No.

In the Supreme Court of the United States

DANA J. BOENTE, ACTING ATTORNEY GENERAL, PETITIONER

v.

CONSTANTINE FEDOR GOLICOV

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

PETITION FOR A WRIT OF CERTIORARI

NOEL J. FRANCISCO
Acting Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ROBERT A. PARKER
Assistant to the Solicitor General
DONALD E. KEENER
BRYAN S. BEIER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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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The Acting Solicitor General, on behalf of the Acting 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 Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 837 F.3d 1065. The decision of the Board of Immigration Appeals (App., *infra*, 20a-25a) is unreported. The decision of the immigration judge (App., *infra*, 26a-35a) is unreported. Prior decisions of the Board of Immigration Appeals (App., *infra*, 36a-46a) and the immigration judge (App., *infra*, 47a-68a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2016. A petition for rehearing was denied on November 4, 2016 (App., *infra*, 69a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent is a native and citizen of Moldova and a lawful permanent resident of the United States. App., *infra*, 48a. In 2010, respondent was convicted in Utah state court of failing to stop at a police officer's command, in violation of Utah Code Ann. § 41-6a-210(1)(a)(i) (LexisNexis 2014). App., *infra*, 3a, 48a. That statute makes it a third-degree felony to operate a vehicle, "in willful or wanton disregard" of a police officer's signal to stop, in a manner that "interfere[s] with or endanger[s] the operation of any vehicle or person." Utah Code Ann. § 41-6a-210(1)(a)(i) (LexisNexis 2014). Respondent was sentenced to five years of imprisonment in connection with that offense. App., *infra*, 3a.

2. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien may be deported if, *inter alia*, he is "convicted of an aggravated felony at any time after admission" into the United States. 8 U.S.C. 1227(a)(2)(A)(iii). The INA defines the term "aggravated felony" to include a variety of federal and state offenses, including "crime[s] of violence" as defined in 18 U.S.C. 16. See 8 U.S.C. 1101(a)(43)(F). Section 16, in turn, defines a "crime of violence" as an offense that (a) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"; or (b) "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.

In 2012, the Department of Homeland Security initiated removal proceedings against respondent on the ground that his Utah felony conviction qualified as a crime of violence (and thus an aggravated felony) under 18 U.S.C. 16(b). App., *infra*, 3a, 48a. An immigration judge terminated the proceedings, accepting respondent's argument that his prior offense was not a crime of violence because it could be committed negligently. See *id.* at 64a-68a.

The Board of Immigration Appeals (Board) reversed. App., *infra*, 36a-46a. The Board concluded that respondent's offense qualified as a crime of violence under Section 16(b) because it "naturally involves a person acting in disregard of the risk that physical force might be used against another in committing" the offense. *Id.* at 43a. The Board noted, for example, that a violation of Utah Code Ann. § 41-6a-210(1)(a)(i) (LexisNexis 2014) "will always involve an overt disobedience of an officer's command, will occur directly in the officer's presence, and will likely occur in the presence of innocent and unsuspecting bystanders." App., *infra*, 43a. The Board acknowledged that it was "theoretically possible" for an individual to be convicted based solely on negligent conduct, but found no evidence "that such hypothetical situations constitute the 'ordinary case'" of the offense. *Id.* at 45a.

3. Respondent filed another motion to terminate the proceedings, arguing that this Court's decision in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), rendered Section 16(b) unconstitutionally vague. See App., *infra*, 28a. *Johnson* invalidated the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), and respondent contended that Section 16(b) suffered from the same

constitutional infirmities. See App., *infra*, 28a. The immigration judge denied respondent's motion and ordered him removed. *Id.* at 28a, 35a.

The Board affirmed the immigration judge's decision. App., *infra*, 20a-25a. The Board noted that there were "important differences" between the text of the ACCA's residual clause and the text of Section 16(b), *id.* at 23a, and that Section 16(b) had "not given rise to the confusion and contradiction that pervaded the federal courts' efforts to apply the ACCA residual clause," *id.* at 24a. The Board further noted that this Court's only decision interpreting Section 16(b) had unanimously found the statute capable of reasoned application. *Ibid.* (citing *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004)). The Board thus concluded that *Johnson* did not establish that Section 16(b) was void for vagueness. *Id.* at 24a-25a.

4. The court of appeals granted respondent's petition for review and remanded to the Board for further proceedings. App., *infra*, 1a-19a. Without addressing respondent's argument that his offense was not properly classified as a "crime of violence," the court ruled that Section 16(b) is unconstitutionally vague. *Id.* at 14a-15a, 19a. The court rejected the government's argument that the vagueness standard for criminal statutes does not apply to Section 16(b) insofar as that provision is incorporated into the INA's civil removal standards. *Id.* at 6a-7a (citing, *inter alia*, *Dimaya* v. *Lynch*, 803 F.3d 1110, 1113-1114 (9th Cir. 2015), cert. granted, No. 15-1498 (argued Jan. 17, 2017)). The court further stated that it "agree[d] with the Sixth, Seventh, and Ninth Circuits" that Section 16(b) is unconstitutionally vague in light of *Johnson*. *Id.* at 13a; see *Shuti* v. *Lynch*, 828 F.3d 440 (6th Cir. 2016);

United States v. *Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya*, 803 F.3d at 1110.

