No. 15-1494

In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

JOSE RODOLFO MAGANA-PENA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

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JOSE RODOLFO MAGANA-PENA

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is not published in the *Federal Reporter* but is reprinted at 628 Fed. Appx. 547. A prior opinion of the court of appeals is also not published in the *Federal Reporter* but is reprinted at 453 Fed. Appx. 760. The decisions of the Board of Immigration Appeals (App., *infra*, 3a-8a) and the immigration judge (App., *infra*, 9a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2016. On April 4, 2016, Justice Kenne-

dy extended the time within which to file a petition for a writ of certiorari to and including May 11, 2016. On May 2, 2016, Justice Kennedy further extended the time to June 10, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. See App., *infra*, 17a-20a.

STATEMENT

1. Respondent is a native and citizen of Mexico who was admitted to the United States in 2001 as a lawful permanent resident. Gov't C.A. Br. 4. In 2004, he was convicted of second-degree burglary in violation of Arizona law. App., *infra*, 4a. For that offense, he was initially sentenced to probation for three years and incarcerated for two months. Gov't C.A. Br. 4-5. He violated the terms of his probation, and upon revocation he was sentenced to three years and six months in prison. *Id.* at 5; see App., *infra*, 11a.

In 2005, the Department of Homeland Security (DHS) initiated removal proceedings against respondent. See App., *infra*, 10a. DHS charged that, in addition to another ground not relevant here, respondent is removable, and is ineligible for cancellation of removal, because his second-degree burglary conviction qualifies as an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43). See 8 U.S.C. 1227(a)(2)(A)(iii), 1229b(a)(3). In particular, DHS charged that the offense constitutes "a theft offense * * * or burglary offense for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G) (footnote omitted). See App., *infra*, 11a.

An immigration judge sustained that charge and ordered respondent's removal, and the Board of Immigration Appeals (Board) affirmed. App, *infra*, 11a. The Ninth Circuit, however, remanded the case for further proceedings on the ground that respondent's burglary conviction does not qualify as an "aggravated felony" under the provision that DHS had cited, 8 U.S.C. 1101(a)(43)(G). 453 Fed. Appx. at 760-761. On remand, DHS lodged an additional charge of removability, asserting that respondent's burglary conviction qualifies as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F), which encompasses any "crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(F) (footnote omitted). App., *infra*, 12a. DHS maintained that burglary meets the definition of "crime of violence" in 18 U.S.C. 16(b) because burglary, "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," *ibid.*

The immigration judge sustained that charge, denied respondent's application for cancellation of removal, and ordered him removed. App., *infra*, 9a-16a. The immigration judge rejected respondent's claim that res judicata principles barred DHS from asserting an additional ground of removability on remand, *id.* at 12a-13a, and ruled that his burglary conviction qualifies as a "crime of violence" under 18 U.S.C. 16(b) and therefore as an "aggravated felony" under the INA, App., *infra*, 13a-16a. The Board dismissed respondent's appeal. *Id.* at 3a-8a. Like the immigration judge, the Board concluded that respondent's burgla-

ry conviction qualifies as a "crime of violence" under 18 U.S.C. 16(b) and therefore as an "aggravated felony" under the INA. App., *infra*, 6a-8a.

2. Respondent petitioned for judicial review, renewing his contentions that DHS's added charge of removability was barred by res judicata and that his burglary conviction does not qualify as an aggravated felony. While the case was pending in the Ninth Circuit, a divided panel of the Ninth Circuit held in *Dimaya* v. *Lynch*, 803 F.3d 1110 (2015), that the definition of "crime of violence" in 18 U.S.C. 16(b), as incorporated into the INA's definition of "aggravated felony," is unconstitutionally vague. 803 F.3d at 1112-1120. The Ninth Circuit based that conclusion on this Court's decision in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), which had held unconstitutionally vague part of the definition of the term "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

The Ninth Circuit granted respondent's petition for review in light of *Dimaya*'s conclusion that 18 U.S.C. 16(b) is unconstitutionally vague. App., *infra*, 1a-2a. The court first held that "res judicata did not bar [DHS] from raising a new ground of removability on remand from this court because there was never a final judgment on the merits." *Id.* at 2a. But because the court was "bound by" *Dimaya*, it held that the Board's decision could not be sustained and remanded the case to the Board for further proceedings. *Ibid.*

ARGUMENT

The decision below rested on the Ninth Circuit's holding in *Dimaya* v. *Lynch*, 803 F.3d 1110 (2015), that 18 U.S.C. 16(b), as incorporated into the INA, see 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague.

