

No. \_\_\_\_\_ 07 - 4 8 7 OCT 9 - 2007

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In The  
**Supreme Court of the United States**

DERICK ANTHONY HENRY,

*Petitioner,*

v.

ATTORNEY GENERAL OF THE  
UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Third Circuit**

**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED FOR REVIEW**

Under 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii), and 1229b(a)(3), lawful permanent residents of the United States must be deported if they commit a “crime of violence,” which is defined in 18 U.S.C. § 16(b) as, *inter alia*, a crime that involves a substantial risk of the use of force “in the course of committing the offense.” Other statutes also incorporate 18 U.S.C. § 16(b)’s definition.

This case raises the following question:

Does the requirement that an offense involve a substantial risk that force may be used “in the course of committing the offense” mean that there must be a risk that force may be necessary to effectuate the offense rather than that force may eventually be used?

**LIST OF PARTIES IN THE COURT BELOW**

The following were parties in the court below:

1. Petitioner Derick Anthony Henry; and
2. The Bureau of Immigration and Customs Enforcement, which is a bureau of the Department of Homeland Security, 6 U.S.C. § 252(a)(1), an executive department of the United States of America. 6 U.S.C. § 111(a).

While Petitioner's *pro se* petition for review named the Bureau as respondent in the court of appeals, the proper respondent is the Attorney General of the United States. *See* 8 U.S.C. § 1103(a).

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App. 1-16) is reported at 493 F.3d 303 (3d Cir. 2007). The Decision of the Board of Immigration Appeals reviewed by the court of appeals (App. 17-21) is unreported. Similarly, the Immigration Judge's Oral Decision (App. 22-30) cancelling Petitioner's deportation and his Interlocutory Ruling on Aggravated Felony (App. 31-36) are unreported.



## STATEMENT OF JURISDICTION

The judgment of the court of appeals (App. 1-16) was entered on July 11, 2007. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), which authorizes review by writ of certiorari of judgments of the United States courts of appeals.



## STATUTES AND REGULATIONS INVOLVED

This case involves the proper interpretation of 18 U.S.C. § 16(b). Section 16 defines a "crime of violence" as:

- (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.

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## STATEMENT OF THE CASE

### Background

This case raises an important and recurring question concerning the proper interpretation of the term “crime of violence” as defined in 18 U.S.C. § 16(b). Petitioner asks the Court to resolve a conflict among the courts of appeals on the meaning of the final phrase in Section 16(b), which requires that a “crime of violence” involve a substantial risk that force may be used “in the course of committing the offense.”

The United States Court of Appeals for the Fifth Circuit has held that unlawful possession of a weapon without further action is not a “crime of violence” under Section 16(b) because it does not involve a substantial risk that force will be used in order to commit the offense of possession. However, the United States Court of Appeals for the Third Circuit held below that possession of a weapon with intent to use it unlawfully is a “crime of violence” under Section 16(b), because “proof of the intent element creates the substantial risk that physical force will be used during the commission of the offense.” App. 15. While

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the Third Circuit correctly concluded that unlawful possession of a weapon with intent to use it creates a “substantial risk that physical force may be used,” it improperly held that the required risk exists “in the course of committing the offense.”

The proper interpretation of “crime of violence” under Section 16(b) is crucial to the operation of other statutory schemes which incorporate it, not only the mandatory deportation provision at issue here.

### **The Facts and Proceedings Below**

Petitioner Derick Anthony Henry is a citizen of Jamaica who was lawfully admitted to the United States as a permanent resident in January, 1990. App. 22. In April 1999, Henry, who worked in a store that had been robbed twice while he was there, was approached by a man offering to sell him a gun. App. 25. Henry took the gun into a back room of the store to examine it. *Id.* Within minutes, the police arrived and arrested him. *Id.*

Henry subsequently pleaded guilty under New York Penal Law Section 265.03(1)(b), “Criminal possession of a weapon in the second degree,” which provides that “[a] person is guilty of criminal possession of a weapon in the second degree when . . . with intent to use the same unlawfully against another, such person . . . possesses a loaded firearm. . . .” He was sentenced to four years imprisonment but was released on parole after serving over two years.

App. 22, 24. Henry has no prior or subsequent criminal record. App. 24, 27.

