No. _____

In The
Supreme Court of the United States

SANTIAGO ALEJANDRO DIAZ-ESPARZA,

Petitioner,

v.

JEFFERSON B. SESSIONS, III,
UNITED STATES ATTORNEY GENERAL,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

RAED GONZALEZ, ESQ.
Counsel of Record for Petitioner
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, Texas 77098
Tel: (713) 481-3040
rgonzalez@gonzalezolivierillc.com

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

NAIMEH SALEM, ESQ.
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, Texas 77098
NSalem@gonzalezolivierillc.com

ALEXANDRE I. AFANASSIEV, ESQ.
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, Texas 77098
AAfanassiev@gonzalezolivierillc.com

QUESTION PRESENTED FOR REVIEW

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.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

CITATIONS TO THE OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit denying Petitioner's petition for review, *Santiago Alejandro Diaz-Esparza*, No. 16-60004 (5th Cir. September 6, 2017), is unreported. App. A, *infra*.

The decision and order of the Board of Immigration Appeals ("BIA") dismissing Petitioner's appeal of the decision of the Immigration Judge, *Matter of Santiago Alejandro Diaz-Esparza*, File A096 567 521 (BIA, December 10, 2015), is unreported. App. B, *infra*.

The decision and order of the Immigration Judge ("IJ"), *Matter of Santiago Alejandro Diaz-Esparza*, File A096 567 521 (Immigration Judge, August 7, 2015), finding Petitioner removable as charged is unreported. App. C, *infra*.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review on September 6, 2017. App. A, *infra*. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. § 1254(1) because Petitioner is a "party to any civil or criminal case, before or after rendition of judgment or decree."

APPLICABLE LAW

8 U.S.C. § 1101(a)(43)(F), which provides: "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 least one year."

8 U.S.C. § 1227(a)(2)(A)(iii), which provides: "Any alien who is convicted of an aggravated felony at any time after admission is deportable."

18 U.S.C. § 16, which provides: "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."

Tex. Penal Code § 38.04, which provides: "EVADING ARREST OR DETENTION. (a) A person commits an offense if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him. (b) An offense under this section is a Class B misdemeanor, except that the offense is: (1) a state jail felony if the actor uses a vehicle while the actor is in flight and the actor has not been previously convicted under this section; (2) a felony of the third degree if: (A) the actor uses a vehicle while the actor is in flight and the actor has been previously convicted under this section; or (B) another suffers serious bodily injury as a direct result of an attempt by the officer

from whom the actor is fleeing to apprehend the actor while the actor is in flight; or (3) a felony of the second degree if another suffers death as a direct result of an attempt by the officer from whom the actor is fleeing to apprehend the actor while the actor is in flight. (c) In this section: "Vehicle" has the meaning assigned by Section 541.201, Transportation Code. (d) A person who is subject to prosecution under both this section and another law may be prosecuted under either or both this section and the other law."

STATEMENT OF THE CASE AND RELEVANT FACTS

The Fifth Circuit erred in this case by finding that 18 U.S.C. § 16(b) is not unconstitutionally vague on the basis of its precedent in *United States v. Gonzalez Longoria*, 831 F.3d 670, 674 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259).

In doing so, the Fifth Circuit decided not to follow the Sixth, Seventh, Ninth and Tenth Circuits that have held to the contrary. *See Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, No. 15-1498, No. 15-1498 (argued Jan. 17, 2017); and *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016).

The Fifth Circuit's denial of the petition for review in this matter amounted to a violation of Petitioner's due process rights, as Petitioner was never removable

as charged, in light of the fact that his removability grounds stem from the facially unconstitutional federal definition of a crime of violence.

Therefore, this Court's review is warranted.

A. Jurisdiction of the Court of Appeals

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to 8 U.S.C. § 1252(a)(1), which provides for judicial review of a final order of removal.