ARGUMENT

The decision below rested on the Tenth Circuit's agreement with the Ninth Circuit's decision in *Dimaya* v. *Lynch*, 803 F.3d 1110 (2015), which held 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*, 12a-14a. This Court has granted a petition for a writ of certiorari to review the Ninth Circuit's judgment in *Dimaya*. See *Boente* v. *Dimaya*, No. 15-1498 (argued Jan. 17, 2017). The Court should accordingly hold this petition pending its decision in *Dimaya* and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Boente* v. *Dimaya*, No. 15-1498 (argued Jan. 17, 2017), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

NOEL J. FRANCISCO
Acting Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ROBERT A. PARKER
Assistant to the Solicitor General
DONALD E. KEENER
BRYAN S. BEIER
Attorneys

FEBRUARY 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-9530

CONSTANTINE FEDOR GOLICOV, A/K/A CONSTANTIN FEDOR GOLICOV, A/K/A CONSTANTINE FEDO GOLICOV, A/K/A CONSTANTIN GOLICOV, A/K/A KOSTIK GOLICOV, A/K/A CONSTANTINE GOLIKOV, A/K/A CONSTANTINE FEDOR GOLICV, A/K/A CONSTANTINE F. GOLICOV, PETITIONER

v.

LORETTA LYNCH, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, RESPONDENT

NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD; IMMIGRANT LEGAL RESOURCE CENTER, AMICI CURIAE

Filed: Sept. 19, 2016

APPEAL FROM THE BOARD OF IMMIGRATION APPEALS
(Petition for Review)

Before: BRISCOE, HOLMES and MORITZ, Circuit Judges.

BRISCOE, Circuit Judge.

Petitioner Constantine Fedor Golicov, a lawful permanent resident of the United States, seeks review of

an order of the Board of Immigration Appeals (BIA) concluding that his Utah state conviction for failing to stop at a police officer's command renders him removable under the Immigration and Nationality Act (INA), 8 U.S.C. § 1227(a)(2)(A)(iii). That provision of the INA requires the removal of "[a]ny alien who is convicted of an aggravated felony at any time after admission." 8 U.S.C. § 1227(a)(2)(A)(iii). The INA defines the term "aggravated felony" to include "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 [is] at least one year." 8 U.S.C. § 1101(a)(43)(F).

Golicov argues, as he did before the BIA, that the INA's definition of "crime of violence," which expressly incorporates 18 U.S.C. § 16(b)'s definition of "crime of violence," is unconstitutionally vague. In support, he points to the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015). In Johnson, the Court held that the Armed Career Criminal Act's residual definition of the term "violent felony," 18 U.S.C. § 924(e)(2)(B), was void for vagueness.

Exercising jurisdiction pursuant to 8 U.S.C. § 1252, we agree with Golicov, grant his petition for review, vacate the order of removal, and remand the case to the BIA for further proceedings consistent with this opinion.

I.

Golicov was born on March 12, 1986, in the Eastern European country of Moldova. On August 15, 2001, he became a lawful permanent resident of the United States.

On November 9, 2010, Golicov was convicted in Utah state court of the third-degree felony of failing to stop at a police officer's command, in violation of Utah Code Ann. § 41-6a-210(1)(a)(i), and sentenced to five years' imprisonment. The statute of conviction reads as follows:

> An operator who receives a visual or audible signal from a peace officer to bring the vehicle to a stop may not:
>
> > (i) operate the vehicle in willful or wanton disregard of the signal so as to interfere with or endanger the operation of any vehicle or person . . . .

Utah Code Ann. § 41-6a-210(1)(a)(i).

On December 4, 2012, while Golicov was still serving his prison sentence, the Department of Homeland Security (DHS) served Golicov with a Notice to Appear (NTA), charging that he was removable under § 227(a)(2)(A)(iii) of the INA, 8 U.S.C. § 1227(a)(2)(A)(iii), because his Utah conviction constituted an aggravated felony under the INA.

The INA outlines several "classes of deportable aliens," all of which "shall, upon the order of the Attorney General, be removed." 8 U.S.C. § 1227(a). Of relevance here, one such class includes "[a]ny alien who is convicted of an aggravated felony at any time after admission." 8 U.S.C. § 1227(a)(2)(A)(iii).

The term "aggravated felony" is expressly defined in the INA and includes, among other things, "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 [is] at least one year." 8 U.S.C.

§ 1101(a)(43)(F). In turn, a "crime of violence" is defined in 18 U.S.C. § 16 to include:

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

18 U.S.C. § 16(b).

Golicov denied the DHS's charge and moved to terminate the removal proceedings. On February 8, 2013, the immigration judge (IJ) issued a decision dismissing the sole charge of removability and terminating the proceedings against Golicov. DHS appealed from that decision.