Eighteen months after Henry's release from prison, the Department of Homeland Security ("DHS") arrested Henry and ordered him deported pursuant to 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 1227(a)(2)(C). Those sections provide that aliens are removable from the United States for possession of a firearm in violation of any law, or for conviction for an "aggravated felony." An "aggravated felony" includes, *inter alia*, a "crime of violence," which is defined in 18 U.S.C. § 16 as

- (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.

8 U.S.C. § 1101(a)(43)(F). Henry's guilty plea was the sole basis for both grounds for deportation.

Henry applied *pro se* for cancellation of the deportation order under 8 U.S.C. § 1229b(a), which permits the discretionary cancellation of a removal order in certain circumstances, as long as the permanent resident has not been convicted of an "aggravated felony." In an Interlocutory Ruling, the Immigration Judge agreed that Henry had not been

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convicted of an “aggravated felony” because his possession offense was not a “crime of violence.” App. 31-36. The Immigration Judge reasoned that “[o]ne may violate the [possession] statute without any utilization of ‘physical force,’” and that “the intention to use a loaded weapon unlawfully against another is not the same as using the weapon. . . .” App. 34-35. He later held a hearing to determine whether to exercise his discretion to cancel Henry’s removal under Section 1229b(a). After finding that Henry “testified credibly” and recognizing that Henry had no criminal record other than the possession guilty plea, the Immigration Judge cancelled the removal order. App. 22-30.

DHS appealed the Immigration Judge’s ruling to the Board of Immigration Appeals. DHS argued that Henry had in fact pleaded guilty to a “crime of violence,” so that the Immigration Judge did not have discretion to cancel Henry’s deportation. App. 20-21.

The Board of Immigration Appeals ruled that Henry’s crime was a “crime of violence” because,

[g]iven the virtually unavoidable consequence of physical injury that will result from using a loaded firearm against another person, . . . the New York conviction involves a “substantial risk of physical force”. . . .

App. 21. The Board did not address Section 16(b)’s requirement that the risk of physical force must arise “in the course of committing the offense.” It ordered Henry deported to Jamaica. *Id.*

Henry petitioned the United States Court of Appeals for the Third Circuit for review of the Board's decision. See 8 U.S.C. § 1252(a). The court of appeals affirmed, denying Henry's petition for review. App. 1-16.<sup>1</sup>

While the court of appeals agreed that "possession alone does not permit the inference that there is a substantial risk of the use of force," it relied on its prior decision in *Impounded*, 117 F.3d 730 (3d Cir. 1997), decided under a different but similar statute, to find that "proof of the intent element creates the substantial risk that physical force will be used during the commission of the offense." App. 14-15. In *Impounded*, the court held that a juvenile convicted (*inter alia*) of possession of a weapon with intent to use it unlawfully had committed a "crime of violence" under 18 U.S.C. § 5032, relying in part on cases that interpreted the definition of "crime of violence" contained in Section 4B1.2(a)(2) of the United States Sentencing Commission Guidelines Manual. *Impounded*, 117 F.3d at 738, fn. 13. The court of appeals here concluded that "certainly if someone intends to use physical force there is a substantial risk that physical force may be used." App. 12.



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<sup>1</sup> The government did not argue that, and the court of appeals did not consider whether, Henry's offense was a "crime of violence" under Section 16(a). App. 7, fn. 2.

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## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision below extends a circuit split on the meaning of one of the dispositive elements of Section 16(b)'s definition of a "crime of violence": the requirement that the offense involve a substantial risk that force may be used "in the course of committing the offense." 18 U.S.C. § 16(b). The Fifth Circuit has explicitly held that this element requires a substantial risk that the offender may use force *in order to complete the elements of the offense, or as a means of effectuating the offense*. However, the decision below and those of other circuits have either explicitly or implicitly held that Section 16(b) requires only that there be a substantial risk that the use of force may occur at some time, as a result of commission of the offense.