B. Factual Background

The Petitioner, Santiago Alejandro Diaz-Esparza, is a native and citizen of Mexico. App. C., *infra*. He adjusted his status to that of a lawful permanent resident ("LPR") on December 9, 2005 under 8 U.S.C. § 1255. *Id.* On November 12, 2014, he was convicted in the 420th Judicial District Court of Nacogdoches County, Texas, for the offense of "evading arrest" in violation of Tex. Penal Code § 38.04. *Id.* For this conviction, Petitioner was sentenced to two (2) years in county jail. *Id.*

On April 2, 2015, Petitioner was issued a notice to appear ("NTA") and charged with deportability under 8 U.S.C. § 1227(a)(2)(A)(iii) for having committed an aggravated felony crime of violence, as defined in 8 U.S.C. § 1101(a)(43)(F) and 18 U.S.C. § 16. *Id.*

On August 7, 2015, the IJ ordered Petitioner deported as charged. *Id.* In its oral decision, the IJ

discussed extensively that 18 U.S.C. § 16(b) was not constitutionally void for vagueness. *Id.* The IJ additionally stated that even if circuit precedent in *United States v. Sanchez-Ledezma*, 630 F.3d 447 (5th Cir. 2011), was overruled by the Supreme Court's decision in *Johnson v. U.S.*, 135 S.Ct. 2551 (2015), the "principle holding in *Sanchez-Ledezma*, that evading arrest or detention pursuant to [§ 38.04] is an aggravated felony, remains valid." *Id.* Therefore, the IJ concluded that Petitioner's conviction was still an aggravated felony crime of violence under the reasoning set forth in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). *Id.*

Petitioner timely filed a notice of appeal with the BIA. However, his appeal was dismissed because the BIA was similarly not persuaded by the arguments that *Johnson* implicitly overruled *Sanchez-Ledezma*. App. B, *infra*.

The BIA also noted that while it acknowledged in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) that "the Ninth Circuit has recently found the Act's crime of violence definition was unconstitutionally vague based on the reasoning in *Johnson*," it is not obligated to apply that holding in Petitioner's case due to its precedent in *Matter of Salazar*, 23 I&N Dec. 223, 235 (BIA 2002) (explaining that the Board applies the law of the circuit in cases arising in that jurisdiction, and are not bound by a decision of a court of appeals in a different circuit). *Id.*

As a result, the BIA upheld the IJ's decision that Petitioner's conviction "constitutes an aggravated

felony crime of violence," and, as such, he is deportable. *Id.*

On December 30, 2015, Petitioner filed a timely petition for review with the Fifth Circuit Court of Appeals on the question of whether 18 U.S.C. § 16(b) is facially unconstitutional in light of the U.S. Supreme Court's decision in *Johnson*. However, on September 6, 2017, the Fifth Circuit Court denied the petition, finding that based on the circuit precedent on the issue raised in *Gonzalez Longoria*, Petitioner's argument "is foreclosed." App. A, *infra*.

As a result of the denial by the Fifth Circuit, Petitioner is now filing the present petition for writ of certiorari.

ARGUMENT FOR GRANTING THE WRIT

The question presented herein is 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.

This is the exact same question that was presented in a writ of certiorari that has already been granted by the High Court. *See Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, No. 15-1498 (argued Jan. 17, 2017). As such, Petitioner respectfully asks this Honorable Court to hold his petition, pending the Court's final disposition of the *Dimaya* case, and

then dispose of this petition appropriately in light of the outcome of *Dimaya*.

CONCLUSION

For the reasons explained above, Petitioner respectfully requests for his petition for writ of certiorari to be held pending this Court's final disposition in *Dimaya*, and then disposed of appropriately in light of that disposition.

Respectfully Submitted,

RAED GONZALEZ, ESQ.
Counsel of Record for Petitioner
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, Texas 77098
rgonzalez@gonzalezolivierillc.com

NAIMEH SALEM, ESQ.
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, Texas 77098
NSalem@gonzalezolivierillc.com

ALEXANDRE I. AFANASSIEV, ESQ.
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, Texas 77098
AAfanassiev@gonzalezolivierillc.com

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60004
Summary Calendar

SANTIAGO ALEJANDRO DIAZ-ESPARZA,
also known as Santiago Alejandro Diaz,

Petitioner

v.

JEFFERSON B. SESSIONS, III,
U. S. ATTORNEY GENERAL,

Respondent

Petitions for Review of an Order of the
Board of Immigration Appeals
BIA No. A096 567 521

(Filed Sep. 6, 2017)

Before REAVLEY, PRADO, and GRAVES, Circuit Judges.

