No. 16-____

IN THE
Supreme Court of the United States

JAVIER ARELLANO HERNANDEZ,

Petitioner,

v.

LORETTA E. LYNCH, United States Attorney General,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DONALD B. AYER
JOHN M. GORE
Counsel of Record
MATTHEW J. RUBENSTEIN
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
jmgore@jonesday.com

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Counsel for Petitioner Javier Arellano Hernandez

QUESTIONS PRESENTED

Under the Immigration and Nationality Act, a conviction of a "crime of violence . . . for which the term of imprisonment [is] at least one year" renders an immigrant removable from the United States and ineligible for discretionary cancellation of removal. 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii), 1229b(a)(3). The phrase "crime of violence" is defined to include an "offense that has as an element the use, attempted use, or threatened use of physical force against the person . . . of another." 18 U.S.C. § 16(a). The questions presented are:

1. Did the Ninth Circuit err in holding that the causation of bodily injury necessarily establishes that an offense is a "crime of violence," even if the offense does not have as an element the use, attempted use, or threatened use of any force?

2. Did the Ninth Circuit err in holding that the California offense of criminal threats, California Penal Code § 422(a)—which requires a threat of bodily injury but not the use, attempted use, or threatened use of any force—is a "crime of violence" within the meaning of § 16(a)?

PARTIES TO THE PROCEEDING

Petitioner is Javier Arellano Hernandez, Petitioner below. Respondent is Loretta E. Lynch, United States Attorney General, Respondent below.

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PETITION FOR A WRIT OF CERTIORARI

The issue whether the causation of bodily injury necessarily entails violent force, and thus standing alone qualifies an offense as a "crime of violence" within the meaning of 18 U.S.C. § 16(a), is a recurring question with broad dispositive consequences that cut across immigration and criminal sentencing contexts. It is an issue on which the circuit courts are sharply and unambiguously divided, both in general and in the context of the specific California Penal Code provision at issue in this case. And it has been discussed by this Court three times in recent years, most recently in *United States v. Castleman*, 134 S. Ct. 1405, 1413 (2014), where the Court expressly reserved judgment upon it.

The resolution of this issue is highly consequential in both the immigration and criminal contexts in which it arises. For Petitioner Javier Arellano Hernandez, who has lived his entire life since the age of three weeks in the United States and has a large family legally residing here, it governs whether he can even return to the United States. In the criminal context, the issue determines the applicability of vastly different, sometimes mandatory terms of imprisonment.

Each of these circuit splits is squarely presented—and dispositive—in this case. Mr. Arellano therefore respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's panel opinion (Pet. App. 2a–12a) is reported at 831 F.3d 1127. The Ninth Circuit's order denying rehearing en banc (Pet. App. 1a), the opinion of the Board of Immigration Appeals (Pet. App. 13a–21a), and the transcript of the immigration judge's oral ruling (Pet. App. 22a–32a) are all unreported.

JURISDICTION

The Ninth Circuit panel issued its opinion on August 1, 2016. Pet. App. 2a–12a. The Ninth Circuit's judgment became final when it denied rehearing en banc on October 7, 2016. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are reproduced in the Appendix. Pet. App. 33a–37a.

STATEMENT OF THE CASE

A. Statutory And Case Law Background

18 U.S.C. § 16(a) defines as a "crime of violence" "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Other federal statutes spanning the immigration and criminal sentencing contexts, as well as the Sentencing Guidelines, contain materially similar definitions of "crime of violence." *See* 18 U.S.C. § 924(c)(3)(A); U.S.S.G. § 2L1.2 cmt.; *id.* § 4B1.2. Congress also has used materially similar language to define "violent felony." 18 U.S.C. § 924(e)(2)(B)(i). Given the substantial identity of these definitions,

courts have interpreted them identically and interchangeably. *See, e.g.*, *Johnson v. United States*, 559 U.S. 133, 140 (2010) (relying upon prior precedent construing "crime of violence" to construe "violent felony"); *Castleman*, 134 S. Ct. at 1411 n.4; *Toledo v. United States*, 581 F.3d 678, 680 n.2 (8th Cir. 2009); *United States v. Gomez-Leon*, 545 F.3d 777, 788 (9th Cir. 2008).[1]

Legal consequences of great moment flow from the designation of an offense as a "crime of violence" or "violent felony." The Immigration and Nationality Act (INA), as it bears directly upon this case, declares a "crime of violence" with a one year term of imprisonment an "aggravated felony" that renders an immigrant removable from the United States and ineligible for cancellation of removal. *See* 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii), 1229b(a)(3).

Further, the Armed Career Criminal Act (ACCA) imposes a mandatory minimum sentence of between 5 and 25 years on a defendant convicted of using, carrying, or possessing a firearm "during and in relation to any crime of violence." 18 U.S.C. § 924(c)(1)(A). The ACCA also mandates imposition of consecutive terms of imprisonment related to a conviction of a "crime of violence" in certain cases, *see id.* § 924(c)(1)(A), (c)(1)(D)(ii), (c)(3)(A), and imposes a minimum term of imprisonment of "not less than

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[1] To be sure, some of these definitions either also extend to the use, attempted use, or threatened use of force against property or are limited to certain categories of offenses, *see* 18 U.S.C. § 924(c)(3)(A), (e)(2)(B)(i), but those differences are of no moment here, *see, e.g.*, *Johnson*, 559 U.S. at 140; *Castleman*, 134 S. Ct. at 1411 n.4.

fifteen years" upon a defendant who has a minimum number of prior "violent felony" convictions, *id.* § 924(e)(1). Finally, the Sentencing Guidelines take account of "crimes of violence," using them to declare defendants career offenders, U.S.S.G. § 4B1.1 or otherwise to raise the offense level, *id.* § 2K2.1(a); *id.* § 2L1.2(b)(2)(E), (b)(3)(E), both of which substantially increase the recommended terms of imprisonment.

In a trio of cases, this Court has construed the statutory definitions of "crime of violence" and "violent felony" and made clear that common-law "force" is insufficient to satisfy them. Instead, this Court has stated several times that only a crime involving "violent force" may be a "crime of violence" or "violent felony." *Johnson*, 559 U.S. at 140.

First, in *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004), the Court focused on the meaning of the term "crime of violence" in 18 U.S.C. § 16(a), and, applying the rule of lenity, ruled that § 16(a) "requires active employment" of force and cannot be satisfied by mere negligent conduct. The Court reasoned that "[t]he ordinary meaning of th[e] term ['crime of violence'], combined with § 16's emphasis on the use of physical force against another person . . . suggests a category of violent, active crimes." *Id.*

Next, in *Johnson v. United States*, 559 U.S. at 139–40, addressing the "violent felony" provision of 18 U.S.C. § 924(e)(1), the Court concluded that a "violent felony" requires "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140 (emphasis in original). The Court thus rejected the contention that a "violent felony" is established simply by meeting the

common-law definition of "force"—which can "be satisfied by even the slightest offensive touching." *Id.* at 139. The Court reasoned that such a conclusion would not fit the "context" of "the statutory category of violent felonies" because "[e]ven by itself, the word 'violent' . . . connotes a substantial degree of force." *Id.* at 140.

Finally, just two years ago, this Court confirmed this understanding of "crime of violence" and "violent felony" in *United States v. Castleman*. The decision there addressed the separate provision of the ACCA requiring the use, attempted use, or threatened use of "physical force" within the context of a "misdemeanor crime of domestic violence." *See* 18 U.S.C. §§ 921(a)(33)(A), 922(g)(9). Focusing specifically on that misdemeanor domestic violence context, the Court ruled that such crimes require only the slight "force" sufficient to establish common-law battery. 134 S. Ct. at 1410–11. At the same time, addressing the broader issue as it arises outside of this specific context, the Court stated that "[n]othing" in its decision "casts doubt on" *Leocal*'s and *Johnson*'s holding that a "crime of violence" requires "violent force," and not mere common-law "force." *Id.* at 1410–11 & n.4. And it specifically reserved and did "not decide" the question "[w]hether or not the causation of bodily injury necessarily entails violent force" and therefore alone is sufficient to establish a "crime of violence" or "violent felony." *Id*. at 1413.