On July 27, 2015, the BIA sustained DHS's appeal and reversed the IJ's decision. The BIA concluded that Golicov's Utah state conviction was "a categorical crime of violence under 18 U.S.C. § 16(b) and an aggravated felony as defined by section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F)." ROA at 3. The BIA remanded the record to the IJ, pursuant to the DHS's request, "to explore [Golicov's] potential eligibility for relief." Id. at 3.

On remand to the IJ, Golicov moved to terminate the proceedings on the grounds that the Supreme Court's decision in Johnson effectively rendered unconstitutional and improper for use in immigration proceedings the definition of "crime of violence" contained in 18 U.S.C. § 16(b). On January 11, 2016, the IJ issued a decision and order rejecting Golicov's argument and denying his motion to terminate. Golicov appealed to

the BIA. On May 5, 2016, the BIA issued a written decision agreeing with the IJ's legal conclusions and dismissing Golicov's appeal.

Golicov subsequently filed a petition for review with this court.

II.

The central question posed by Golicov in this appeal is whether the INA's definition of "crime of violence," 8 U.S.C. § 1101(a)(43)(F), which expressly incorporates 18 U.S.C. § 16(b)'s definition of that same term, is unconstitutionally vague in light of the Supreme Court's decision in Johnson. The BIA answered this question in the negative. We review the BIA's decision de novo. Mena-Flores v. Holder, 776 F.3d 1152, 1162 (10th Cir. 2015) ("In reviewing the Board's decision, we engage in de novo review of constitutional and other legal questions.").

A.

The void-for-vagueness doctrine derives from the Due Process Clause of the Fifth Amendment, which guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Supreme Court precedent "establish[es] that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Johnson, 135 S. Ct. at 2556. "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules

of law,' and a statute that flouts it 'violates the first essential of due process.'" Id. at 2556-57 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)). "These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." Id.

B.

As a threshold matter, the government argues that the vagueness standard for criminal laws that was outlined in Johnson should not apply to the INA, which it characterizes as a civil statute governing removal. Aplee. Br. at 13. We disagree. As the Sixth Circuit recently noted in rejecting this same argument in the context of an identical vagueness challenge to 8 U.S.C. § 1101(a)(43)(F) and 18 U.S.C. § 16(b), Shuti v. Lynch, — F.3d —, 2016 WL 3632539 at *5 (6th Cir. July 7, 2016), the Supreme Court has stated that "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings," Reno v. Flores, 507 U.S. 292, 306 (1993), and has specifically applied the void-for-vagueness doctrine in a deportation case, Jordan v. De George, 341 U.S. 223, 231 (1951).

To be sure, the government argues that the Court in Jordan "did not have occasion to decide whether the same vagueness standard that governs criminal statutes also governs statutes applied in civil removal proceedings." Aplee. Br. at 15. But, like the Ninth Circuit, which also addressed the same argument in the context of a vagueness challenge to 8 U.S.C. § 1101(a)(43)(F) and 18 U.S.C. § 16(b), we find the government's argument "baffling." Dimaya v. Lynch, 803 F.3d 1110, 1113 (9th Cir. 2015). As the Ninth Circuit explained, "Jordan considered whether the term 'crime

involving moral turpitude' in section 19(a) of the Immigration Act of 1917, a type of offense that allowed for a non-citizen to 'be taken into custody and *deported*,' was void for vagueness," id. (quoting 341 U.S. at 225-31) (emphasis added), and "the Court explicitly rejected the argument that the vagueness doctrine did not apply," id. (citing 341 U.S. at 231). In short, Jordan "recognized" that "a necessary component of a non-citizen's right to due process of law is the prohibition on vague deportation statutes." Id. at 1113-14.

Thus, in sum, we agree with the Sixth and Ninth Circuits that "because deportation strips a non-citizen of his rights, statutes that impose this penalty are subject to vagueness challenges under the Fifth Amendment." Shuti, 2016 WL 3632539 at *5; see Dimaya, 803 F.3d at 1114 ("[W]e reaffirm that petitioner may bring a void for vagueness challenge to the definition of a 'crime of violence' in the INA.").

C.

Johnson addressed a constitutional vagueness challenge to the ACCA's definition of the term "violent felony," 18 U.S.C. § 924(e)(2)(B). The ACCA defines the term "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2)(B) (emphasis added). "The closing words of this definition, italicized above, have come to be known as the [ACCA's] residual clause." Johnson, 135 S. Ct. at 2556.