PER CURIAM:*

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

In 2015, Santiago Alejandro Diaz-Esparza, a native and citizen of Mexico who had been granted lawful permanent resident status, was ordered removed pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) based on his 2014 aggravated felony conviction and two-year prison sentence for evading arrest with a vehicle in violation of Texas Penal Code § 38.04. The Board of Immigration Appeals (BIA) dismissed Diaz-Esparza's appeal of the removal order and his motion for reconsideration. Diaz-Esparza has filed petitions for review of the BIA's orders, in which he asserts that his prior conviction was not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) because it did not constitute a crime of violence (COV) under 18 U.S.C. § 16(b) and, further, that § 16(b) is unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2552, 2557 (2015).

We generally lack jurisdiction to review a removal order against an alien who is removable under § 1227(a)(2)(A)(iii) based on the commission of an aggravated felony. 8 U.S.C. § 1252(a)(2)(C); *see Marquez-Marquez v. Gonzales*, 455 F.3d 548, 560-61 (5th Cir. 2006). However, review nevertheless remains available for constitutional claims or questions of law raised in a petition for review. § 1252(a)(2)(D); *see Marquez-Marquez*, 455 F.3d at 560-61. Whether a statute of conviction constitutes an aggravated felony under § 1101(a)(43) is a question of law over which we retain jurisdiction. *Arce-Vences v. Mukasey*, 512 F.3d 167, 170-71 (5th Cir. 2007). Likewise, "[w]hether a statute is unconstitutionally vague is a question of law." *United States v. Gonzalez-Longoria*, 831 F.3d 670, 674 (5th Cir.

2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259). Such questions of law are subject to de novo review. *Id.*

Section 16(b) defines a COV to include a felony crime "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." § 16(b). In *Sanchez-Ledezma*, 630 F.3d at 449-51, we concluded that the § 38.04 offense of evading arrest with a vehicle is categorically a COV under § 16(b) and thus an aggravated felony as defined by § 1101(a)(43)(F). In *Johnson*, 135 S. Ct. at 2557, the Supreme Court struck as unconstitutionally vague the residual clause of the Armed Career Criminal Act (ACCA), which defined a violent felony as an offense involving "conduct that presents a serious potential risk of physical injury to another."

Diaz-Esparza first argues that we should join certain other circuits in holding that § 16(b) is facially unconstitutional in light of *Johnson*, 135 S. Ct. 2551. However, that issue is foreclosed by our en banc decision to the contrary in *Gonzalez-Longoria*, 831 F.3d at 677. *See United States v. Alcantar*, 733 F.3d 143, 145-46 (5th Cir. 2013). Diaz-Esparza's additional argument that § 16(b) is unconstitutional as applied to him likewise fails, as the standard of § 16(b) can be straightforwardly applied to his prior conviction under § 38.04 for evading arrest with a vehicle. *See Gonzalez-Longoria*, 831 F.3d at 677-78; *see also Sanchez-Ledezma*, 630 F.3d at 449-51. Finally, Diaz-Esparza's argument that

Johnson undermined *Sanchez-Ledezma* is unpersuasive. Because the two decisions involved different statutory provisions, the former did not unequivocally overrule the latter. *See United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014); *Alcantar*, 733 F.3d at 145-46.

In light of the foregoing, Diaz-Esparza's petitions for review are DENIED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A096 567 521 – Houston, TX Date: DEC 10 2015

In re: SANTIAGO ALEJANDRO DIAZ-ESPARZA
a.k.a. Santiago Alejandro Diaz

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Raed Olivieri Gonzalez, Esquire

ON BEHALF OF DHS: John Donovan
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

APPLICATION: Termination

The respondent appeals from the Immigration Judge's August 7, 2015, decision ordering him removed from the United States. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be dismissed.

We review for clear error the findings of fact, including credibility findings, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all

other issues, including issues of law, judgment, or discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a lawful permanent resident of the United States and a native and citizen of Mexico (Exh. 1). The Immigration Judge affirmed the charge of removability under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii), based on a finding that the respondent's conviction under section 38.04 of the Texas Code for Evading Arrest or Detention with a motor vehicle is an aggravated felony crime of violence under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F) (I.J. at 3-11).[1] Relying on the United States Supreme Court's recent decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015) (finding the residual clause of the Armed Career Criminal Act (ACCA) unconstitutionally vague), the respondent argues that (1) his order of removal violates due process because section 101(a)(43)(F) of the Act is unconstitutionally vague in the same way as the residual clause of the ACCA; and (2) even if section 101(a)(43)(F) of the Act is not unconstitutionally vague, *Johnson* has undermined or overruled other key decisions from the Supreme Court and the United States Court of Appeals from the Fifth Circuit, in whose jurisdiction this case arises, regarding the interpretation of "crime of

[1] The respondent concedes that he has been convicted of violating section 38.04 of the Texas Code with a motor vehicle (Resp. Br. at 11-14). However, as explained below, the use of a motor vehicle is not a dispositive element of this statute for purposes of determining whether the respondent's conviction is a crime of violence.

violence," including Texas Code § 38.04, and those cases may no longer be relied on (Resp. Br. at 4-14).