B. Factual And Procedural Background

Mr. Arellano entered the United States as a lawful permanent resident with his parents in December 1967, when he was 23 days old. (R. 219)[2] He attended school in the United States, graduating from high school in Calexico, California. (R. 215) All four of his children, his mother, and all five of his siblings reside in the United States. (R. 95–102) His children and siblings are United States citizens, and his mother is a lawful permanent resident. (*Id.*; R. 222–27) During the more than 40 years between the time he arrived in the United States and the time he was removed, Mr. Arellano returned to Mexico only infrequently and for no more than two or three days at a time. (R. 102) Hence, as the immigration judge (IJ) noted, "[a]ll of his family and important social ties are found in this country," and "[h]is socialization, education and acculturation have all occurred in the United States." Pet. App. 27a. "In effect, Mexico, his native land, is a foreign land to him." *Id.*

On August 3, 2010, the Bureau of Immigration and Customs Enforcement (BICE) initiated removal proceedings against Mr. Arellano based upon his conviction for attempted criminal threats under California Penal Code sections 422(a) and 664. (R. 399–401) BICE charged that this conviction was an aggravated felony "crime of violence" under 8 U.S.C. § 1101(a)(43)(F), (U). (R. 401) In particular, BICE alleged that § 422(a) categorically defines a "crime of

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[2] Citations to portions of the agency record not included in the appendix are noted as "(R. [page number])".

violence" within the meaning of 18 U.S.C. § 16(a), (R. 401); 8 U.S.C. § 1101(a)(43)(F), because it "has as an element the use, attempted use, or threatened use of physical force against the person . . . of another," 18 U.S.C. § 16(a); (R. 401).[3] BICE further alleged that this conviction rendered Mr. Arellano ineligible for cancellation of removal as a matter of law. *See* 8 U.S.C. § 1229b(a)(3).

BICE subsequently lodged an additional charge alleging that Mr. Arellano's unrelated drug paraphernalia conviction under California Health & Safety Code § 11364(a) constituted a removable offense related to a controlled substance. (R. 391–92)

Mr. Arellano contested the aggravated felony charge, conceded removability based on his drug paraphernalia conviction under then-controlling law, and requested cancellation of removal. (R. 85) To prove its aggravated felony charge, the government relied exclusively upon the categorical approach, and never even attempted to satisfy the modified categorical approach. *See* Opening Br. 36–37 (9th Cir. Dkt. 30); Br. For Resp't 9–21 (9th Cir. Dkt. 35); Pet. App. 5a–9a.[4]

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[3] The government never alleged or argued that § 422(a) qualifies as a "crime of violence" under 18 U.S.C. § 16(b), so the construction of § 16(b) is not implicated here. *See* Resp't's Resp. Br. To Pet'r's Suppl. Br. 3–4 (9th Cir. Dkt. 50); *see also Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) (holding that § 16(b) is unconstitutionally vague in immigration proceedings), *cert. granted sub nom. Lynch v. Dimaya*, 137 S. Ct. 31 (2016).

[4] The modified categorical approach was unavailable because § 422(a) is not a "divisible statute," and, in any event, the documents of conviction related to Mr. Arellano's § 422(a)

After a hearing, the IJ "weighed the positive, social, and humane factors in [Mr. Arellano's] favor against [the] negative factors in the case," Pet. App. 27a, and found "a close case" for discretionary cancellation of removal, Pet. App. 30a. "[O]n balance," the IJ stated, he would, "if discretion were available today, grant [Mr. Arellano's] request" for cancellation of removal "and permit him to keep his legal residence and remain in the United States." *Id.* The IJ rested this conclusion on Mr. Arellano's "long history of presence here in the United States as a legal permanent resident, which had its inception within days of his birth, together with the fact of his education, acculturation, and socialization in this country" and the "turmoil" he would experience if he were removed to Mexico. *Id.*

The IJ held, however, that Mr. Arellano's attempted criminal threats conviction was an aggravated felony "crime of violence" and, thus, that Mr. Arellano was removable and ineligible for cancellation of removal under the INA. Pet. App. 25a–26a; *see also* 8 U.S.C. §§ 1101(a)(43)(F); 1227(a)(2)(A)(iii); 1229b(a)(3). The IJ ordered Mr. Arellano removed to Mexico. Pet. App. 31a.

Mr. Arellano appealed to the Board of Immigration Appeals (BIA), which affirmed the IJ's removal order. Pet. App. 21a. Mr. Arellano then timely petitioned the Ninth Circuit for review of the

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(continued…)

offense do not establish the essential elements of a "crime of violence." *Descamps v. United States*, 133 S. Ct. 2276, 2281–85 (2013).

BIA's decision. Before the Ninth Circuit, the government conceded that this Court's intervening decision in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), forecloses removal based upon Mr. Arellano's drug paraphernalia conviction because California's controlled substances schedule includes substances that are not federally controlled. *See* Apr. 12, 2016 Oral Argument at 17:59–18:07 (government counsel conceding that Mr. Arellano's "28(j) letter does raise an interesting point that is correct"); Apr. 4, 2016 Rule 28(j) Letter (9th Cir. Dkt. 59).

Accordingly, the only issue presented to the Ninth Circuit was whether Mr. Arellano's attempted criminal threats offense categorically qualifies as a removable "crime of violence." Pet. App. 5a–9a. The Ninth Circuit panel recounted that "[i]n our prior [circuit] precedent regarding section 422, we have held that a conviction under this statute is a crime of violence." Pet. App. 6a (citing *United States v. Villavicencio-Burruel*, 608 F.3d 556, 563 (9th Cir. 2010); *Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003)). The panel expressly acknowledged that this holding conflicts with the holdings of the Fifth and Fourth Circuits that § 422(a) does not define a "crime of violence." Pet. App. 7a. Yet the panel saw no "basis for us to overturn our prior precedent" because, in its view, "contrary decisions of our sister circuits have no effect on our jurisprudence." *Id.* The panel therefore denied Mr. Arellano's petition for review. Pet. App. 12a. The Ninth Circuit later denied Mr. Arellano's timely petition for rehearing en banc. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition in order to resolve two mature circuit splits left in place by *Castleman* and exacerbated by the Ninth Circuit in this case. Each of the questions presented is of national importance and frequently recurs in the immigration and federal criminal sentencing contexts, where the consequences are of enormous significance to the parties involved, and where the need for nationwide uniformity is paramount. This case provides an ideal vehicle for resolving both circuit splits. The questions are squarely presented, have been actively litigated, and are dispositive of the relief requested.

I. THE NINTH CIRCUIT'S DECISION EXACERBATES TWO DEEP AND MATURE CIRCUIT SPLITS

The Ninth Circuit's holding that California's criminal threats statute, § 422(a), defines a "crime of violence" compounds two deep and mature circuit splits. First, there is now a well-developed 5-4 circuit split on the question whether the "causation of bodily injury necessarily entails violent force" and, thus, by itself establishes that an offense is a "crime of violence" or "violent felony." *Castleman*, 134 S. Ct. at 1413. Second, there is also a 2-2 split on the subsidiary question whether § 422(a)—which requires a threat to cause bodily injury but no use, attempted use, or threatened use of physical force—defines a "crime of violence." The Court should grant certiorari and resolve these ripe circuit splits.

A. There Is A 5-4 Circuit Split On The Question Whether A Crime Requiring Bodily Injury Necessarily Constitutes A "Crime Of Violence" Or "Violent Felony"

The question that the Court reserved in *Castleman* has deeply divided the courts of appeals. Five circuits have held that a criminal statute's requirement to cause bodily injury does not necessarily require violent force, and thus is insufficient to establish that the offense is a "crime of violence" or "violent felony." Four circuits have held to the contrary that the causation of bodily injury alone establishes a "crime of violence" or "violent felony," even if the offense does not have as an element the use, attempted use, or threatened use of violent force.

1. The First, Second, Fourth, Fifth, and Tenth Circuits agree that the causation of bodily injury does not necessarily entail violent force and, thus, does not render an offense a "crime of violence" or "violent felony." *See Whyte v. Lynch*, 807 F.3d 463, 469 (1st Cir. 2015); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 194–96 (2d Cir. 2003); *United States v. Torres-Miguel*, 701 F.3d 165, 168–69 (4th Cir. 2012); *United States v. Rodriguez-Rodriguez*, 775 F.3d 706, 711–12 (5th Cir. 2015); *United States v. Perez-Vargas*, 414 F.3d 1282, 1285–87 (10th Cir. 2005).[5] Thus, these

[5] The Eleventh Circuit reached the same conclusion in *United States v. Vail-Bailon*, 838 F.3d 1091, 1095–98 (11th Cir. 2016), but the opinion was vacated when the Eleventh Circuit recently granted rehearing en banc, *see* No. 15-10351, 2016 U.S. App. LEXIS 20868 (Nov. 21, 2016).

courts have held that "[a]n offense that *results* in physical injury, but does not involve the use or threatened use of force, simply does not meet the . . . definition of a crime of violence." *Torres-Miguel*, 701 F.3d at 168.

These courts have recognized that "there is a difference between the causation of an injury and an injury's causation by the use of physical force" that is "violent" in nature. *Chrzanoski*, 327 F.3d at 194; *United States v. De La Rosa-Hernandez*, 264 F. App'x 446, 448–49 (5th Cir. 2008) (per curiam). Indeed, as the Fourth Circuit has summarized, "[n]ot to recognize the distinction between a *use* of force and a *result* of injury" is to fall victim to the "logical fallacy that simply because all conduct involving a risk of the use of physical force also involves a risk of injury then the converse must also be true." *Torres-Miguel*, 701 F.3d at 169 (emphasis in original).