App., *infra*, 2a. Contemporaneously with the filing of this petition, the Attorney General is filing a petition for a writ of certiorari in this Court seeking review of the Ninth Circuit's decision in *Dimaya*. This Court should accordingly hold this petition pending its final disposition of *Dimaya* and then dispose of the petition as appropriate in light of that disposition.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's final disposition of the Attorney General's petition for a writ of certiorari seeking review of the Ninth Circuit's decision in *Dimaya* v. *Lynch*, 803 F.3d 1110 (2015), and then disposed of as appropriate in light of that disposition.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
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Principal Deputy Assistant Attorney General
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JUNE 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-70117

JOSE RODOLFO MAGANA-PENA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL, RESPONDENT

Submitted: Nov. 20, 2015[*]
Filed: Jan. 12, 2016

MEMORANDUM[***]

Before: W. FLETCHER, RAWLINSON, and PARKER,[**] Circuit Judges.

Petitioner Jose Rodolfo Magana-Pena (Magana-Pena) petitions for review of a decision of the Board of Immigration Appeals (BIA) that determined Magana-Pena's conviction for residential burglary under Arizona Revised Statute § 131507 was an aggravated felony within the

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[*] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[**] The Honorable Barrington D. Parker, Jr., Senior Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

[***] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

meaning of 8 U.S.C. § 1101(a)(43)(F). Specifically, the BIA determined that Magana-Pena's burglary offense constituted a crime of violence under 18 U.S.C. § 16(b).[1]

As a preliminary matter, we conclude that res judicata did not bar the Department of Homeland Security from raising a new ground of removability on remand from this court because there was never a final judgment on the merits. *See Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1324 (9th Cir. 2006).

However, we conclude that our recent decision in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), controls the outcome of this case. In *Dimaya*, we adhered to the rationale articulated in *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 2558, 192 L. Ed. 2d 569 (2015), where the Court held that the residual clause defining a violent felony under the Armed Career Criminal Act of 1984 was unconstitutionally vague. We held that the similar "residual clause definition of a violent felony [under 18 U.S.C. § 16(b)] is unconstitutionally vague. . . . " *Dimaya*, 803 F.3d at 1111 (internal quotation marks omitted). We are bound by this precedent, which does not support the BIA's determination.

The petition for review is **GRANTED** and we **REMAND** to the BIA for further proceedings consistent with this disposition.

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[1] 18 U.S.C. § 16(b) defines a crime of violence as a felony offense "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."

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
Falls Church, Virginia 22041

File: A076 743 779 - Eloy, AZ

IN RE JOSE RODOLFO MAGANA-PENA A.K.A.
JOSE RODOLFO MAGANA A.K.A. JOSE RUDY MAGANA

Date: [Dec. 11, 2012]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Benjamin T. Wiesinger, Esquire

ON BEHALF OF DHS:
Elly Laff
Assistant Chief Counsel

CHARGE:

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

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

APPLICATION:

Cancellation of removal for permanent residents

The respondent has appealed an Immigration Judge's July 30, 2012, decision, denying the respondent's application for cancellation of removal for permanent residents under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The Department of Homeland Security ("DHS") has opposed the appeal. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). As the respondent submitted his application after May 11, 2005, it is governed by the provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42, 43 (BIA 2006).

This case was last before the Board pursuant to an October 13, 2011, decision by the United States Court of Appeals for the Ninth Circuit, finding that the respondent's May 26, 2004, conviction for second degree burglary in violation of section 13-1507 of the Arizona Revised Statutes ("ARS"), did not constitute a theft or burglary offense aggravated felony under section 101(a)(43)(G) of the Act. The Ninth Circuit concluded, under the modified categorical approach, that the language contained in the indictment was insufficient to narrow the statute to the generic crime of burglary, as the intent to commit the theft or felony could be formed after entry into the residence. *Magana-Pena v. Holder*, 453 Fed. Appx. 760 (9th Cir. 2011). We re-

manded the case back to the Immigration Judge for further proceedings on April 16, 2012.

On remand, the DHS lodged an additional charge of removability under section 237(a)(2)(A)(iii) of the Act, charging the respondent as having been convicted of a "crime of violence" aggravated felony, as defined at section 101(a)(43)(F) of the Act (Exh. R4). The Immigration Judge rejected the respondent's argument that the additional charge was barred by res judicata. She also found that the new charge of removability had been sustained.