These two conflicting interpretations of "in the course of committing the offense" are often dispositive on the question of whether an offense is a "crime of violence" under Section 16(b). Weapons possession crimes are a prime example, because violent acts committed with a weapon necessarily occur as a result of possession of the weapon; under the Third Circuit's rationale, all possession crimes that create a risk of physical force do so "in the course of committing the offense." On the other hand, few, if any, weapons possession crimes present a risk that violence will be used for the purpose of perpetrating the possession offense itself, because all elements of a possession offense are satisfied as soon as the offender takes

possession of the weapon and has the requisite mental state. Thus, whether unlawful possession of a weapon alone is, without more, a “crime of violence” turns on the proper interpretation of the term “in the course of committing the offense.” If Section 16(b) requires only that the offense involve a risk that physical force may sometimes occur, then a possession offense, without more, is a “crime of violence.” However, if Section 16(b) requires that a “crime of violence” must involve a risk that physical force will be used *in order to perpetrate the offense of possession*, then unlawful possession of a weapon, with or without intent to use it, is not a “crime of violence.”

Whether an offense is a Section 16 “crime of violence” profoundly affects substantial individual rights. In this case, as in many similar cases, the classification of an offense as a “crime of violence” mandates that a lawful permanent resident of the United States – including, here, one with a minor child who is a U.S. citizen – be deported to a country that the permanent resident had not lived in for more than ten years even though those years were, with the exception of the possession offense, conviction-free. In other cases, Section 16’s “crime of violence” definition forms the basis for conviction of another, separate crime. *See, e.g.*, 18 U.S.C. §§ 842(p)(2)(A) (unlawful to teach another to use, *inter alia*, an explosive, knowing or intending that the other will use the explosive for a crime of violence), 1952(a)(2) (unlawful to travel interstate with intent to commit a crime of violence).

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Review of this case would allow the Court to resolve widespread uncertainty as to the scope of Section 16(b)'s definition of a "crime of violence," which currently causes the disparate application in different circuits of the deportation statute to lawful permanent residents convicted of the same crime, and will cause inconsistent convictions under other criminal statutes that incorporate Section 16.

**I. The Third Circuit Has Interpreted A Federal Criminal Statute That Has Important Immigration Law Consequences In A Way That Conflicts With Recent Rulings Of The Fifth Circuit.**

**A. Several Circuits Disagree Over The Meaning Of "In The Course Of Committing The Offense."**

1. In *United States v. Medina-Anicacio*, 325 F.3d 638, 646 (5th Cir. 2003), *reh'g denied*, 91 Fed. Appx. 975 (5th Cir.), *cert. denied*, 542 U.S. 911 (2004), the United States Court of Appeals for the Fifth Circuit held that an offense is a "crime of violence" under Section 16(b) only when it presents a substantial risk that physical force may be "necessary to effectuate the offense." Thus, the court held, possession of a concealed dagger is not a "crime of violence" under Section 16(b) "because there is no substantial risk that an offender may use violence to *perpetrate the [possession of a deadly weapon] offense.*" *Id.* at 647 (emphasis added). The Fifth Circuit has also held that possession of a short-barrel firearm is not a crime of violence under

Section 16(b), because “physical force against the person or property of another *need not be used to complete the crime.*” *United States v. Diaz-Diaz*, 327 F.3d 410, 413 (5th Cir.), *cert. denied*, 540 U.S. 889 (2003) (emphasis in original). *See also United States v. Hernandez-Neave*, 291 F.3d 296, 299 (5th Cir. 2001) (possession of a handgun on the premises of a business licensed to sell alcohol is not a “crime of violence” under Section 16(b) because force “need not be used to complete the crime”). Contrary to the Third Circuit’s holding here, App. 15, the Fifth Circuit noted in each of these cases that possession crimes are complete upon possession of the weapon and the requisite mental state. *Diaz-Diaz*, 327 F.3d at 414; *Medina-Anicacio*, 325 F.3d at 645-46; *Hernandez-Neave*, 291 F.3d at 299.

The United States Courts of Appeals for the Second and the Fourth Circuits apparently view Section 16(b)’s “in the course of committing the offense” requirement similarly to the Fifth Circuit. *See, e.g., Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003) (involuntary manslaughter is not a crime of violence because “the risk in section 16(b) concerns the defendant’s likely use of violent force *as a means to an end*”) (emphasis added); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 446-47 (4th Cir. 2005) (same).