In reaching this conclusion, these courts have noted that "bodily injury could result from a number of acts that [do] not involve use of force," let alone "destructive or violent force." *De La Rosa-Hernandez*, 264 F. App'x at 448–49. For example, a defendant may cause bodily injury without the use of violent force by "telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim," *Whyte*, 807 F.3d at 469, by "guid[ing] someone intentionally into dangerous traffic," *De La Rosa-Hernandez*, 264 F. App'x at 449, or by "direct[ing] a firefighter acting in the line of duty to drive towards a bridge at night, knowing that it was out," *United States v. Rice*, 813 F.3d 704, 708 (8th Cir. 2016) (Kelly, J., dissenting). So, too, may a

defendant cause bodily injury without the use of violent force by "deliberately withhold[ing] vital medicine from a sick patient," *United States v. Villegas-Hernandez*, 468 F.3d 874, 881 (5th Cir. 2006), by "cancel[ing] an incompetent individual's insulin prescription, knowing her to be severely diabetic," *Rice*, 813 F.3d at 707 (Kelly, J., dissenting), or by "leav[ing] an infant alone near a pool," *Dalton v. Ashcroft*, 257 F.3d 200, 207 (2d Cir. 2001). And because each of these acts or omissions may cause bodily injury without the use of violent force, any attempt or threat to commit them also does not involve the "attempted" or "threatened" use of violent force. 18 U.S.C. § 16(a); *see, e.g.*, *De La Rosa-Hernandez*, 264 F. App'x at 449; *Torres-Miguel*, 701 F.3d at 168.

2. Taking the opposite view, the Sixth, Seventh, Eighth, and Ninth Circuits have held that the causation of bodily injury necessarily entails violent force and, thus, by itself necessarily qualifies an offense as a "crime of violence" or "violent felony." *United States v. Anderson*, 695 F.3d 390, 400–01 (6th Cir. 2012); *United States v. Waters*, 823 F.3d 1062, 1064–66 (7th Cir. 2016); *Rice*, 813 F.3d at 705–06; Pet. App. 5a–9a. Both the Eighth and Sixth Circuits have adopted this position over separate opinions rejecting it. *See Rice*, 813 F.3d at 706–08 (Kelly, J., dissenting); *Anderson*, 695 F.3d at 403–06 (White, J., concurring in the judgment).

In *Rice*, the Eighth Circuit relied upon *Castleman* to hold that the offense of "intentionally or knowingly . . . caus[ing] physical injury to one he knows to be a law enforcement officer" is a "crime of violence," even though it does not have as an element

the use, attempted use, or threatened use of physical force. 813 F.3d at 706. *Rice* was decided over the dissent of Judge Kelly, who expressed agreement with the holdings of other circuits that the causation of bodily injury does not establish a "crime of violence" because "a person may cause physical or bodily injury without using violent force." *Id.* at 707–08 (Kelly, J., dissenting).

The Seventh and Ninth Circuits have also relied upon *Castleman* in holding that the causation of bodily injury alone establishes a "crime of violence" or "violent felony." *Waters*, 823 F.3d at 1064–66; Pet. App. 5a–9a. And in a case pre-dating *Castleman*, the Sixth Circuit adopted the same position on plain-error review. *See Anderson*, 695 F.3d at 400–01. In that case, Judge White concurred on an alternative ground, while invoking *Johnson* and the decisions of other circuits to support the view "that proof of serious physical harm [does not] necessarily require[] proof that violent physical force was used." *Id.* at 403 (White, J., concurring).[6]

B. There Is Also A 2-2 Circuit Split On The Subsidiary Question Whether § 422(a) Defines A "Crime Of Violence"

The circuits' divergent approaches outlined above have also produced a second, more specific split

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[6] The Third Circuit has not squarely answered the question *Castleman* reserved, but has indicated in an unpublished opinion that "it would not be plain error to determine that the causation of bodily injury necessarily requires the use of force capable of causing bodily injury—that is, 'violent force.'" *United States v. Gorny*, 655 F. App'x 920, 925 (3d Cir. 2016) (citing *Rice*, 813 F.3d at 706).

relating to California Penal Code § 422(a) and whether it qualifies as a "crime of violence" or "violent felony." Section 422(a) defines as an offense "willfully threaten[ing] to commit a crime which will result in death or great bodily injury to another person," but does not require the use, attempted use, or threatened use of any force. Cal. Penal Code § 422(a); *People v. Toledo*, 26 P.3d 1051, 1055 (Cal. 2001) (listing elements of § 422(a) offense). Thus, the question whether § 422(a) delineates a "crime of violence" turns directly on the question this Court left open in *Castleman*. Because § 422(a) does not "have as an element the use, attempted use, or threatened use of [violent] physical force," 18 U.S.C. § 16(a), it qualifies as a "crime of violence" only if "the causation of bodily injury necessarily entails violent force," *Castleman*, 134 S. Ct. at 1413.

In accordance with their holdings that the causation of bodily injury does not necessarily entail violent force, the Fifth and Fourth Circuits have held that § 422(a) is not a "crime of violence." *See, e.g.*, *De La Rosa-Hernandez*, 264 F. App'x at 447–49; *Torres-Miguel*, 701 F.3d at 167–71. In *De La Rosa-Hernandez*, the Fifth Circuit pointed out that, under the authoritative decisions of the California Supreme Court, § 422(a) does not "require that the threatened criminal act involve the use of destructive or violent force," and that "a defendant could violate § 422, for example, by threatening either to poison another or to guide someone intentionally into dangerous traffic." 264 F. App'x at 447–49 (citing *People v. Toledo*, 26 P.3d at 1055). The Fifth Circuit later adopted this "persuasive" reasoning in a published opinion, *United States v. Cruz-Rodriguez*, 625 F.3d

274, 276 (5th Cir. 2010) (per curiam), and reiterated it in another recent case, *see Rodriguez-Rodriguez*, 775 F.3d at 711–12. The Fourth Circuit also adopted this holding in *Torres-Miguel*. 701 F.3d at 168–69.

By contrast, in line with their holdings that the causation of bodily injury necessarily entails violent force, the Eighth Circuit has concluded that § 422(a) is a "violent felony," *see Toledo v. United States*, 581 F.3d at 681, and the Ninth Circuit here reaffirmed its holding that § 422(a) is a "crime of violence," *see* Pet. App. 5a–9a. The Ninth Circuit acknowledged that its holding conflicts with "Fourth and Fifth Circuit law, concluding section 422 is not a crime of violence." Pet. App. 6a.

II. THE QUESTIONS PRESENTED ARE RECURRING AND OF NATIONWIDE IMPORTANCE

The Questions Presented by this case—and in particular the question on which the Court reserved judgment in *Castleman*—are frequently recurring and implicate "important matter[s]" of nationwide significance. Sup. Ct. R. 10(a). Indeed, the question whether "the causation of bodily injury necessarily entails violent force," *Castleman*, 134 S. Ct. at 1413, recurs in hundreds of cases in the federal courts each year and cuts across the immigration and criminal sentencing contexts, *see, e.g.*, *id.*; *see also* 18 U.S.C. §§ 16(a), 924(c)(3)(A), (e)(2)(B)(i); U.S.S.G. §§ 2L1.2 cmt., 4B1.2.

This question carries significant legal consequences that impact the important rights of immigrants and criminal defendants. The question is dispositive of whether scores of criminal offenses—including California Penal Code § 422(a)—qualify as

"crimes of violence" or "violent felonies" under several federal statutes and the Sentencing Guidelines. *See, e.g.*, 18 U.S.C. §§ 16(a), 924(c)(3)(A), (e)(2)(B)(i); U.S.S.G. §§ 2L1.2 cmt., 4B1.2. The import of these designations is enormous. For example, under the INA, a "crime of violence" designation can render an immigrant—including a lifetime lawful permanent resident such as Mr. Arellano—removable from the United States and ineligible for discretionary cancellation of removal. *See* 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii), 1229b(a)(3). And in the criminal context, a "crime of violence" or "violent felony" designation can trigger long mandatory minimum sentences, dramatically lengthen a defendant's sentence, and even require imposition of consecutive terms of imprisonment. *See* 18 U.S.C. § 924(c)(1)(A), (c)(1)(D)(ii), (c)(3)(A), (e)(1); U.S.S.G. §§ 2K2.1(a), 2L1.2(b)(2)(E), (b)(3)(E), 4B1.1.