The Supreme Court in Johnson held that "[t]wo features of the residual clause conspire to make it unconstitutionally vague." Id. at 2557. The Court explained:

> In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" United States v. Mayer, 560 F.3d 948, 952 (C.A.9 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc). To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence? Critically, picturing the criminal's behavior is not enough; as we have already discussed, assessing "potential risk" seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out. James[v. United States, 550 U.S. 192, 127 S. Ct. 1586 (2007),] illustrates how speculative (and how detached from statutory elements) this enterprise can become. Explaining why attempted burglary poses a serious potential risk of physical injury, the Court said: "An armed would-be burglar may be spotted by a police officer, a private security

guard, or a participant in a neighborhood watch program. Or a homeowner . . . may give chase, and a violent encounter may ensue." 550 U.S., at 211, 127 S. Ct. 1586. The dissent, by contrast, asserted that any confrontation that occurs during an attempted burglary "is likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away." Id., at 226, 127 S. Ct. 1586 (opinion of Scalia, J.). The residual clause offers no reliable way to choose between these competing accounts of what "ordinary" attempted burglary involves.

At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses." Begay[v. United States], 553 U.S. [137,], 143, 128 S. Ct. 1581 [(2008)]. Does the ordinary burglar invade an occupied home by night or an un ccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for

> the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

Id. at 2557-58 (italics in original).

The Court also noted, relatedly, that it "ha[d] had trouble making sense of the residual clause" and that there had been "pervasive disagreement" among the lower federal courts "about the nature of the inquiry one [wa]s supposed to conduct" in determining whether a crime fell within the scope of the ACCA's residual clause. Id. at 2559-60. The Court concluded that "[n]ine years' experience trying to derive meaning from the residual clause convince[d] [it] that [it] ha[d] embarked upon a failed enterprise." Id. at 2660. "Each of the uncertainties in the residual clause may be tolerable in isolation," the Court stated, "but 'their sum makes a task for us which at best could be only guesswork.'" Id. (quoting United States v. Evans, 333 U.S. 483, 495 (1948)). Consequently, the Court held that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." Id.

Less than a year after Johnson was issued, the Supreme Court granted certiorari in Welch v. United States, 136 S. Ct. 1257 (2016), to consider the question of "whether Johnson is a substantive decision that is retroactive in cases on collateral review." Id. at 1261. Although that issue is immaterial to the instant appeal, the Court's description of its decision in Johnson bears consideration:

> The Johnson Court held the residual clause unconstitutional under the void-for-vagueness doctrine, a

doctrine that is mandated by the Due Process Clauses of the Fifth Amendment (with respect to the Federal Government) and the Fourteenth Amendment (with respect to the States). The void-for-vagueness doctrine prohibits the government from imposing sanctions "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Id., at ----, 135 S. Ct., at 2556. Johnson determined that the residual clause could not be reconciled with that prohibition.

The vagueness of the residual clause rests in large part on its operation under the categorical approach. The categorical approach is the framework the Court has applied in deciding whether an offense qualifies as a violent felony under the Armed Career Criminal Act. See id., at ----, 135 S. Ct., at 2556-2557. Under the categorical approach, "a court assesses whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" Ibid. (quoting Begay, supra, at 141, 128 S. Ct. 1581). For purposes of the residual clause, then, courts were to determine whether a crime involved a "serious potential risk of physical injury" by considering not the defendant's actual conduct but an "idealized ordinary case of the crime." 576 U.S., at ----, 135 S. Ct., at 2561.

The Court's analysis in Johnson thus cast no doubt on the many laws that "require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." Ibid. The residual

> clause failed not because it adopted a "serious potential risk" standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense. In the Johnson Court's view, the "indeterminacy of the wide-ranging inquiry" made the residual clause more unpredictable and arbitrary in its application than the Constitution allows. Id., at ----, 135 S. Ct., at 2557. "Invoking so shapeless a provision to condemn someone to prison for 15 years to life," the Court held, "does not comport with the Constitution's guarantee of due process." Id., at ----, 135 S. Ct., at 2560.

Id. at 1261-62 (italics in original).

D.

To date, two circuits, the Sixth and Ninth, have addressed the precise question that is before us, and both concluded that the INA's residual definition of "crime of violence," 8 U.S.C. § 1101(a)(43)(F), which expressly incorporates the definition of that phrase contained in 18 U.S.C. § 16(b), is unconstitutionally vague in light of Johnson.[1] Shuti, 2016 WL 3632539 at *1; Dimaya, 803

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[1] Approximately two months prior to the Sixth Circuit's decision in Shuti, a separate Sixth Circuit panel considered and rejected a constitutional vagueness challenge to the statutory definition of "crime of violence" set forth in 18 U.S.C. § 924(c)(3)(B). United States v. Taylor, 814 F.3d 340, 376-79 (6th Cir. 2016). The Second Circuit also recently considered and rejected a constitutional vagueness challenge to the statutory definition of "crime of violence" set forth in 18 U.S.C. § 924(c)(3)(B). United States v. Hill, — F.3d —, 2016 WL 4120667 at *7-12 (2d Cir. Aug. 3, 2016).