Here, however, the Third Circuit rejected Henry’s argument that Section 16(b) is meant to embrace only those crimes that involve substantial risk that force will be used in order to commit the offense in question. App. 13. Instead, the court below relied upon one of its prior decisions that based its holding in large

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part on a different statute, *see Impounded, supra*, to hold that Henry's offense "create[d] the substantial risk that physical force will be used *during*" his unlawful possession of the firearm. App. 15 (emphasis added). It so held because an element of the offense to which Henry pleaded guilty is intent to use the weapon unlawfully against another. The United States Court of Appeals for the Ninth Circuit has cast the Section 16(b) net even wider than the Third Circuit, holding that a possession offense that does not require intent to use the weapon against another – the offense of being a felon in possession of a firearm – is a "crime of violence" because "the history of the firearm laws reveals the strong congressional conviction that an armed felon poses a substantial threat to all members of society." *United States v. O'Neal*, 937 F.2d 1369, 1375 (9th Cir. 1991) (interpreting "crime of violence" under Section 16(b) in applying the pre-1989 version of Sentencing Guideline § 4B1.2, which incorporated Section 16 by reference).

2. The question concerning the meaning of "in the course of committing the offense" arises in interpreting a definition of "crime of violence" identical to Section 16(b) that is contained in the Bail Reform Act, 18 U.S.C. §§ 3141-56. The Bail Reform Act permits pre-trial and pre-sentencing detention of an offender convicted of a "crime of violence" as defined in 18 U.S.C. § 3156(a)(4)(B), under certain circumstances. Section 3156(a)(4)(B) defines "crime of violence" as, *inter alia*,

An 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.

In *United States v. Dillard*, 214 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 907 (2001), the Second Circuit held that a conviction of being a felon in possession of a firearm is a “crime of violence” under Section 3156(a)(4)(B). The majority and dissenting opinions in *Dillard* succinctly present the two conflicting interpretations of the phrase “in the course of committing the offense.” The majority held that a felon’s mere possession of a firearm is a crime of violence. It reasoned that the “in the course of committing the offense” language is satisfied because any eventual violence would “necessarily occur[] during the possession of the gun”:

[i]f that possession is illegal because the possessor is a convicted felon who is forbidden from possessing a gun, the violent use will inevitably have occurred in the course of the commission of the offense of illegal possession.

*Id.* at 93-94. The dissent, on the other hand, used the same reasoning that the Fifth Circuit later adopted in *Medina-Anicacio*, *supra*. It argued that

The critical limitation in this definition is the requirement that the risk of physical force must arise “in the course of committing *the offense*.” This phrase, taken as a whole, plainly refers only to the actions or conditions necessary to satisfy each element of

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“the offense.” Here, the offense is the possession of a weapon by a felon. . . . No element other than the possession of a weapon by a felon is needed for conviction. What a felon does or does not do with the weapon neither adds to, nor subtracts from, that offense.

*Id.* at 104-05 (emphasis in original).

The dissent in *Dillard* went on to describe the “in the course of committing the offense” provision as “limiting language,” stating that “[a] felon who subsequently uses the weapon against another person is ‘in the course of committing’ another offense, not ‘in the course of committing the [felon-in-possession] offense.’” *Id.* at 105. See also, e.g., *United States v. Singleton*, 182 F.3d 7 (D.C. Cir. 1999), *aff’d on other grounds*, 13 Fed. Appx. 4 (D.C. Cir. 2001) (crime of possession of a weapon by a felon is not a “crime of violence” under Section 3156(a)(4)(B)); compare, e.g., *United States v. Rogers*, 371 F.3d 1225 (10th Cir.), *rev’d on other grounds*, 391 F.3d 1165 (10th Cir. 2004) (crime of possession of a weapon while subject to a domestic protection order is a “crime of violence” under Section 3156(a)(4)(B)).

Without resolution by this Court, the lower courts will continue to disagree over whether a “crime of violence” is one that involves a substantial risk that physical force may subsequently result, App. 15, or one that involves a risk that force will be used *in order to commit* the offense. Until then, the “always [] harsh measure” of deportation, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987), will continue to be imposed inconsistently to permanent residents

convicted of the same crime. Likewise, other important criminal statutes, including those that govern whether a defendant may be held without bail, will also be interpreted inconsistently.

**B. The Issue Presented By The Conflict Is Of Great Significance.**

The conflict in the courts of appeals on this issue is significant because, as in this case, it may determine the right of many lawful permanent residents of the United States to continue their residence in America.