We adopt and affirm the Immigration Judge's decision. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). The doctrine of res judicata only applies where a final judgment on the merits has been rendered in a separate action. *Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1323-24 (9th Cir. 2006). As there has been no final judgment entered in the respondent's case, the regulations permit the DHS to lodge any additional charge or allegation against the respondent, without implicating the doctrine of res judicata. 8 C.F.R. § 1003.30 (DHS may lodge additional or substituted charges or factual allegations "[a]t any time during deportation or removal proceedings").

Although the respondent cites to *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007), in support of his argument that res judicata applies, that case is distinguishable (Resp. Br. at 9-10), as the DHS in that case attempted to lodge new charges after the prior proceedings had been terminated. *Bravo-Pedroza v. Gonzales*, *supra*, at 1359-60 (holding that res judicata precluded the DHS from filing additional charges in *subsequent* proceedings that could have been lodged in

prior proceedings, noting that "the government could have taken account of the change in law that wrecked its first case and moved to reopen with the new charges.")

Turning to the issue of removability, we agree with the Immigration Judge that the respondent has been convicted of an aggravated felony as defined at section 101(a)(43)(F) of the Act, namely "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year." In making this determination, the Immigration Judge applied the modified categorical approach. *See generally Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887-88 (9th Cir. 2003). She noted that the respondent pled guilty to Count 1 of the indictment, which charged that the respondent, "with the intent to commit a theft or felony therein, entered or remained unlawfully in or on the residential structure" of the victim (Exh. 17, tab D). The Immigration Judge found that the respondent's conviction constitutes a conviction for a crime of violence under 18 U.S.C. § 16(b), as 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" (I.J. at 6-8). *See*, *e.g.*, *Lopez-Cardona v. Holder*, 662 F.3d 1110 (9th Cir. 2011) (California conviction for felony residential burglary constituted crime of violence under 18 U.S.C. § 16(b), since offense, by its nature, involved substantial risk that physical force against person or property of another would be used in course of committing offense).

The respondent argues that his conviction could not be for a crime of violence since it did not constitute a generic burglary offense, given that the record did not establish that he had the intent to commit a felony at the time of entry into the residence (Resp. Br. at 12-14). However, the risk derives not from the intent at entry, but from the fact that a lawful occupant may discover the burglar and the burglar may use force or violence to escape or carry out the theft or felony. *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004). Thus, regardless of when the felonious intent is developed, the risk of violence is equally likely.

Therefore, the fact that the Arizona statute does not require that the offender possess the intent to commit the theft or felony prior to entering the residence has no bearing on whether the crime is a "crime of violence" under 18 U.S.C. § 16(b). *See*, *e.g.*, *U.S. v. Terreil*, 593 F.3d 1084, 1093 (9th Cir. 2010) (the lack of a requirement of unlawful intent prior to entry in Arizona burglary law does not change the fact that committing the offense, in the ordinary case, presents a serious potential risk of injury to another'); *see also Matter of Lanferman*, 25 I&N Dec. 721, 724 (BIA 2012) (explaining that unlike a "burglary offense," the "crime of violence" definition does not contain discrete elements that are tied to specific facts, but rather is defined in probabilistic terms by reference to the level of "risk" that inheres in the crime "by its nature").

Accordingly, the crime for which the respondent has been convicted is a crime of violence under 18 U.S.C. § 16(b) and is an aggravated felony under section 101(a)(43)(F) of the Act. As the respondent has not met his burden to prove that he has not been con-

victed of an aggravated felony, he is statutorily ineligible for cancellation of removal under section 240A(a)(3) of the Act. *See Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009) (under REAL ID Act, alien bears burden to prove that he satisfies the applicable eligibility requirements for relief and merits a favorable exercise of discretion under section 240(c)(4)(A) of the Act). Accordingly, the appeal will be dismissed.

ORDER: The respondent's appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ELOY, ARIZONA

File: A076-743-779

IN THE MATTER OF JOSE RODOLFO MAGANA-PENA,
RESPONDENT

Date: July 30, 2012

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT:
JOHN POPE

ON BEHALF OF DHS:
ELLIE LAUGH

CHARGES:

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act - at any time after admission, having been convicted of an aggravated felony as defined in Section 101(a)(43)(F), a crime of violence for which the term of imprisonment imposed was at least one year.

Section 237(a)(2)(B)(i) of the Immigration and Nationality Act - at any time after admission, having

been convicted of a violation of law relating to a controlled substance.