F.3d at 1111. In addition, the Fifth and Seventh Circuits have addressed similar Johnson-based vagueness challenges in the context of criminal cases involving 8 U.S.C. § 1326(b)(2), which expressly incorporates § 16(b)'s definition of "crime of violence" to define the statutory phrase "aggravated felony." The Fifth Circuit, sitting en banc, concluded that § 16(b)'s definition of "crime of violence" is textually distinct from the ACCA's residual clause and thus is not unconstitutionally vague on its face or as applied. United States v. Gonzalez-Longoria, — F.3d —, 2016 WL 4169127 at *1, *4, *5 (5th Cir. Aug. 5, 2016) (*en banc*). In contrast, the Seventh Circuit concluded that "[s]ection 16(b) is materially indistinguishable from the ACCA's residual clause," and thus "is unconstitutionally vague according to the reasoning of Johnson." United States v. Vivas-Ceja, 808 F.3d 719, 720 (7th Cir. 2015).

E.

Having carefully considered these principles and precedents, we agree with the Sixth, Seventh, and Ninth Circuits that 18 U.S.C. § 16(b) is not meaningfully distinguishable from the ACCA's residual clause and

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The Sixth Circuit panel in Shuti "f[ou]nd Taylor wholly consistent with [its] conclusion." 2016 WL 3632539 at *8. More specifically, the panel in Shuti noted that "the statute at issue in Taylor is a criminal offense and 'creation of risk is an element of the crime.'" Id. (quoting Johnson, 135 S. Ct. at 2557). Thus, the Shuti panel noted, "[u]nlike the ACCA and INA, which require a categorical approach to stale predicate convictions, 18 U.S.C. § 924(c) is a criminal offense that requires an ultimate determination of guilt beyond a reasonable doubt—by a jury, in the same proceeding." Id.

Because § 924(c)(3)(B) is not implicated in this case, we offer no opinion on its constitutionality or upon any distinctions that may or may not exist between it and § 1101(a)(43)(F) or § 16(b).

that, as a result, § 16(b), and by extension 8 U.S.C. § 1101(a)(43)(F), must be deemed unconstitutionally vague in light of Johnson.

Similar to the ACCA's residual clause, § 16(b), through its use of the phrase "by its nature," "directs our focus to the 'offense' of conviction" and thus "requires us to look to the elements and nature of the offense of conviction, rather than to the particular facts relating to the [defendant's] crime." Leocal v. Ashcroft, 543 U.S. 1, 7 (2004). In other words, similar to the ACCA's residual clause, § 16(b) "requires courts to use a [two-step] framework known as the categorical approach when deciding whether" a prior conviction constitutes a crime of violence. See Johnson, 135 S. Ct. at 2557. Under the first step of this framework, a reviewing court must "picture the kind of conduct that the crime involves in 'the ordinary case.'" Id. Under the second step, a reviewing court must "judge whether that abstraction," i.e., the "ordinary case," falls within the standard outlined by the statute. Id.

As was the case with the ACCA's residual clause, it is the combination of these two steps that "conspire to make [§ 16(b)] unconstitutionally vague." Id. To begin with, § 16(b) "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." Id. As the Supreme Court noted in Johnson, "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves?" Id. No doubt, the federal courts have struggled mightily over the years in answering this question. In turn, the standard against which that ordinary case is measured, i.e., whether it "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), "leaves uncertainty about how much risk it takes for a crime to qualify as a" crime of violence, Johnson, 135 S. Ct. at 2558. Indeed, "[n]either term—'substantial' in the INA or 'serious' in the ACCA—'sets forth [objective] criterion' to determine how much risk it takes to qualify as a crime of violence or violent felony." Shuti, 2016 WL 3632539 at *6 (alteration in original). And, the Court emphasized in Johnson, "[i]t is one thing to apply an imprecise ['substantial risk'] standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." 135 S. Ct. at 2558. In sum, § 16(b), by "requir[ing] courts to assess the hypothetical risk posed by an abstract generic version of the offense" at issue, Welch, 136 S. Ct. at 1262, "produces more unpredictability and arbitrariness than the Due Process Clause tolerates," Johnson, 135 S. Ct. at 2558.

We recognize that the Fifth Circuit concluded, and the government in this case argues, that the textual differences between § 16(b) and the ACCA's residual clause are significant enough to spare § 16(b) from being declared unconstitutionally vague. To begin with, the Fifth Circuit noted, the ACCA's residual clause "requires courts . . . to decide whether the ordinary case would present a 'serious potential risk of *physical injury*.'" Gonzalez-Longoria, 2016 WL 4169127 at *3 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). "In contrast, 18 U.S.C. § 16(b) requires courts to decide whether the ordinary case 'involves a substantial risk that *physical force* against the person or property of another may be used *in the course of committing* the offense.'" Id. (quoting 18 U.S.C. § 16(b)). In the Fifth Circuit's view, "[r]isk of physical force is more definite than risk of

physical injury," and, "by requiring that the risk of physical force arise 'in the course of committing' the offense, 18 U.S.C. § 16(b) does not allow courts to consider conduct or events occurring after the crime is complete." Id. As a result, the Fifth Circuit concluded, § 16(b) "is predictively more sound—both as to notice (to felons) and in application (by judges)—than imputing clairvoyance as to a potential risk of injury." Id. at *4.