The immigration and criminal sentencing contexts implicated by the questions presented are areas of quintessentially national concern where the need for the federal courts to speak with a single voice is paramount. *See, e.g.*, *Chamber of Commerce v. Whiting*, 563 U.S. 582, 634 (2011) (Sotomayor, J., dissenting) (recognizing Congress's intent that immigration laws be enforced "uniformly"). Yet under the fragmented state of the law in the circuits, whether the same offense triggers the grave and frequently life-altering consequences of a "crime of violence" or "violent felony" designation currently turns on the serendipity of the immigrant's or defendant's geographic location or, perhaps even

more troublingly, on prosecutorial discretion as to where to file the case.

For example, if the government had instituted removal proceedings against Mr. Arellano in Texas, Virginia, or any other state within the Fifth or Fourth Circuits, he never would have been ordered removed—and would have remained in the United States with his family to this day—because those circuits have held that § 422(a) is not a "crime of violence." *De La Rosa-Hernandez*, 264 F. App'x at 447–49; *Torres-Miguel*, 701 F.3d at 167–71. In fact, Mr. Arellano would never have been removed if his hearing had occurred in *any* of the twenty-one states within the First, Second, Fourth, Fifth, or Tenth Circuits because those courts decline to substitute "the causation of bodily injury" for "the use, attempted use, or threatened use of physical force" Congress has required for a "crime of violence." *See Whyte*, 807 F.3d at 469; *Chrzanoski*, 327 F.3d at 194–96; *Torres-Miguel*, 701 F.3d at 168–69; *Rodriguez-Rodriguez*, 775 F.3d at 711–12; *Perez-Vargas*, 414 F.3d at 1285–87. Yet Mr. Arellano has been removed to Mexico because his hearing took place in the Ninth Circuit, and would have been removed if his hearing had taken place in the Sixth, Seventh, or Eighth Circuits. *See* Pet. App. 5a–9a; *Anderson*, 695 F.3d at 400–01; *Waters*, 823 F.3d at 1064–66; *Rice*, 813 F.3d at 705–06. Likewise, the criminal sentencing implications of a conviction under § 422(a)—or any other statute that requires the causation of bodily injury but not the use, attempted use, or threatened use of violent force—now vary across the circuits. *Compare, e.g.*, *Torres-Miguel*, 701

F.3d at 167–71, *with Waters*, 823 F.3d at 1064–66. The Court should grant certiorari.

III. THE NINTH CIRCUIT'S HOLDING THAT AN OFFENSE THAT DOES NOT REQUIRE VIOLENT FORCE NONETHELESS QUALIFIES AS A "CRIME OF VIOLENCE" IS WRONG

The position that "the causation of [bodily] injury" is, by itself, sufficient to establish a "crime of violence" or "violent felony" cannot be reconciled with the "plain text" of Congress's statutory directives. *Leocal*, 543 U.S. at 7–8. Congress chose to define "crime of violence" and "violent felony" to require "the use, attempted use, or threatened use of physical force." 18 U.S.C. §§ 16(a), 924(c)(3)(A), (e)(2)(B)(i). It said nothing about the causation of bodily injury. Accordingly, Congress directed that an offense that does not have "as an element the use, attempted use, or threatened use of physical force" cannot be a "crime of violence" or "violent felony"—even if it involves the causation of bodily injury. 18 U.S.C. §§ 16(a), 924(c)(3)(A), (e)(2)(B)(i). The decision below, and those of three other circuits, have turned this statutory command on its head. For them, an offense is a "crime of violence" or "violent felony" if it causes bodily injury, even if it does not require the use, attempted use, or threatened use of physical force. *See Anderson*, 695 F.3d at 400–01; *Waters*, 823 F.3d at 1064–66; *Rice*, 813 F.3d at 705–06; Pet. App. 5a–9a.

This rewriting of the statutes to sweep in conduct that does not involve actual, attempted, or threatened physical force is also contrary to this Court's statements in *Leocal*, *Johnson*, and *Castleman*. The Court has gone to great lengths to

emphasize that a "crime of violence" or "violent felony" requires "violent force"—a "substantial degree of force" greater than common-law "force." *Johnson*, 559 U.S. at 140; *see also Leocal*, 543 U.S. at 11; *Castleman*, 134 S. Ct. at 1410–11 & n.4.

Most recently, in *Castleman,* this distinction between "violent force" and common-law "force" was crucial to the Court's holding that common-law "force" is sufficient for a "misdemeanor crime of domestic violence." *See* 134 S. Ct. at 1410–14 & n.4. Indeed, the position that there is *no* difference between "violent force" and common-law "force" because both are present whenever there is causation of bodily injury, is precisely the position that Justice Scalia urged the Court to adopt in *Castleman*, *see id.* at 1416–17 (Scalia, J., concurring), but that the *Castleman* Court rejected, *see id.* at 1414–15. Yet the Ninth Circuit in this case—and the Sixth, Seventh, and Eighth Circuits in the cases cited above—have adopted that position by ruling that both "violent force" and common-law "force" are necessarily present when there has been causation of bodily injury. Pet. App. 5a–9a; *see also Anderson*, 695 F.3d at 400–01; *Waters*, 823 F.3d at 1064–66; *Rice*, 813 F.3d at 705–06.

The Sixth, Seventh, Eighth, and Ninth Circuits have offered two primary rationales for their counter-textual and counter-precedential construction of "crime of violence" and "violent felony." First, those courts have posited that, as a matter of logic, the causation of bodily injury necessarily entails violent force. *See Anderson*, 695 F.3d at 400–01; *Waters*, 823 F.3d at 1064–66; *Rice*, 813 F.3d at 705–06; Pet. App. 5a–9a. But this

rationale repeats the "logical fallacy that simply because all conduct involving a risk of the use of physical force also involves a risk of injury then the converse must also be true." *Torres-Miguel*, 701 F.3d at 169. The fact that the use of "violent force" necessarily involves the capacity to "caus[e] physical pain or injury to another person," *Johnson*, 559 U.S. at 140, does not mean that all bodily injury is caused by "violent force," *see, e.g.*, *Chrzanoski*, 327 F.3d at 194; *Torres-Miguel*, 701 F.3d at 169; *De La Rosa-Hernandez*, 264 F. App'x at 448–49.

Section 422(a) is a specific case in point. The offense defined in § 422(a) requires "willfully threatening to commit a crime which will result in death or great bodily injury to another person," but does not require the use, attempted use, or threatened use of physical force. Cal. Penal Code § 422(a); *People v. Toledo*, 26 P.3d at 1055. Thus, § 422(a) can be violated without violent force, such as by threatening to "permit any elder or dependent" or "child" "to suffer . . . unjustifiable physical pain" or "to be placed in a situation where his or her person or health is endangered," Cal. Penal Code §§ 273a, 368(b)(1), or to "omit[] . . . to furnish necessary clothing, food, shelter or medical attendance, or other remedial care" to one's "minor child," *id.* § 270; *see also De La Rosa-Hernandez*, 264 F. App'x at 448–49; *supra* at 12–13.

Second, the Seventh, Eighth, and Ninth Circuits have also tried to support the position that bodily injury always involves "violent force" by invoking *Castleman*. *See, e.g.*, *Waters*, 823 F.3d at 1064–66; *Rice*, 813 F.3d at 705–06; Pet. App. 5a–9a. But *none* of these courts mentioned that *Castleman* addressed

the ACCA's separate "misdemeanor crime of domestic violence" provision, or that *Castleman* commented positively about *Leocal*'s and *Johnson*'s construction of the "crime of violence" and "violent felony" provisions and expressly reserved the question whether the "causation of bodily injury necessarily entails violent force." *Castleman*, 134 S. Ct. at 1410–1415 & n.4; *see also Waters*, 823 F.3d at 1064–66; *Rice*, 813 F.3d at 705–06; *id.* at 706–08 (Kelly, J., dissenting); Pet. App. 5a–9a.

Thus, both the text of the relevant statutes and this Court's several recent decisions make clear that the decision below was wrongly decided.

IV. This Case Presents An Ideal Vehicle To Resolve The Important And Recurring Questions Presented

This case is an ideal vehicle to resolve both of the important and recurring nationwide questions. Those questions are squarely presented, have been actively litigated by both sides, and are dispositive of Mr. Arellano's requested relief.

Although Mr. Arellano was initially found removable based upon a drug paraphernalia conviction, the government has conceded away that ground for removal under *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015). *See* Apr. 12, 2016 Oral Argument at 17:59–18:07 (government counsel conceding that Mr. Arellano's "28(j) letter does raise an interesting point that is correct"); Apr. 4, 2016, Rule 28(j) Letter (9th Cir. Dkt. 59). Thus, the *only* remaining basis for the removal order against Mr. Arellano is his attempted criminal threats conviction under § 422(a). Accordingly, resolution of either question presented

in Mr. Arellano's favor would require reversal of the removal order.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

DONALD B. AYER
JOHN M. GORE
Counsel of Record
MATTHEW J. RUBENSTEIN
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
jmgore@jonesday.com

Counsel for Petitioner Javier Arellano Hernandez

JANUARY 5, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAVIER ARELLANO HERNANDEZ, Petitioner, v. LORETTA E. LYNCH, Attorney General, Respondent.	No. 11-72286 Agency No. A017-214-318 ORDER

Before: WALLACE, SCHROEDER, and N.R. SMITH, Circuit Judges.