APPLICATIONS:

Cancellation of removal for certain permanent residents

ORAL DECISION OF THE IMMIGRATION JUDGE

These proceedings before this Court pursuant to a decision issued by the Board of Immigration Appeals dated April 16, 2012 of this year, remanding these proceedings to the Court for further proceedings and for the entry of a new decision. See R-I. In the Board's decision, the Board stated that the record was to be remanded to the Immigration Judge for further proceedings not inconsistent with the Ninth Circuit Court of Appeals' decision as indicated in the order.

Subsequent to the remand, both parties were given the opportunity to submit documentation to the Court for consideration and the respondent's counsel and the Department of Homeland Security submitted documents to the Court subsequent to the remand, marked and admitted from R-2 through R-8. In addition, the Court has taken into consideration all documentary evidence that was previously submitted to the Court prior to this remand. In essence, the entirety of respondent's record of proceeding, commencing with the Notice to Appear in this matter, dated December 5, 2005, up to R-8, has been considered in its entirety by this Court.

The Court believes a brief synopsis of the procedural history is adequate and appropriate at this time. From the Court's review of these proceedings, it is apparent that the Government had originally charged the

respondent with being removable as an aggravated felony pursuant to Section 101(a)(43)(G) of the Act relating to a theft offense or burglary offense for which the term of imprisonment of at least one year was imposed, in addition to the 237(a)(2)(B)(i) charge that is referenced above. It is the aggravated felony charge that is in question today. The aggravated felony charge was based upon respondent's May 26, 2004 conviction in the Superior Court of Arizona, Maricopa County, for burglary in the second degree in violation of Section 13-15011507 of the Arizona revised statute for which he was sentenced to 3.5 years in the Arizona Department of Corrections. It appears that conviction documents had been submitted by the Government that are part of all of the record commencing from Exhibit 3 and also included in Exhibit 17, with additional documents contained in R-8. The Immigration Court during the original proceedings had sustained the aggravated felony charge pursuant to 101(a)(43)(G), and had denied respondent's request for cancellation of removal for certain lawful permanent residents, finding him to be statutorily ineligible for that relief. Upon appeal of the Board's decision, the Board of Immigration Appeals affirmed the Immigration Judge's decision. However, the Ninth Circuit Court of Appeals found that the documents submitted by the Government were insufficient to establish that respondent's conviction under Arizona revised statute Section 13-1507 was sufficient or, in other words, the Ninth Circuit found those documents to be insufficient to establish that respondent had been convicted of a burglary offense. As such, the Ninth Circuit sent the case back to the Board of Immigration Appeals which

eventually sent the case back to the Immigration Court.

Upon remand of these proceedings to the Court, on May 23, 2012, the Department of Homeland Security issued an I-261, marked and admitted as R-4 in this matter, charging the respondent as having been convicted of an aggravated felony as defined in Section 101(a)(43)(F), a crime of violence for which the term of imprisonment imposed is at least one year. Respondent's counsel argued that the Government could not bring this additional charge as res judicata applies or has attached to any new charges being issued in this case, and on today's date of July 30, 2012, respondent's counsel also argued that if respondent's offense was not a burglary offense as found by the Ninth Circuit, in essence, it cannot also be a crime of violence.

Both parties were given the opportunity to file any additional documentation and briefs in support of their arguments and the Court received documentation from respondent's counsel pertaining to this issue as contained in R-6, with the Government's documentation contained in R-8. This Court has reviewed all documentation in its entirety as it relates to the record of proceedings in this matter, including all documentation submitted subsequent to the remand and also all the documentation submitted prior to the remand that have been part of these proceedings since the issuance of the Notice to Appear.

Based upon the Court's review of the documents as submitted by the Government, first of all, this Court does not find that res judicata has attached to prevent the Government from issuing the new I-261 that it did as contained in R-4. The Ninth Circuit has held that

res judicata applies to Immigration cases and bears further litigation on a claim where there is an identity of claims, a final judgment on the merits, and privity between the parties. However, it appears from this case that because the respondent's proceedings have been remanded to the agency or to this Court from the Ninth Circuit that there is no final judgment on the merits. As such, this Court finds that res judicata does not apply to the respondent's case and cannot serve as a basis to preclude and this Court does not find any basis to preclude the Government from issuing a new I-261 in this matter as it has done in R-4.