The Fifth Circuit also concluded that the "uncertainty about *how much risk* it takes for a crime to qualify is less pressing in the context of 18 U.S.C. § 16(b)" than in the context of the ACCA's residual clause. Id. As the Supreme Court noted in Johnson, the ACCA's residual clause "forces courts to interpret 'serious potential risk' in light of . . . four enumerated crimes" that "are 'far from clear in respect to the degree of risk each poses.'" 135 S. Ct. at 2558 (quoting Begay, 553 U.S. at 143). In contrast, the Fifth Circuit noted, the amount of risk required under § 16(b) "is not linked to any examples." 2016 WL 4169127 at *4. Thus, the Fifth Circuit concluded, § 16(b) "is just like the 'dozens of federal and state criminal laws' that employ terms such as 'substantial risk,' 'grave risk,' or 'unreasonable risk,' see Johnson, 135 S. Ct. at 2561, that state and federal judges interpret as a matter of routine." Id.

We respectfully disagree with the Fifth Circuit and the government that these textual differences are sufficient to meaningfully distinguish § 16(b) from the ACCA's residual clause. It is true that the standards employed in the two statutes vary somewhat: 16(b) focuses on the risk of physical force being used by the de-

fendant in the course of committing the offense, whereas the ACCA's residual clause focuses on the risk of physical injury resulting from the defendant's conduct. But even if we assume that the standard employed in § 16(b) is "marginally narrower" than the standard employed in the ACCA's residual clause,[2] the fact remains that they are both "abstraction[s] all the same." Shuti, 2016 WL 3632539 at *7; see Vivas-Ceja, 808 F.3d at 722 ("Any difference between these two phrases is superficial."). In other words, neither phrase offers courts meaningful guidance to assess the risk posed by the hypothetical offense.

As for the fact that the risk standard employed in § 16(b) contains no list of enumerated crimes, we agree with the Sixth, Seventh and Ninth Circuits that this does not serve to meaningfully distinguish § 16(b) from the ACCA's residual clause because the enumeration of specific crimes in the ACCA's residual clause was not one of the "[t]wo features of the residual clause"—i.e., the determination of the ordinary case and the risk assessment of that ordinary case—that "conspire[d]," in

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[2] On this point, we tend to agree with the dissent in Gonzalez-Longoria:

> The difference [between the two statutory phrases], when sliced very thinly, may indicate that § 16(b) is slightly less indeterminate because a reviewing court can more easily determine the physical force of a crime than the future injury resulting from a crime; nonetheless, nearly all uses of physical force "risk a possibility of future injury." Thus, virtually every criminal act that satisfies the § 16(b) test could also satisfy the residual clause's test; any distinction between the two statutes on this ground is of indeterminate consequence to § 16(b)'s unconstitutionality under Johnson.

2016 WL 4169127 at *11 (Jolly, J., dissenting).

the Supreme Court's view, "to make it unconstitutionally vague." Johnson, 135 S. Ct. at 2557; see Shuti, 2016 WL 3632539 at *7 ("[T]he existence of a prefatory 'list of examples,' though surely confusing, was not determinative of the Court's vagueness analysis."); Vivas-Ceja, 808 F.3d at 723 (concluding that "[t]he government overreads" the part of the Court's analysis in Johnson discussing the enumerated crimes); Dimaya, 803 F.3d at 1118 ("Johnson . . . made plain that the residual clause was void for vagueness in and of itself for the reasons stated in reaching its decision, and not because of the clause's relation to the four listed offenses."). To be sure, the Court in Johnson indicated that the list of enumerated crimes in the ACCA's residual clause added to the uncertainty of the risk assessment required by that clause because the listed offenses "are 'far from clear in respect to the degree of risk each poses.'" Id. at 2558 (quoting Begay, 553 U.S. at 143). But this "was not determinative of the Court's vagueness analysis." Shuti, 2016 WL 3632539. That point was made clear by the Court itself in Welch when it summarized its holding in Johnson: "The residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." 136 S. Ct. at 1262. Nowhere in Welch did the Court mention the list of enumerated crimes in the ACCA's residual clause, let alone indicate that the list was relevant to its holding in Johnson.

Finally, we take note of what the Sixth Circuit has accurately described as "the insidious comingling of [INA, ACCA and Sentencing Guidelines] precedents" that occurred prior to Johnson. Shuti, 2016 WL

3632539 at *6. In sum, the BIA and the federal courts regularly applied ACCA and Guidelines precedents in INA cases, without regard to the textual differences between the various provisions. See id. (citing cases). This comingling, in our view, confirms that the textual differences relied on by the Fifth Circuit in Gonzalez-Longoria and argued by the government in this case are simply not significant enough to allow us to treat the two provisions differently in terms of vagueness analysis.

F.