The panel denies the petition for rehearing en banc. Judge N.R. Smith has voted to deny the petition for rehearing en banc and Judges Wallace and Schroeder have so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

APPENDIX B

831 F.3D 1127
UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

JAVIER ARELLANO HERNANDEZ, PETITIONER,
V.
LORETTA E. LYNCH, ATTORNEY GENERAL,
RESPONDENT.

NO. 11-72286

|

ARGUED AND SUBMITTED APRIL 12,
2016, SAN FRANCISCO, CALIFORNIA

|

FILED AUGUST 1, 2016

OPINION

* * *

N.R. SMITH, Circuit Judge:

Javier Arellano Hernandez's conviction for attempted criminal threats, pursuant to California Penal Code sections 422 and 664, constitutes an aggravated felony for which he is removable. *See* 8 U.S.C. § 1101(a)(43)(F). First, attempted criminal threats is categorically a crime of violence as defined under 18 U.S.C. § 16(a). Second, the California superior court designated the conviction as a felony and imposed a sentence of "at least one year."

I.

In 1967, Arellano Hernandez entered the United States with his parents as a legal permanent resident. In March 2009, Arellano Hernandez pleaded guilty to unlawful possession of drug paraphernalia and was sentenced to six days' imprisonment. In September 2009, a jury convicted him of three separate crimes: (1) attempted criminal threats, a felony in violation of California Penal Code sections 422 and 664; (2) simple assault, a misdemeanor in violation of California Penal Code section 240; and (3) false imprisonment, a misdemeanor in violation of California Penal Code section 236. The superior court imposed a suspended sentence for attempted criminal threats and placed Arellano Hernandez on probation for a period of three years with certain terms and conditions, including 365 days in jail. The court stayed sentencing the misdemeanor counts of simple assault and false imprisonment pending Arellano Hernandez's probation.

As a result of these convictions, the Department of Homeland Security ("DHS") began removal proceedings and issued a Notice to Appear. DHS alleged that Arellano Hernandez was removable under 8 U.S.C. § 1101(a)(43) (F), (U), because of his March 2009 drug paraphernalia conviction and his September 2009 attempted criminal threats conviction.

At a hearing before the immigration judge ("IJ"), Arellano Hernandez conceded removability based on the drug paraphernalia conviction. However, Arellano Hernandez contested whether his criminal threats conviction constituted an aggravated felony;

therefore he requested cancellation of removal.[1] The IJ ultimately concluded that Arellano Hernandez was sentenced to 365 days in jail for the attempted criminal threats conviction. Thus, Arellano Hernandez had been convicted of a crime of violence and an aggravated felony.

The Board of Immigration Appeals ("BIA") dismissed the appeal and affirmed the IJ's conclusion that Arellano Hernandez was convicted of a crime of violence and an aggravated felony. Arellano Hernandez was therefore ineligible for cancellation of removal.

II.

In its decision, the BIA reviewed the IJ's findings of fact for clear error and questions of law de novo. Where the BIA conducts de novo review of the IJ's decision, we limit our review to the BIA's decision, except to the extent that the BIA expressly adopted the IJ's decision. *Hosseini v. Gonzales*, 471 F.3d 953, 957 (9th Cir. 2006). However, where the BIA conducts a clear error review, it relies "upon the IJ's opinion as a statement of reasons"; therefore, we can "look to the IJ's oral decision as a guide to what lay behind the BIA's conclusion." *Tekle v. Mukasey*, 533 F.3d 1044, 1051 (9th Cir. 2008) (quoting *Kozulin v. INS*, 218 F.3d 1112, 1115 (9th Cir. 2000)). "In so doing, we review here the reasons explicitly identified by the BIA, and then examine the reasoning

[1] In a Fed. R. App. P. 28(j) letter, Arellano Hernandez also challenged his removability based on the drug paraphernalia conviction in light of *Mellouli v. Lynch*, ____ U.S. ____, 135 S. Ct. 1980 (2015). Because we affirm the BIA on the aggravated felony charge, we need not address this issue.

articulated in the IJ's oral decision in support of those reasons." *Id.*

We review de novo whether a particular conviction under state law is a removable offense. *Coronado–Durazo v. INS*, 123 F.3d 1322, 1324 (9th Cir. 1997). We defer to the BIA's interpretation of its own regulation when that interpretation "is neither clearly erroneous nor inconsistent with the regulation[ ]." *Singh–Bhathal v. INS*, 170 F.3d 943, 945 (9th Cir. 1999).

"We review *de novo* claims of due process violations in immigration proceedings." *Simeonov v. Ashcroft*, 371 F.3d 532, 535 (9th Cir. 2004). Factual findings are reviewed for substantial evidence. *Zehatye v. Gonzales*, 453 F.3d 1182, 1184–85 (9th Cir. 2006).

III.

Arellano Hernandez argues that his conviction under California Penal Code sections 422 and 664 is not an aggravated felony or a crime of violence. We disagree. We affirm our prior precedent, which held that a conviction under sections 422 and 664 is categorically a crime of violence. Further, because the superior court designated Arellano Hernandez's conviction as a felony and sentenced him to 365 days in jail, his conviction is also an aggravated felony.

A.

A "crime of violence" includes any "offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). California Penal Code section 422(a) (2009) provides:

> Any person who willfully threatens to commit a crime which will result in death or great bodily

> injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

In our prior precedent regarding section 422, we have held that a conviction under this statute is a crime of violence. *See, e.g.*, *United States v. Villavicencio-Burruel*, 608 F.3d 556, 563 (9th Cir. 2010); *Rosales–Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003). In *Villavicencio–Burruel*, we concluded that, based on the plain language of the statute, "section 422's elements necessarily include a threatened use of physical force 'capable of causing physical pain or injury to another person.'" 608 F.3d at 562 (quoting *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265 (2010). Arellano Hernandez challenges the validity of this holding in light of (1) other California criminal threat statutes, which are not crimes of violence; (2) Fourth and Fifth Circuit law, concluding section 422 is not a crime of violence; and (3) our recent case *Dimaya v. Lynch*, 803 F.3d

1110 (9th Cir. 2015). None of these arguments provide a basis for us to overturn our prior precedent.

First, neither of the other California criminal threat statutes, California Penal Code sections 69[2] or 71,[3] are analogous to section 422. As we have previously recognized, neither section 69 nor section 71 include the elements of a threatened use of physical force. *See Flores–Lopez v. Holder*, 685 F.3d 857, 863 (9th Cir. 2012); *Bautista–Magallon v. Holder*, 584 Fed. App'x 300, 301 (9th Cir. 2014).

Second, contrary decisions of our sister circuits have no effect on our jurisprudence. The Fourth and Fifth Circuits reasoned that section 422 does not qualify categorically as a crime of violence under the element test, because one could threaten to poison another, which is not (under their precedent) "force," and therefore not a crime of violence. *See United States v. Torres–Miguel*, 701 F.3d 165, 168–69 (4th Cir. 2012); *United States v. Cruz–Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010). However, this reasoning has been rejected by the Supreme Court. *United States v. Castleman*, ____ U.S. ____, 134 S. Ct. 1405, 1415 (2014) ("The 'use of force' ... is not the act of 'sprinkling' the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter." (alteration omitted)); *see also United States v. De La Fuente*, 353 F.3d 766, 770–71 (9th Cir. 2003)

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[2] Penal Code section 69 is titled "Obstructing or Resisting Executive Officer in Performance of Duties."

[3] Penal Code section 71 is titled "Threatening Public Officers and Employees and School Officials."

(concluding that a threat of anthrax poisoning constituted a "threatened use of physical force" because the defendant's "letters clearly threatened death by way of physical contact with anthrax spores"). Further *Villavicencio–Burruel* remains the law of this circuit. Absent intervening higher authority, "a three-judge panel may not overrule a prior decision of the court." *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).

Finally, *Dimaya* does not compel a different conclusion. In *Dimaya*, we concluded that 8 U.S.C. § 1101(a)(43)(F)'s definition of "crime of violence" was void for vagueness as it related to 18 U.S.C. § 16(b).[4] 803 F.3d at 1120 (citing *Johnson v. United States*, ____ U.S. ____, 135 S. Ct. 2551, 2558 (2015)); *see also United States v. Hernandez–Lara*, 817 F.3d 651, 652 (9th Cir. 2016) (per curiam). However, *Dimaya* did not "cast any doubt on the constitutionality of 18 U.S.C. § 16(a)'s definition of a crime of violence." 803 F.3d at 1120 n.17. Arellano Hernandez does not challenge the constitutionality of § 16(a). Thus, applying our precedent, section 422 is categorically a crime of violence.