Immigration judges often have discretion to cancel removal orders after considering the individual facts and circumstances surrounding each case, including the individual alien's personal circumstances and relationship with the United States. *See* 8 U.S.C. § 1229b. However, there is no such discretion when the permanent resident has been convicted of a "crime of violence." *See* 8 U.S.C. §§ 1101(a)(43)(F) and 1229b(a)(3). Once the "crime of violence" label is applied, the alien's deportation is mandatory, regardless of the actual facts of the crime and the hardship that it may inflict. This can be especially severe for the many lawful permanent residents who, like Henry, immigrated to the United States years ago and have children who are United States citizens. As this Court has recognized, "[d]eportation can be the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

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This Court's clarification of Section 16(b) will also have a significant impact beyond immigration cases because, as noted, a number of statutes either explicitly or implicitly incorporate Section 16's definition of "crime of violence." For example, 18 U.S.C. § 1952(a)(2) prohibits, *inter alia*, interstate travel in order to commit a "crime of violence" as defined by Section 16(b) "in furtherance of unlawful activity." 18 U.S.C. § 1952(a)(2); *see also, e.g., id.* § 842(p)(2)(A). In each of these areas, a consistent rule of law is crucial to the evenhanded enforcement of the law.

**II. The Court Below Erred In Concluding That The Possession Offense To Which Petitioner Pleaded Guilty Involves A Risk That Violence May Occur "In The Course Of Committing The Offense."**

The Fifth Circuit's interpretation of the phrase "in the course of committing the offense" to mean that violence may be "necessary to effectuate the offense," *Medina-Anicacio*, 325 F.3d at 646, is the correct one. This interpretation gives meaning to each separate element of the "crime of violence" definition in Section 16(b). Moreover, it draws a distinction between the "classic" Section 16(b) crime of burglary (*see Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004)) – which involves a substantial risk that the perpetrator may use force in order to commit the burglary – and possession crimes, the elements of which do not present a risk that violence will be used in order to commit them.

The Fifth Circuit's interpretation is consistent with the language this Court used in *Leocal*. Although *Leocal* did not involve the issue raised here, the Court there stated that Section 16(b)'s risk of force "relates *not* to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another *might be required in committing a crime.*" *Leocal*, 543 U.S. at 10 (second emphasis added). The Court also described the risk involved as that of "having to use [physical] force in committing a crime." *Id.* at 11.

The Third Circuit's interpretation of Section 16(b) in effect reads the phrase "in the course of committing the offense" out of the statute. By holding that the substantial risk of physical force may arise at any time, the Third Circuit instead applied the standard now set forth in Section 4B1.2 of the Sentencing Guidelines Manual, which defines "crime of violence" as merely one that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Section 4B1.2's definition of "crime of violence" is much broader than that in Section 16(b) because it requires only a substantial risk that "injury will result," and does not contain the additional requirement that the risk occur "in the course of committing the offense." See *Leocal*, 543 U.S. at 10, fn. 7 (Section 16(b) "plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct").

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The Third Circuit's error resulted in part from its reliance on *Impounded*, *supra*. The court there held that a juvenile convicted of, *inter alia*, possession of a weapon with intent to use it could be tried as an adult under 18 U.S.C. § 5032 because the possession with intent offense "by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense." *Impounded*, 117 F.3d at 738. It stated that the juvenile's crime "satisfie[d] the requirement[] . . . that the charged offense by its very nature involve[] a 'substantial risk that physical force . . . may be used' during the commission of the crime." *Id. Impounded* relied heavily on cases interpreting the broader standard in Section 4B1.2 of the Sentencing Guidelines Manual. *Id.* at fn. 13. As a result, the court below erred in relying on it. *See Leocal*, 543 U.S. at 10, fn. 7.

The court below also confused the effect of the distinction between "simple" possession of a weapon and possession with intent to use the weapon. App. 12 (agreeing that "possession alone does not permit the inference that there is a substantial risk of the use of force," but finding that "certainly if someone intends to use physical force there is a substantial risk that physical force may be used"). That distinction goes to whether there is a "risk of the use of force" under Section 16(b), not whether force may be used "in order to commit the [possession] offense."

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**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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