First, we disagree with the respondent that *Johnson v. United States* renders the INA's definition of a crime of violence unconstitutionally vague. For the reasons adequately articulated by the Immigration Judge when addressing this issue, the Act's crime of violence definition, which relies on the definition of that term provided at 18 U.S.C. § 16(b), is distinguishable from the residual clause in many material respects, such as the fact that it is significantly more narrow than the residual clause, and it does not contain the same list of mismatched enumerated offenses as the residual clause (I.J. at 6). This list of mismatched offenses was a foundational reason the Supreme Court rendered the residual clause unconstitutionally vague. *See Johnson v. United States*, *supra.* While we acknowledge that the United States Court of Appeals for the Ninth Circuit has recently found the Act's crime of violence definition unconstitutionally vague based on the reasoning in *Johnson*, we are not obligated, and further decline to, apply that holding here. *See Matter of Salazar*, 23 I&N Dec. 223, 235 (BIA 2002) (explaining that the Board applies the law of the circuit in cases arising in that jurisdiction, and are not bound by a decision of a court of appeals in a different circuit); *see also Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) (finding section 101(a)(43)(F) unconstitutionally vague).

Further, we are not persuaded by the respondent's arguments that subsequent Supreme Court precedent

has implicitly overruled *United States v. Sanchez-Ledezma*, 630 F.3d 447 (5th Cir. 2011) (finding that the same crime the respondent was convicted of committing, Evading Arrest or Detention with a motor vehicle under section 38.04 of the Texas Code, is an aggravated felony crime of violence under section 101(a)(43)(F) of the Act) or *Begay v. United States*, 553 U.S. 137 (2008) (supplying the reasoning for *Sanchez-Ledezma*).[2] Neither the Supreme Court nor the Fifth Circuit has expressly overruled either decision, and we will not infer that they have been overruled at this time. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (stating that lower courts should not conclude that more recent cases have overruled an earlier precedent by implication). The analyses in *Sanchez-Ledezma* and *Begay* that shed light on the respondent's removability here, remain good law.

Based on the foregoing, we agree with the Immigration Judge that the respondent's conviction for Evading Arrest or Detention with a motor vehicle under Texas Code § 38.04 is categorically a crime of violence because that issue has been foreclosed by the United States Court of Appeals for the Fifth Circuit (I.J. at 10). *See Sanchez-Ledezma*, 630 F.3d at 451. We acknowledge the respondent's arguments on appeal that a recent unpublished decision of this Board, finding that Vehicular Eluding under section 18-9-116.5 of

---

[2] While we acknowledge that *Begay* was limited in its application to the ACCA by *Sykes v. United States*, 131 S. Ct. 2267 (2011), we note that it was not overruled, nor was its applicability to 18 U.S.C. § 16(b) limited.

the Colorado Revised Statutes (CRS) was categorically not a crime of violence. However, we are not persuaded that this case should change the result here. First, the Board speaks exclusively through its published decisions. Second, CRS § 18-9-116.5 is distinguishable from Texas Code § 38.04 in that CRS § 18-9-116.5 requires the actor recklessly use a motor vehicle in order to complete the crime. As we explained in that unpublished decision, in the ordinary case, this would not involve the *intentional* use of violent force. That is not the case with Texas Code § 38.04, which is completed as soon as a person *intentionally* flees an officer he *knows* is attempting to lawfully arrest him. Texas Code § 38.04(a). The Texas statute is a crime of violence because it "will typically lead to a confrontation with the officer being disobeyed, a confrontation fraught with risk of violence." *Sanchez-Ledezma v. Holder*, 630 F.3d at 451. While the use of a motor vehicle increases the degree of culpability under Texas Code § 38.04, it is not required for a conviction. *Compare* Texas Code § 38.04, subsections (a) and (b)(1)-(2).