The "attempt" portion of Arellano Hernandez's conviction does not alter our determination that the conviction is a crime of violence. We have "generally found attempts to commit crimes of violence, enumerated or not, to be themselves crimes of

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[4] Crime of violence under subsection (b) is defined as "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(b).

violence." *United States v. Riley*, 183 F.3d 1155, 1160 (9th Cir. 1999); *cf.* 8 U.S.C. § 1101(a)(43)(U) (providing that an aggravated felony includes the attempt to commit the offense). California's attempt statute is coextensive with an "attempt" at common law. *United States v. Saavedra–Velazquez*, 578 F.3d 1103, 1110 (9th Cir. 2009). Therefore, Arellano Hernandez's conviction for attempted criminal threats is categorically a crime of violence.

B.

Arellano Hernandez was convicted of violating California Penal Code section 422, which can be punished as either a felony or misdemeanor offense. *See* Cal. Penal Code § 422(a). This dual classification is also known as a "wobbler" under California law. See *Ewing v. California*, 538 U.S. 11, 16, 123 S. Ct. 1179 (2003). "Under California law, a 'wobbler' is presumptively a felony and 'remains a felony except when the discretion is actually exercised' to make the crime a misdemeanor." *Id.* An offense is "deemed a felony" when a defendant is convicted and "granted probation without the imposition of a sentence." *People v. Feyrer*, 48 Cal. 4th 426, 106 Cal. Rptr. 3d 518, 226 P.3d 998, 1007 (2010), *superseded by statute on another ground as stated in People v. Park,* 56 Cal. 4th 782, 156 Cal. Rptr. 3d 307, 299 P.3d 1263, 1266 n.4 (2013). The offense remains a felony unless the sentencing court subsequently reduces it to a misdemeanor. *Id.*

Here, Arellano Hernandez's conviction was "deemed a felony." The superior court suspended Arellano Hernandez's sentence and placed him on probation. As part of Arellano Hernandez's terms and conditions of probation, the superior court

ordered him to serve 365 days in the county jail. At no time did the superior court ever declare the offense to be a misdemeanor nor did the superior court ever subsequently reduce the felony offense. *See* Cal. Penal Code § 17(b).

Arellano Hernandez argues that the superior court's judgment designated his conviction as a misdemeanor. Arellano Hernandez misreads the superior court's judgment. First, the court acknowledged that the jury found Arellano Hernandez guilty of three separate counts: (1) attempted criminal threats "in violation of Penal Code section 664/422, a felony"; (2) simple assault "in violation of Penal Code section 240, a misdemeanor"; and (3) false imprisonment "in violation of Penal Code section 236 ..., a misdemeanor." Second, as part of the superior court's sentence, it ordered "the misdemeanor counts stayed." Thus, the record is clear that the superior court sentenced Arellano Hernandez to 365 days in jail for the attempted criminal threats, and it did not reduce the crime to a misdemeanor either directly or implicitly.

C.

A crime of violence is an aggravated felony if "the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). "Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." *Id.* at § 1101(a)(48)(B).

Arellano Hernandez was found guilty of a felony offense under sections 422 (criminal threats) and 664 (attempt). California Penal Code section 422(a) outlines the punishment for this charge as either "imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."[5]

Arellano Hernandez argues that the IJ erred in concluding the 365-day jail term was for the attempted criminal threats conviction. We disagree. The record shows that the superior court imposed a 365-day jail term. This sentence of 365 days equates to imprisonment of "at least one year." *See Habibi v. Holder*, 673 F.3d 1082, 1085–86 (9th Cir. 2011). If the superior court had concluded that the conviction was to be treated as a misdemeanor, the maximum sentence Arellano Hernandez could have received was six months. Cal. Penal Code §§ 422, 664. However, the superior court did not impose a misdemeanor sentence (as discussed above), but rather imposed probation on the sole count of attempted criminal threats.

The superior court was not imposing a sentence on all three convictions, because it ordered "the misdemeanor counts stayed." There is no ambiguity to this statement; the superior court suspended the sentence and only placed Arellano Hernandez on probation with regard to the felony conviction. [6]

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[5] Section 664 reduces the penalty, where the crime is merely "attempted." Cal. Penal Code § 664(a).

[6] Whether the court was applying California Penal Code section 654 is not relevant to this court's determination. California Penal Code section 654(a) provides that an act "that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the

Thus, Arellano Hernandez was sentenced to at least one year. *See United States v. Mendoza–Morales*, 347 F.3d 772, 775 (9th Cir. 2003) (holding, in the context of United States Sentencing Guidelines § 4A1.2(b)(1), days in incarceration as a term of probation should be counted in calculating the term of imprisonment).

The BIA properly denied Arellano Hernandez's application for cancellation of removal based on his conviction for an aggravated felony offense.

PETITION FOR REVIEW DENIED.

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longest potential term of imprisonment." Section 654 therefore provides that a person can only be punished (to the "longest potential term of imprisonment") for one crime arising out of the same conduct. Cal. Penal Code § 654; *see also People v. Correa*, 54 Cal. 4th 331, 142 Cal. Rptr. 3d 546, 278 P.3d 809, 812 (2012).

APPENDIX C

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

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File: A017 214 318 – El Centro, CA Date: July 29 2011

In re: JAVIER ARELLANO HERNANDEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: David P. Finn
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (attempt or conspiracy to commit offense)

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (crime

of violence)

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Mexico, appeals the Immigration Judge's February 28, 2011, decision denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The appeal will be dismissed.

We review the Immigration Judge's findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i). All other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii). Because the respondent's application for cancellation of removal was filed after May 11, 2005, it is subject to the REAL ID Act of 2005. *Matter of S-B-*, 24 I&N Dec. 42, 45 (BIA 2006). Thus, the amendments made by the REAL ID Act to section 208(b)(1)(B) of the Act apply to this case.

The respondent argues on appeal that the Immigration Judge erred in concluding that he was convicted of an aggravated felony and, thus, is ineligible for cancellation of removal. The respondent, who concedes removability under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), bears the burden of establishing eligibility for cancellation of removal. *See* 8 C.F.R. § 1240.8(d). Upon review, we conclude that the respondent's 2009 conviction for attempted criminal threat under sections 664 and 422 of the California Penal Code qualifies as a crime of violence aggravated felony under section 101(a)(43)(F) of the Act. Consequently, he is additionally removable under section

237(a)(2)(A)(iii) of the Act, and is also ineligible for cancellation of removal pursuant to section 240A(a)(3) of the Act.

In applying the categorical approach, as set forth in *Taylor v. United States*, 495 U.S. 575 (1990), we compare the elements of the statute of conviction to a "crime of violence" under 18 U.S.C. § 16 to determine "whether the full range of conduct covered by [the criminal statute] falls within the meaning of that term." *Suazo Perez v. Mukasey*, 512 F.3d 1222, 1225 (9th Cir. 2008) (internal quotation marks omitted); *see also Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016 (9th Cir. 2006) (in determining the categorical reach of a state crime, we also consider the interpretation of the state crime's language in judicial opinions).

Section 422 of the California Penal Code provides in relevant part that "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement ... is to be taken as a threat, even if there is no intent of actually carrying it out, . . . shall be punished." CAL. PENAL CODE § 422 (2008). The United States Court of Appeals for the Ninth Circuit has held that section 422 is categorically a crime of violence under 18 U.S.C. § 16(a) because it is an offense "that has as an element the . . . threatened use of physical force against the person or property of another." *Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003)[1];

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[1] The 2008 version of section 422 of the California Penal Code, the applicable version of the statute in the case at hand, mirrors the language of the 2000 version of section 422, which

see also United States v. Villavicencio-Burruel, 608 F.3d 556 (9th Cir. 2010) (holding that section 422 is categorically a "crime of violence" for purposes of section 2L1.2 of the United States Sentencing Guidelines (USSG), which defines a "crime of violence" as either the commission of one of the enumerated offenses, or, identical to the language in 18 U.S.C. § 16(a), any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another" USSG § 2L1.2, cmt. n. 1(B)(iii)). Thus, the Immigration Judge correctly concluded that a criminal threat conviction under section 422 is a crime of violence aggravated felony.

The respondent, however, was convicted of *attempted* criminal threat under sections 664 and 422 of the California Penal Code. Section 664 sets forth punishment for "[e]very person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration." CAL. PENAL CODE § 664 (2008). Although not specifically addressed by the Immigration Judge, we conclude that attempted criminal threat constitutes a "crime of violence" under 18 U.S.C. § 16(a), i.e., it "has as an element the use, attempted use, or threatened use of physical force against the person of another."