To summarize, we conclude that the INA's residual definition of "crime of violence," which expressly incorporates § 16(b)'s definition of that same term, is unconstitutionally vague in light of the Supreme Court's decision in Johnson. As the Sixth Circuit has noted, "[f]rom a non-citizen's perspective, this provision substitutes guesswork and caprice for fair notice and predictability." Shuti, 2016 WL 3632539 at *8. And that in turn makes it impossible for "non-citizens and their counsel [to] be able to anticipate the immigration consequences of criminal convictions." Id.

III.

The petition for review is GRANTED, the order of removal is VACATED, and the case is REMANDED to the BIA for further proceedings consistent with this opinion.

APPENDIX B

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

File No. A047-547-785—Salt Lake City, UT

IN RE: CONSTANTINE FEDOR GOLICOV A.K.A. CONSTANTIN FEDOR GOLICOV A.K.A. CONSTANTINE FEDO GOLICOV A.K.A. CONSTANTIN GOLICOV A.K.A. KOSTIK GOLICOV A.K.A. CONSTANTIN GOLIKOV A.K.A. CONSTANTINE FEDOR GOLICV A.K.A. CONSTANTINE F. GOLICOV

Date: [May 5, 2016]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Skyler K. Anderson, Esquire

ON BEHALF OF DHS:

Jeffrey D. Clark
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 of proceedings

This case was last before the Board on July 27, 2015, when we sustained the Department of Homeland Security's ("DHS") appeal of the Immigration Judge's February 8, 2013, decision dismissing the sole charge of removability and terminating the respondent's proceedings. At that time we found the respondent removable as charged and remanded the record to the Immigration Judge for further proceedings. The respondent now appeals the Immigration Judge's decision dated January 11, 2016, denying his motion to terminate his proceedings. The appeal will be dismissed.

In our July 27, 2015, decision we found the respondent's November 9, 2010, conviction for the offense of failing to stop at a police officer's command in violation of section 41-6a-210(1)(a)(i) of the Utah Code to be a categorical crime of violence under 18 U.S.C. §16(b) and an aggravated felony as defined by section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F). Therefore, we sustained the DHS's appeal of the Immigration Judge's decision terminating the respondent's proceedings and remanded the record to the Immigration Judge, pursuant to the DHS's request, to explore the respondent's potential eligibility for relief.

During the remanded proceedings, the respondent filed another motion to terminate his proceedings arguing that the United States Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which found the residual clause in the definition of "violent felony" in the Armed Career Criminal Act ("ACCA") to be unconstitutionally vague, also renders unconstitutional and improper for use in immigration proceedings the definition of a crime of violence under 18 U.S.C. § 16(b) (I.J. at 2). *See* Respondent's Motion to Terminate. In opposition, the DHS argued that *Johnson* is distinguishable and does not affect the use of the definition of "crime of violence" in 18 U.S.C. § 16 in immigration proceedings (I.J. at 2). *See* DHS's Opposition to Respondent's Motion to Terminate. The Immigration Judge concluded that *Johnson* does not invalidate the definition of "crime of violence" under 18 U.S.C. § 16 and denied the respondent's motion to terminate. The respondent has appealed.

In our prior decision, we concluded that section 41-6a-210(1)(a)(i) of the Utah Code defines a categorical crime of violence under 18 U.S.C. § 16(b). More specifically, we noted that the proper inquiry for determining whether a conviction is for a crime of violence under that subsection is whether the offense's elements define conduct that, in an "ordinary case," would present a substantial risk of the use of violent physical force against another. *See Matter of Francisco-Alonzo*, 26 I&N Dec. 594, 597-600 (BIA 2015); *Matter of U. Singh*, 25 I&N Dec. 670, 677 (BIA 2012); *see also Leocal v. Ashcroft*, 543 U.S. 1, 10-11 (2004) (holding that 18 U.S.C. § 16(b) covers offenses that naturally involve a person acting in disregard of the physical risk that physical

force might be used against another in committing an offense).

Notwithstanding the respondent's arguments on appeal, we agree with the Immigration Judge's finding that *Johnson* has not invalidated application of the "ordinary case" test in immigration law (I.J.at 4-5).[1] *See* 8 C.F.R. § 1003.1(d)(3)(ii) (2016) (de novo review). The *Johnson* Court's decision to invalidate the ACCA residual clause was motivated by multiple factors, most of which are not present in cases arising under 18 U.S.C. § 16(b). First, the language and structure of the two statutes have important differences that do not necessarily lead to them being interpreted in the same manner. The structure of the ACCA residual clause required courts to evaluate an offense's riskiness in light of the risk posed by a confusing introductory list of four enumerated crimes which bore little resemblance to one another (burglary, arson, extortion, and the use of explosives), despite widespread disagreement as to the degree of risk posed by each of those crimes. *See*

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[1] Contrary to the respondent's assertions on appeal, neither the Board nor the Immigration Judge may determine whether § 16(b) is or is no longer constitutional in light of *Johnson*. The Court's holding in *Johnson* applies specifically to 18 U.S.C. § 924(e)(2)(B) of the ACCA, not to 18 U.S.C. § 16(b), which is the statute at issue in this case. Thus, the issue we determine in this case is whether the Court's ruling in *Johnson* affects our application of § 16(b), a different statute, not whether or not § 16(b) is constitutional, a question we are without authority to decide. *See Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992) ("[I]t is settled that the immigration judge and this Board lack jurisdiction to rule upon the constitutionality of the Act and the regulations."); *Matter of Fede*, 20 I&N Dec. 35, 36 (BIA 1989) (recognizing that Immigration Judges and the Board are without "authority to consider constitutional challenges to the laws we administer").