The minimum conduct required to be convicted under section 38.04 of the Texas Code, intentionally fleeing a person known to be an officer attempting to arrest the perpetrator, involves a substantial risk that physical force would be used, in the ordinary case. *See Matter of Francisco-Alonzo*, 26 I&N Dec. 594 (BIA 2015); *see also Sanchez-Ledezma v. Holder*, 630 F.3d at 451 (explaining that the risk of violence forcer inheres from the confrontation with the arresting officer). Accordingly, the Immigration Judge properly held that

the respondent's conviction for that offense constitutes an aggravated felony crime of violence, and as such the respondent is removable under section 237(a)(2)(A)(iii) of the Act. The following order will be entered.

ORDER: The appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
HOUSTON, TEXAS

File: A096-567-521 August 7, 2015

In the Matter of

SANTIAGO ALEJANDRO DIAZ-ESPARZA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, in that at any time after admission, you have been convicted of an aggravated felony as defined in Section 101(a)(43)(F) of the Act, a crime of violence for which the term of imprisonment is at least one year.

APPLICATIONS: None.

ON BEHALF OF RESPONDENT: Francisco Muniz, Eesquire

ON BEHALF OF DHS: John Donoavan, Eesquire

ORAL DECISION OF THE
IMMIGRATION JUDGE

I. INTRODUCTION

The Department of Homeland Security (DHS) commenced these removal proceedings against Rthis rrespondent on April 9, 2015, charging him with being removable pursuant the above-referenced section of the Immigration and Nationality Act (INA or Act).

Removability is at issue in this matter. Through prior counsel, respondent admitted all the factual allegations and conceded removability as charged in the Notice to Appear (NTA) on June 9, 2015. Based on respondent's admissions and concession, the Ceourt found him removable as charged in the NTA by clear and convincing evidence. Mexico was designated as the country of removal. As for relief, respondent indicated he would be seeking a "U" -visa before DHS. The matter was rescheduledcontinued to allow the respondent to establish *prima facie* eligibility for such relief for the purpose of seeking further continuances to await a decision on the application.f.

On July 14, 2015, respondent appeared with current counsel and moved to terminate the proceeding on the ground the he was no longer removable pursuant to the United States Supreme Court's recent decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015). He no longer sought any form of relief other than termination. For the reasons that follow, the Ceourt again finds Rthe respondent is removable as charged and will enter an order of removal against him.-

II. SUMMARY OF THE EVIDENTIARY RECORD

The record in this case consists ~~of the admission~~ of the ~~following~~ exhibits listed below.

Exhibit 1 is the NTA dated April 2, 2015.

Exhibit 2 is the Record of Deportable/Inadmissible Alien, Form 1-213.

Exhibit 3 consists of the conviction record for evading arrest/~~ or~~ detention with a vehicle, a third degree felony.

Exhibit 4 consists of respondent's approved affirmative~~summory of~~ application for adjustment of status, Form 1-485.

Exhibit 5 is respondent's motion to terminate.

Exhibit 6 is the DHS response to respondent's motion to terminate.

Exhibit 7 is respondent's reply brief.

III. ANALYSIS AND FINDINGS~~INDS~~ OF THE COURT

DHS must prove by clear and convincing evidence that ~~the~~ respondent is subject to removal as charged. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. INA § 240(c)(3)(A). DHS argues that respondent has been convicted of an aggravated felony as defined in Section 101(a)(43)(F) of the Act for which the

term of imprisonment ordered is at least one year. Exhibit 1.

Section 101(a)(43)(F) provides one definition of aggravated felony as "-any crime of violence for which the term of imprisonment is at least one year."- A "crime of violence" is "a~~a~~n 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). A "crime of violence" is also "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). In determining whether an alien's specific conviction constitutes a "crime of violence," the C~~c~~ourt first engages in a categorical review of the statute of conviction and not the underlying facts of the case. See Taylor v. United States, 495 U.S. 575, 602 (1990); Matter of Sweetser, 22 I&N Dec. 709, 712-13 (BIA 1999).

In this case, respondent was convicted on November 12, 2014, in the 420th District Court of Nacogdoches County, Texas of evading arrest, a third degree felony. The conviction record shows respondent was charged with, and pleaded guilty to, a criminal indictment. According to the indictment, on or about April 10, 2014, respondent "did then and there, while using a vehicle, intentionally flee from Chad Patrick ~~[phonetic]~~, a person the [respondent] knew was a peace officer who was attempting lawfully to arrest or detain the [respondent]." Exhibit 3. The court records of respondent's conviction leave no doubt that he was

convicted under subsection 38.04(b)(2)(A) of the Texas Penal Code, and that he used a vehicle in evading arrest or detention.