The Court also, upon review of the Board of Immigration Appeals' order dated April 16, 2012, contained in R-1 does not find any limitations placed on the Court as to what documents, if any, it can consider. Specifically, the Board of Immigration Appeals' decision states that the record was to be remanded to the Court for further proceedings, not inconsistent with the Ninth Circuit's order in that the record was remanded to the Court for further proceedings and the entry of a new decision. This Court does not find that the issuance of the Court's consideration of the issuance of an I-261 in this matter is inconsistent with the Ninth Circuit's order and, therefore, the Court did accept the I-261 as filed by the Government and does not find res judicata applicable.

As it relates to the aggravated felony charge, this Court finds that respondent's conviction under Arizona revised statute Section 13-1507 does constitute an aggravated felony, crime of violence, for which in his case he was sentenced to over one year.

Section 16 of Title 18 of the United States Code defines a crime of violence as (a) an offense that has as an element the use or attempted use or threatened use of physical force against the personal 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 personal property of another may be used in the course of committing the offense.

Additionally, to be a crime of violence, the force necessary must actually be violent in nature. See Ortega-Mendez v. Gonzales, 450 F.3d 1010, 1016 (9th Cir. 2006).

The question that this Court considers in this matter is whether the respondent was convicted of an offense that by its nature involves a substantial risk that physical force against the personal property of another may be used in the course of committing the offense pursuant to 18 United States Code Section 16(b). In analyzing whether Arizona revised statute Section 13-1507 would qualify as an INA Section 101(a)(43)(F) crime of violence, the Court conducts a modified categorical analysis of the record of conviction but does not look to the particular facts underlying the conviction. A review of the conviction records as contained in the record of proceeding does reflect that the respondent was originally given probation for the offense, but eventually his probation was revoked on December 1, 2005, and he was committed to the Arizona Department of Corrections for a term of imprisonment of 3.5 years. The original documents for this conviction dated June the 2, 2004, reflects that the respondent had plead guilty and the Court had found him guilty of burglary in the second degree in violation of Arizona

revised statute Section 13-15011507. A review of the record of proceeding reflects that the respondent plead guilty to the following. On or about January 29, 2004, with intent to commit a theft or felony therein, the respondent with two other named individuals entered or remained unlawfully in or on the residential structure of Charles J. Burkes, located at 12704 South 209th Avenue, in violation of Arizona revised statute Section 13-1507.

Several courts have observed that burglary of a dwelling entails an inherent risk of violent confrontation. See example, United States v. Taylor, 495 U.S. 475, 588, 110 (Supreme Court, 2143, 1990). See also United States v. Becker, 919 F.2d 568, 573 (9th Cir. 1990). In Ye v. INS, 214 F.3d 1128, 1134 (9th Cir. 2000), the Ninth Circuit Court of Appeals found or held that a person who enters a home or occupied building to commit theft may well encounter people inside and resort to physical force to carry out his or her plan.

Based upon the foregoing persuasive authority, this Court finds that the respondent's conviction for entering or remaining unlawfully in a residential structure of another person with the intent to commit a theft or felony therein in violation of Arizona revised Section 13-1507 involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense, and that the force involved would be actually violent in nature, and that, therefore, the conviction of crime of violence as defined in 18 United States Code Section 16(b) and 101(a)(43)(F) has been established. In essence, the Court finds that respondent's conviction does consti-

tute a crime of violence as charged by the Government as contained in the I-261. Therefore, the new aggravated felony charge is hereby sustained by the Court.

With the Court's sustaining of the aggravated felony charge, the respondent is statutorily ineligible for the relief of cancellation of removal for certain lawful permanent residents which apparently was the intended relief that this respondent was seeking before this Court. With the aggravated felony charge being sustained by this Court, there does not appear to be any relief that this respondent is currently eligible to seek before this Court. Accordingly, the following orders are entered.

ORDER

IT IS HEREBY ORDERED that the 237(a)(2)(A)(iii) charge as defined under Section 101(a)(43)(F) crime of violence is sustained.

IT IS HEREBY ORDERED that the respondent's request for cancellation of removal for certain lawful permanent residents is denied.

IT IS HEREBY ORDERED that the respondent be removed from the United States to Mexico.

/s/ _____
LINDA I. SPENCER-WALTERS
Immigration Judge

APPENDIX D

1. U.S. Const. Amend V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 8 U.S.C. 1101 provides in pertinent 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[5] least one year;

---

[5] So in original. Probably should be preceded by "is".

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[5] least one year;

* * * * *

3. 8 U.S.C. 1227 provides in pertinent part:

Deportable aliens.

(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.

* * * * *

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the

term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

* * * * *

4. 8 U.S.C. 1229b(a) provides:

Cancellation of removal; adjustment of status

(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

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

5. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.