In *People v. Toledo*, 26 P.3d 1051 (Cal. 2001), the California Supreme Court concluded that the language of sections 664 and 422 of the California Penal Code supports the existence of the crime of attempted criminal threat.

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was the applicable version of the statute in *Rosales-Rosales v. Ashcroft*, *supra*.

> Under the provisions of section 21a [of the California Penal Code], a defendant properly may be found guilty of attempted criminal threat whenever, acting with the specific intent to commit the offense of criminal threat, the defendant performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action. Furthermore, in view of the elements of the offense of criminal threat, a defendant acts with the specific intent to commit the offense of criminal threat only if he or she specifically intends to threaten to commit a crime resulting in death or great bodily injury with the further intent that the threat be taken as a threat, under circumstances sufficient to convey to the person threatened a gravity of purpose and an immediate prospect of execution so as to reasonably cause the person to be in sustained fear for his or her own safety or for his or her family's safety.

Id. at 1057. Thus, the court explained that a number of possible circumstances fall within the reach of section 664:

> For example, if a defendant takes all steps necessary to perpetrate the completed crime of criminal threat by means of a written threat, but the crime is not completed only because the written threat is intercepted before delivery to the threatened person, the defendant properly may be found guilty of attempted criminal threat. Similarly, if a defendant, with the requisite intent, orally makes a sufficient threat directly to the threatened person, but for some reason the threatened person does not

> understand the threat, an attempted criminal threat also would occur. Further, if a defendant, again acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat. In each of these situations, only a fortuity, not intended by the defendant, has prevented the defendant from perpetrating the completed offense of criminal threat itself.

Id. (emphasis in original); *see also In re Sylvester C.*, 40 Cal. Rptr. 3d 461, 465 (Cal. Ct. App. 2006).

Based on the California Supreme Court's interpretation of the offense attempted criminal threat, we conclude that just as making a criminal threat under section 422 has as an element the "threatened use of physical force," so does an attempted criminal threat under section 664. The only difference between the two crimes is the "fortuitous" act that prevents the threat from actually causing the threatened person to be in sustained fear for his safety; the threat of physical force, however, always remains as an element. Thus, we conclude that attempted criminal threat under sections 664 and 422 is categorically a crime of violence under 18 U.S.C. § 16(a). *See generally United States v. Riley*, 183 F.3d 1155, 1160 (9th Cir. 1999) (noting that the Ninth Circuit has "generally

found attempts to commit crimes of violence, enumerated or not, to be themselves crimes of violence").

Having concluded that the respondent's conviction under section 664 is a crime of violence, we turn to whether it was "for a term of imprisonment at least one year." Section 101(a)(43)(F) of the Act. The sentencing order indicates that the respondent was convicted of three lesser included offenses in violation of the California Penal Code: (1) attempted criminal threat under sections 664 and 422 (a felony); (2) simple assault under section 240 (a misdemeanor); and (3) false imprisonment under section 236 (a misdemeanor) (Exh. 5). The sentencing order also indicates that the respondent was sentenced to 365 days in county jail. The respondent argues that the sentencing order is Prague as to whether the 365-day sentence was imposed for each conviction to be served concurrently or consecutively, or whether the sentence relates to all convictions or just one conviction in particular. For the reasons that follow, we agree with the Immigration Judge's conclusion that the 365-day sentence was imposed for solely the respondent's attempted criminal threat conviction (I.J. at 3-4).

In California, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." CAL. PENAL CODE § 654(a). "The purpose of [section 654(a)] is to prevent multiple punishment for a single act or omission, even though that act or omission

violates more than one statute and thus constitutes more than one crime." *People v. Tarris*, 103 Cal. Rptr. 3d 278, 289 (Cal. Ct. App. 2009) (citation omitted). "If, on the other hand, [the] defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" *People v. Keneficic* 87 Cal. Rptr. 3d 773, 780 (Cal. Ct. App. 2009) (citation omitted). Thus, under section 654 of the California Penal Code, "[i]f all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." *People v. Alford*, 103 Cal. Rptr. 3d 898, 901 (Cal. Ct. App. 2010) (citation omitted).

The sentencing order states that the respondent's misdemeanor counts were stayed. As noted above, the respondent's conviction for attempted criminal threat is a felony, whereas the other two convictions were misdemeanors. Because the two misdemeanor convictions were stayed, it is reasonable to infer from the sentencing order that the sentencing judge sought to prevent multiple punishment for a single act that resulted in convictions for three lesser included offenses and, accordingly, imposed punishment solely for the attempted criminal threat conviction. The respondent, who bears the burden of showing that his conviction is not a crime of violence aggravated felony, does not assert on appeal that his offenses were not incident to one objective.

In conclusion, the respondent has been convicted of a crime of violence for which the term of

imprisonment was at least 1 year, and thus the conviction qualifies as an aggravated felony under section 101(a)(43)(F) of the Act. The conviction also qualifies as an aggravated felony under section 101(a)(43)(U) of the Act, as an attempt to commit a crime of violence for which the term of imprisonment at least one year. Consequently, the respondent is ineligible for cancellation of removal as a matter of law. *See* section 240A(a)(3) of the Act. Further, in light of the respondent's criminal history, we conclude that he has not shown that he warrants cancellation of removal as a matter of discretion. *See* section 240A(a) of the Act; *Matter of Sotelo-Sotelo*, 23 I&N Dec. 201, 203 (BIA 2001). The following order will be entered.

ORDER: The appeal is dismissed.

/s/ Roger A Paul
FOR THE BOARD

APPENDIX D

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

El Centro, California

File A 17 214 318 Date: February 28, 2011

In the Matter of

	)	
JAVIER ARELLANO HERNANDEZ	)	IN REMOVAL PROCEEDINGS
	)	
Respondent	)	

CHARGE: Section 237(a)(2)(A)(iii) of the INA – attempted aggravated felony; Section 237(a)(2)(A)(iii) of the INA – crime of violence aggravated felony; Section 237 (a)(2)(B)(i) of the INA - controlled substance offense; Section 237 (a)(2)(A)(iii) of the INA – attempted crime of violence aggravated felony; Section 237(a)(2)(A)(iii) of the INA – crime of violence aggravated

	felony
APPLICATION:	Termination; cancellation of removal under Section 240A(a) of the INA; Voluntary Departure under Section 240B of the INA

APPEARANCES:

ON BEHALF OF RESPONDENTS:	ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
Joseph A. Mbacho, Esquire 300 South Imperial Avenue, Ste 2 El Centro, California 92243	David P. Finn, Esquire 15 North Imperial Avenue El Centro, California 92243

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a 44 year old man who is a native and citizen of Mexico who has been a legal permanent resident of the United States since within days of his birth. Immigration authorities began removal proceedings alleging in the Notice to Appear that he had been convicted of an aggravated felony relating to an attempted aggravated felony and that he was separately removable for having been convicted of a crime of violence aggravated felony. Exhibit 1. The Notice to Appear was properly served.

The Government subsequently lodged amended or changed allegations. Exhibit 2. The lodged allegations were properly served and were in lieu of

the original charges. The lodged charge expanded the allegations and charge to include a charge that Respondent is removable for having been convicted of a controlled substance offense. Exhibit 2.

On February 28, 2011, the matter came on for a hearing. The Respondent, through his counsel, admitted allegations one through seven of the lodged charge and conceded that Respondent was removable for having been convicted of a controlled substance offense. However, the Respondent disputed that he is removable for having been convicted of an aggravated felony related to an attempted crime of violence and that he was removable for having been convicted of a crime of violence aggravated felony, without regard to attempted conspiracy.

Initially, I was persuaded that the Respondent was removable for his controlled substance offense, just as he conceded, and I was also persuaded that the Respondent had not suffered a conviction for an aggravated felony. The conviction documents, which were offered by the Government, *see* Exhibit 5, show that the Respondent had a jury trial and was also convicted of lesser included offenses. He was convicted of the lesser included offense attempted criminal threats. *See* Exhibit 5, page 52. He was convicted as well of a simple assault and he was convicted of a lesser included misdemeanor, false imprisonment. *See id* at page 58. The Respondent was sentenced to a jail term of 365 days. The finding of the court with regard to that sentence is initially difficult to interpret. As the Respondent's counsel pointed out, the sentence imposed as a condition of probation requires the Respondent serve 365 days in the county jail. However, that part of the order does

not designate to which of the particular offenses that sentence is attached. Consequently, at first blush it would appear that it could relate to any or all of them, or might be an indication of a consecutive sentence imposed on each, or it might be 365 days as to each one with them to run concurrently. Therefore, I initially found that the Government had not born its burden showing that the Respondent was removable as an aggravated felon. However, as the case continued on the issue of relief, the Government pointed out that page two of that order shows that the Court ordered the misdemeanor counts stayed. The stay obviously relates to the sentence. The offenses themselves could not be stayed. Therefore, I'm ultimately persuaded that the Respondent's sentence to serve 365 days in the county jail are related to the conviction for an attempted criminal threat, which was a violation of Sections 664 and 422 of the penal code.