Under the Texas Penal Code, a person commits an offense of evading arrest or detention if he intentionally flees from a person he knows is a police officer attempting lawfully to arrest or detain him. Texas Penal Code Ann. § 38.04(a)(West Supp. 2014). The offense becomes a third degree felony, punishable by imprisonment for any term between two and 10 years and a fine not to exceed $10,000, if the person uses a vehicle while in flight. Texas Penal Code Ann. § 12.34 (West 2011), 38.04(b)(2)(A)(West Supp. 2014). Section 38.04(c) further states that the term "vehicle" has the meaning assigned by section 541.21 of the Texas Transportation Code. That statute, in turn, provides that "vehicle" means "a device that can be used to transport or draw persons or property on the highway." Texas Transportation Code § 541.21(23~~1~~).

With those elements established, this C~~c~~ourt finds that respondent's conviction under section 38.04(b)(2)(A) of the Texas Penal Code to categorically be a crime of violence under 18 U.S.C. § 16(b) because it involves a substantial risk of the use of physical force against the person or property of another.

In United States v. Sanchez-Ledezma, 630 F.3d 447 (5th Cir. 2011), t~~T~~he United States Court of Appeals for the Fif~~5~~th Circuit, in whose jurisdiction this case arises, has held that evading arrest with a vehicle under Texas law constitutes a crime of violence under

18 U.S.C. § ~~C§~~16(b). In part, the Fif~~5~~th Circuit relied on the Supreme Court's decision in the Begay v. United States, 553 U.S. 137, 144-45 (2008). *to find that the offense* ~~defined that the offense~~ is purposeful, violent, and aggressive. The respondent claims that the Supreme Court's decision in Johnson v. United States, ~~135 S. Ct. 2551 (2015)~~, changes the outcome of this case. His argument is lacking, however.

At issue in Johnson was the residual clause of the Armed Career Criminal Act (ACCA). The Supreme Court held in Johnson that the ACCA's residual clause —,that is, the provision that defines a "violent felony" to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another~~,~~"—is vague. Id; 18 U.S.C. § 924(e)(2)(B)(ii). The C~~c~~ourt further found that imposing an increased sentence under the residual clause violates the Constitution's guarantee of due process. See Johnson v. United States, 135 S.Ct.~~upreme Court reporter~~ at 2563. The C~~c~~ourt overruled its decisions in James v. United States, 550 U.S. 192 (2007), and Sykes v. United States, 564 U.S. 1 (2001), which previously rejected the contention that the residual clause was vague. Id.

The Johnson ~~*Johnson*~~ C~~c~~ourt found the ACCA's residual clause vague on factors that are not present in the instant case. The C~~c~~ourt was concerned that the assessment was tied to considering risk in an ordinary case, but without accounting for "real--world facts or statutory elements." Id. The C~~c~~ourt also found that ACCA leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." Id. at 2558.

The Ceourt held that the ACCA's structure forces courts to interpret serious potential risk in light of the four enumerated crimes and the degree of risk posed by the enumerated crimes was far from clear. Additionally, the Ceourt found that it had repeatedly attempted to create a standard for the residual clause, but it failed to do so, further supporting its vagueness. Id.

Similar to the ACCA, 18 U.S.C. § 16(b) involves a risk-based analysis of the ordinary case of a predicate offense. In- Johnson*Johnson*, the Supreme Court identified the ordinary--case analysis as a problematic feature of the ACCA's residual clause. 135 S.Ct. ~~Supreme Court Reporter~~ at 2557-58, 2561. However, the Johnson*Johnson* decision did not turn solely on the ordinary–case inquiry, and 18 U.S.C. § 16(b) presents circumstances materially different from those in Johnson*Johnson*. The Johnson*Johnson*Ceourt observed that the uncertainties in the ACCA's residual clause may be tolerable in isolation, but their presence together led the Ceourt to its holding. Id. at 2560.

Section 16(b) of Title 18 is significantly and materially narrower than ACCA. Unlike ACCA, 18 U.S.C. §16(b), contains no list of enumerated offenses followed by an "otherwise" provision that has been treated as qualifying the predicate offenses; it has been limited to a narrow risk of force during the commission of the offense; and, the Supreme Court has never disagreed about its proper construction.

