in the last six years, not a single bill on gun control has been enacted into law. *Id.; see also* Gregory Krieg, *New Gun Control Action After Congressional Shooting? Don't Bet on It*, CNN, http://www.cnn.com/2017/06/15/politics/steve-scalise-baseball-shooting-gun-control/index.html (last updated June 15, 2017, 4:27 PM) (discussing congressional inaction in 2017 with regard to gun control laws). Even with these legislative efforts, the United States continues to see a rise in violent crimes. John Sanburn & David Johnson, *Violent Crime Is on the Rise in U.S. Cities*, Time (Jan. 30, 2017), http://time.com/4651122/homicides-increase-cities-2016/.

a firearm in connection with such a crime. The court's use of the categorical approach was unnecessary because the determination involved an instant offense rather than a past offense. The court should have examined the underlying facts of Benally's conviction. The *Benally* court came to its conclusion by inaccurately relying on prior analysis of violent crimes in the context of immigration law rather than firearm regulations. Additionally, the court failed to consult the Guidelines in its interpretation. Even in using the categorical approach, the *Benally* court's conclusion that a "crime of violence" requires intentional conduct was unwarranted. The Ninth Circuit's own precedent and other persuasive precedent states that the court should only ask if there is a substantial risk of force in the nature of the offense as defined by the statute. This holding is dangerous because it prescribes that crimes, regardless of their outcome, are only considered violent if their commission required intent to produce their result. This precludes numerous risky offenses that naturally result in serious injury or death from invoking a "crime of violence" sentencing enhancement while crimes that hardly ever produce such a result are nonetheless violent. With rates of gun violence in the United States reaching some of the world's highest,[121] it is important to do everything necessary to prevent gun deaths. This includes judicial effort in imposing severe punishments on those who take another's life with a firearm, which is an effort the *Benally* court failed to make.

121. Quealy & Sanger-Katz, *supra* note 113.