A crime is an aggravated felony under Section 101(a)(43) of the Act, "without regard to whether, under state law, the crime is labeled a felony or misdemeanor." *U.S. v. Gonzalez-Tamariz*, 310 F.3d 1168, 1179 (9th Cir. 2002) (quoting *U.S. v. Corona-Sanchez*, 291 F.3d 1201, 1210 (9th Cir. 2002) (en banc)). Further, that same cited case provides that the clause "at least one year" includes crimes that receive a sentence of exactly one year. In *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001), the Circuit upheld the Board of Immigration Appeals' interpretation of the statutory language "a term of imprisonment of at least one year" as meaning a calendar year of 365 days rather than a natural or lunar year, which is composed of 365 days and some hours. Thus, I am

persuaded that the Respondent was sentenced to a term of imprisonment of at least one year for an attempted terroristic threat. The code section under which the Respondent was convicted has been determined to be a crime of violence. *See Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003). The Rosales case related to a matter heard in 2003 relating to a conviction which occurred in 2000. This clearly relates, then, to an offense for which a Respondent was convicted after IRA-IRA took effect. Therefore, I find that the Respondent is removable for having been convicted of a controlled substance offense and because he has been convicted of an attempted crime of violence aggravated felony, an offense for which he was sentenced to 365 days.

Having been convicted of an aggravated felony, the Respondent is ineligible for cancellation of removal as a permanent resident (Section 240A(a)(3) of the INA), ineligible for Voluntary Departure (Section 240B(a) & (b) of the INA), ineligible to adjust his status through any family member or employer because a) his controlled substance offense cannot be waived under Section 212(h), and b) his conviction for an aggravated felony makes him otherwise ineligible for a Section 212(h) waiver. I am unaware of any relief which would otherwise be available in a circumstance such as this. Therefore, I must ultimately order the Respondent removed.

Although I ultimately determine that the Respondent is removable for an aggravated felony as well as a controlled substance offense, I did not initially think that to be the case. Consequently, the Court undertook to hear and adjudicate the

Respondent's request for cancellation of removal as a permanent resident.

There seems to be no contest that the Respondent meets the requirement of the necessary five years of legal permanent residence and the necessary seven years of continuous residence. The case, however, is lost upon a finding that he is convicted of an aggravated felony. However, I did, nevertheless, undertake initially to consider his case and consider the discretionary weighing in the matter. In doing so, I weighed the positive, social, and humane factors in his favor against he negative factors in the case. *See Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998). Among the factors in the Respondent's favor is a very strong factor in that he came to the U.S. when he was a mere infant. All of his family and important social ties are found in this country. His socialization, education, and acculturation have all occurred in the United States. In effect, Mexico, his native land, is a foreign land to him. He has merely days of presence in that country after his birth. In my view this is a very strong, important factor in his favor. Similarly, I consider that he and his family would all suffer hardship if he must be removed. For him, he goes to a place basically unknown and foreign to him. He leaves behind family and important ties. However, I'd note that the Respondent testified that he'd go to Mexicali, Mexico, which as it happens abuts almost his family homes in Calexico, California. His son, Maximus, lives in Calexico. Further, the rest of his family, who lives in the general vicinity of El Centro and Calexico, could easily travel back and forth across the border to visit him daily if they so desired. That, to some degree, ameliorates the hardship of

their separation. Even so, he would depart to a country of turmoil, crime, and lesser economic vitality. Certainly these facts would prey upon the minds of his family and produce real hardship.

The Respondent does not himself have a particular property or business tie to the country. He did not produce any particular evidence of value or service to his community, though I am convinced that there must be people in the community who value him and for whom he has provided the occasional kindness or service. The issue of rehabilitation is more complicated. The Respondent has two incidents which involve ultimately the convictions that bring him to Immigration Court. He was convicted of a drug offense involving paraphernalia. He denies any responsibility. He explains it belonged to his girlfriend. He says he took the blame in part to protect her, and also because he understood that if it was his car and it was found in his car, then he was responsible.

The Respondent was also convicted by a jury of violence towards his girlfriend, the mother of his son. Again, he denies any ultimate responsibility. He says his girlfriend basically lied and was a convincing liar, such that the jury believed her. He was convicted of an attempted terroristic threat, as well as a simple battery and a misdemeanor false imprisonment. I consider that each of these offenses is a serious offense. I consider that the Respondent's protestations of innocence must ultimately seem to pale in the face of his repeated inability to remember facts and details about the inquiries that were had of him during this proceeding. While that does not necessarily reflect that he is a dishonest witness, it

necessarily impacts his credibility and wears against the burden of proof that he must bear. Whether he does, by design or by mere accident of memory, have no recollection of the important events in his life, is ultimately inconsequential. Since he bears the burden of proof he must come forward with evidence. If he cannot do so, then to some degree or another his cause is undermined.

The Respondent's attorney frankly admitted that the Respondent had a sketchy work history. It's clear as well that Respondent has not been responsible about paying his taxes and reporting his income. He hasn't paid the court fees imposed upon him after he suffered this conviction for attempted terroristic threats and others. He has not provided any substantial support to his children, which is particularly shocking to me, when he inherited $60,000, which he used to buy instead a Porsche. I think that that is conduct which is unbecoming an adult. He hadn't had a significant work history. When he came into money where he might benefit his family, he decided to buy himself what's essentially an extravagance. That purchase itself does not weigh against him, but his determination to benefit himself without regard to what he has left undone for his family does reflect upon his character.

The Respondent's criminal record is indeed one which is worrisome. He didn't know why he did any of the drugs that he talked about. He just did. He was persuaded by people who were his friends to do so. He explained that he has learned his lesson, an explanation I ultimately reject, because there was no lesson to be learned. Respondent already knew the lesson. He knew the use of methamphetamine was

unlawful. If, as he explained, they were simply about an experimentation or trying drugs, that curiosity should have been satisfied after the initial use. However, the Respondent tried again.

I find the Respondent's case as regards discretion to be a close case because his long residence weighs very much in his favor. I also consider that the drug involvement and the attempted terroristic threats and associated offenses all occurred in a relatively close point in time after a long life of apparent lawful behavior. Of course, that long life was not so often supported by a good work history or attention to tax requirements. Yet, on balance, I would find that his long history of presence here in the United States as a legal permanent resident, which had its inception within days of his birth, together with the fact of his education, acculturation, and socialization in this country, and colored as well by the turmoil to which he would have to go should he depart, and I would, if discretion were available today, grant his request and permit him to keep his legal residence and remain in the United States. However, as I've discussed above, I am persuaded that his conviction is, after all, an aggravated felony which bars him from any relief in the circumstances.

Having considered all the evidence of record, whether discussed above or not, I make the following order.

ORDERS

IT IS HEREBY ORDERED that the Respondent's request for cancellation of removal under Section 240A(a) of the Immigration and Nationality Act be DENIED.

IT IS FURTHER ORDERED that the Respondent be removed from the United States to Mexico on the basis of the allegations and charge in the Notice to Appear.

s/JACK W. STATON
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JACK W. STATON, in the matter of:

JAVIER ARELLANO HERNANDEZ

A 17 214 318

El Centro, California

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

s/Sarah E. Vandervort
Sarah E. Vandervort, Transcriber

YORK STENOGRAPHIC
SERVICES, INC.
34 North George Street
York, Pennsylvania 17401-1266
(717) 854-0077

April 8, 2011
Completion Date

sev

APPENDIX E

18 U.S.C. § 16 provides in relevant part:

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.

California Penal Code § 422(a) provides:

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

8 U.S.C. § 1101 provides in relevant part:

Definitions

(a) As used in this chapter—

* * *

(43) The term "aggravated felony" means—

* * *

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at[1] least one year;

* * *

(U) an attempt or conspiracy to commit an offense described in this paragraph.

* * *

8 U.S.C. § 1227 provides in relevant part:

(a) Classes of deportable aliens

* * *

(2) Criminal offenses

(A) General crimes

* * *

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

* * *

8 U.S.C. § 1229b(a) provides:

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

---

[1] So in original. Should probably be preceded by "is."

(3) has not been convicted of any aggravated felony.

18 U.S.C. § 924 provides in relevant part:
Penalties

* * *

(c)(1)(A) 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.

* * *

(D) Notwithstanding any other provision of law—

* * *

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of

imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

* * *

(3) For purposes of this subsection the term "crime of violence" means 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

* * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * *

(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;

* * *