The presence of the enumerated list of offenses in ACCA was a determinative~~ing~~ factor in Johnson

~~*Johnson*~~. The Ceourt also struggled with the enumerated list in Begay v. United States. The Ceourt attributed part of the uncertainty about how much risk it takes for a crime to qualify to the residual clause's structure, which "forces courts to interpret 'serous potential risk' in light of the four enumerated crimes – burglary, arson, extortion, and crimes involving the use of explosives." Johnson, 135 S.Ct. at 2558. ~~Johnson v. United States, 135 Supreme Court Reporter at 2558~~. The Ceourt referred to the enumerated crimes in explaining why its decisions in Begay and Sykes did "not succeed in bringing clarity to the meaning of the residual clause." Id. at 2559. The Ceourt also distinguished other statutes requiring risk-based assessments in part because they did not connect the phrase such as "substantial risks" to a confusing list of examples. Id. at 2561. Section 16(b) of Title 18, like the statutes the Ceourt distinguished in *Johnson*, contains no confusing list to cloud its analysis.

In Sanchez-Ledezma~~Sanchez Adezma [phonetic]~~, the Fifth~~5th~~ Circuit ~~also~~ did not go beyond the elements of the offense to consider potential extra-offense conduct in assessing whether evading arrest under Texas law fits the definition of Section 16(b). ~~Unlike Johnson~~, Sanchez-Ledezma ~~Sanchez Adezma~~ focused on the elements of 18 U.S.C. § 16(b). Absent from~~or~~ 18 U.S.C. § 16(b) is the necessity for courts to go beyond evaluating the chances that the physical acts that make up the crime injure someone and to evaluate the risk for injury even after the completion of the offense. The Johnson Ceourt explained that the ACCA's inquiry

into whether a crime involves conduct that presents too much risk of injury goes beyond the offense elements. Id. at 2557. The inclusion of burglary and extortion among the enumerated offenses, the *Johnson* Ceourt explained, confirmed that courts assessing risk had to go beyond evaluating the chances that the physical acts that make up the crime will injure someone. That was so because risk of injury could arise in a burglary after the breaking and entering had occurred, and an extortionist might become violent after making his demand. The consideration of post-offense conduct was therefore part of ACCA's inquiry. In contrast, 18 U.S.C. § 16(b) is significantly narrower. Unlike ACCA, it applies only where the risk of force occurs in the course of committing the offense. See Leocal v. Ashcroft, 543 U.S. 1, 10 & n.7 (2007). This means that the assessment is confined to the risks that arise during the commission of the offense. See also United States v. Hernandez-Neave, 291 F.3d 296, 299 (5th Cir. 2001). Unlike ACCA, 18 U.S.C. § 16(b) does not go beyond the physical acts that make up the crime. In that regard, ~~Further,~~ Sanchez-Ledezma~~Sanchez Adezma~~ properly looks at the risk of the use of force rather than the much broader risk of injury addressed in Johnson. The focus on the use of force during an offense, rather than on the potential risk and effects of the offense limits the statute's reach and avoids the kind of speculation about extra-offense conduct that the Johnson Ceourt rejected.

Moreover, the Supreme Court has not repeatedly failed to construe 18 U.S.C. § 16(b). This concern, also

absent here, further serveds the Ceourt's decision in Johnson to find ACCA vague. The Johnson Ceourt expressed clear frustration that it's ACCA's decisions hadve been a "failed enterprise." United States v. Johnson, 135 S.Ct. at Supreme Court Reporter 2560. In contrast,Unlike ACCA, the Supreme Court has rendered only one significant decision that addresses 18 U.S.C. §16(b). In Leocal, a unanimous Supreme Ceourt expressed no uncertainty and had no difficulty adopting an interpretive framework that identified one offense, that is, burglary, as the classic example of a qualifying offense under 18 U.S.C. § 16(b), and another that was not. See Leocal, 543 U.S. at 10. The Ceourt's analysis in Leocal undermines respondent's argument that the Fifth5th Circuit's decision in Sanchez-Ledezma *Sanchez Adezma* has been overruled or rendered is too uncertain or overruled to be readily applied.

Under Leocal, an aggravated felony for purposes of 18 U.S.C. § 16(b) is limited to offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. Leocal, 543 U.S. at 10. The Ceourt specified that 18 U.S.C. § 16(b) only includes violent, active crimes. See Leocal, 543 U.S. at 11. To qualify as a predicate offense under this framework, the offense must proescribe conduct that (1) naturally involves a disregard of a substantial risk of force against another, and (2) the risk of force must arise during the course of committing (3) an active, violent offense. Id. at 10-11. Under subsection 16(b), the ordinary case is defined by the elements of the offense, and a court does

not consider risks that arise only after the physical acts of committing the crime have been completed. At issue is whether the offense elements would "naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." Leocal, 543 U.S. at 11. The analysis is non-speculative and ~~is~~ consistent with *Johnson*. If the risk of the use of force is naturally present in the elements of the offense, it qualifies as a crime of violence under 18 U.S.C. § 16(b). See, e.g. United States v. Diaz-Diaz, 327 F.3d 410, 413-14 (5th Cir. 2003); United States v. Medina-Anicacio, 325 F.3d 638, 645 (5th Cir. 2003) (possession of concealed dagger not a crime of violence because an offender commits a crime once he takes possession of and conceals the dagger and it is unlikely that any physical force would be used in the process); United States v. Chapa-Garza, 243 F.3d 921, 924 (5th Cir. 2001) (DWI not a crime of violence because force against another is virtually never employed to commit the offense); United States v. Velazquez-Overa, 100 F.3d 418, 422 (5th Cir. 1996) (indecency with a child by sexual contact is a crime of violence because, due to ~~the~~ disparity between adult perpetrator and child victim, there is a significant likelihood that physical force may be used to perpetuate the crime). There is nothing vague or~~f~~ speculative about asking whether an offense naturally involves a risk of the use of force during the commission of the offense for purposes of 18 U.S.C. § 16(b). The phrase "by its nature" in 18 U.S.C. § 16(b) compels the application of the categorical approach, which looks at offense

elements. See ~~United States v.~~ Velazquez-Overa, 100 F.3d at 420.

Even if the 5th Circuit's decision in Sanchez-Ledezma ~~Sanchez Adezma~~ was overruled by the Supreme Court's decision in *Johnson*, the ~~principal~~ holding in Leocal ~~Sanchez Adezma, that evading arrest or detention pursuant to section 38.04 of the Texas Penal Code.~~ remains valid. The issue remains whether the relevant offense constitutes a substantial risk of the use of physical force under 18 U.S.C. § 16(b). As found by the Fifth~~5th~~ Circuit in- Sanchez-Ledezma~~Sanchez Adezma~~, the offense of evading arrest or detention by vehicle requires intentional conduct and a showing that the defendant disregarded an officer's lawful order, which is a clear challenge to the officer's authority. The act of defiance of an attempted stop or arrest is similar to the behavior underlying an escape from custody and will typically lead to a confrontation that has the risk of violence. Fleeing by vehicle typically involves violent force that the arresting officer must overcome. It is immaterial whether use of violent force actually occurs in a particular case; what matters is the risk of force was substantial. See e.g., Larian-Ulloa v. Gonzales, 462 F.3d 456, 465-66 (5th Cir. 2006); Zaidi v. Ashcroft, 374 F.3d 357, 361 (5th Cir. 2004). Here, respondent's offense involved prohibited conduct that is by its very nature provocative and invites a response from a peace officer trying to affect an arrest or detention. If burglary by its nature involves a substantial risk the perpetrator would use force in order to

complete the crime, so too does the respondent's evading conviction.

Accordingly, the Ceourt finds that respondent's conviction under section 38.04(b)(2)(A) of the Texas Penal Code is a crime that, by its nature, involves a substantial risk that physical force against the person or property of another may be used. It further follows that because respondent was sentenced to two years imprisonmentinprisonfor the after the offense, his conviction constitutes an aggravated felony pursuant to the definition at Section 101(a)(43)(F) of the Act18 USC §16(b).

RThe respondent has not identified any relief from removal. Moreover, histhe aggravated felony conviction bars him from seeking asylum, cancellation of removal for certain permanent residents, and all forms of voluntary departure.

IV. CONCLUSION AND ORDERS

For the reasons discussed, the following orders shall enter:are entered.

IT IS HEREBY ORDEREDt is hereby ordered thate respondent shall be removed from the United States to Mexico on the charge contained in the Notice to Appear dated April 2, 2015.

Please see the next page for electronic signature

LISA LUIS
Immigration Judge
August 7, 2015

Immigration Judge LISA LUIS

LuisL on September 25, 2015 at 1:27 AM GMT