Johnson v. United States, *supra*, at 2558. No such confusing list of exemplars is present in 18 U.S.C. § 16(b).

Also, unlike 18 U.S.C.§ 16(b), which instructs courts to focus upon the risk of the use of force that inheres in a predicate offense "by its nature," the ACCA residual clause permitted imposition of an enhancement whenever a predicate offense "involve[d] conduct" posing a "serious potential risk" of injury to another, thereby allowing consideration of post-offense conduct. *See id.* at 2557. This problem does not exist under 18 U.S.C. § 16(b), which is concerned only with the risk that physical force will be used "in the course of committing the offense." *See Leocal v. Ashcroft*, *supra*, at 10 & n.7.

Further, in striking down the ACCA residual clause, *Johnson* emphasized both its own "repeated attempts and failures to craft a principled and objective standard" for interpreting the provision, and the demonstrated inability of the lower courts to achieve a consensus understanding of their own. *See id.* at 2558, 2559, 2560. However, § 16(b) has not given rise to the confusion and contradiction that pervaded the federal courts' efforts to apply the ACCA residual clause. The Supreme Court has decided only one case arising under 18 U.S.C. § 16(b), where it unanimously concluded that DUI causing serious injury under Florida law was not a crime of violence. *See Leocal v. Ashcroft*, *supra*. In that decision, the Court explained limitations on the scope of § 16(b), and noted that burglary is the classic example of a crime that would qualify as a crime of violence under that section. *Id.*

In conclusion, *Matter of Francisco-Alonzo*, *supra*, remains controlling as to the application of 18 U.S.C. § 16(b) despite *Johnson*, which did not address our use

of § 16(b) or our precedent decisions. Under our precedent, an alien's offense of conviction is a crime of violence under 18 U.S.C. § 16(b) if the offense is a felony and if the conduct encompassed by the elements of the offense presents a substantial risk that physical force may be used in the course of committing the offense in the ""ordinary case." Applying this standard to the present facts, we once again conclude that the respondent's offense of conviction is a categorical crime of violence under 18 U.S.C.§ 16(b) and, by extension, an aggravated felony under section 101(a)(43)(F) of the Act rendering him removable as charged. Therefore, we find no reason to disturb the Immigration Judge's decision denying the respondent's motion to terminate his proceedings and ordering him removed.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ ROGER A. PAULEY
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SALT LAKE CITY, UTAH

File No. A047-547-785

IN THE MATTER OF CONSTANTINE GOLICOV,
RESPONDENT

Date: Jan. 11, 2016

IN REMOVAL PROCEEDINGS

WRITTEN DECISION OF THE IMMIGRATION JUDGE ORDERING THE RESPONDENT REMOVED FROM THE UNITED STATES

APPLICATIONS:

ON BEHALF OF THE RESPONDENT:

Skyler K. Anderson, Esq.
Immigrant Defenders
5675 S. Redwood Road # 10
Taylorsville, UT 84123

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Jeff Clark
Assistant Chief Counsel
2975 S. Decker Lake Dr., Stop C
West Valley City, Utah 84119

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. INTRODUCTION AND PROCEDURAL HISTORY

The respondent is a 29-year old (DOB: 03/12/1986), native and citizen of Moldova. (Exh. 1.) The United States Department of Homeland Security (DHS) brought these removal proceedings against the respondent under the authority of the Immigration and Nationality Act (INA or Act) pursuant to the filing of a Notice to Appear (NTA), which is marked in the record as Exhibit 1. 8 C.F.R. § 1003.14(a). The NTA is dated December 4, 2012. (*Id.*)

The NTA contains four (4) allegations. The allegations set forth in the NTA are: (1) the respondent is not a citizen or national of the United States; (2) the respondent is a native and a citizen of Moldova; (3) the respondent's status was adjusted to that of lawful permanent resident on August 15, 2001, under section 245 of the Act; (4) on November 9, 2010, the respondent was convicted of Failing to Stop/Respond at Command of Police, in violation of section 41-6A-210 of the Utah Code, a 3rd-degree Felony, for which he was sentenced to 5 years. (Exh. 1.)

The NTA contains one charge of removability. The respondent is charged with removability pursuant to section 237(a)(2)(A)(iii) of the Act, as amended, in that, at any time after admission, the respondent was convicted of an aggravated felony as defined in Section 101(a)(43)(F) of the Act, a crime of violence (as defined in section 16 of Title 18 of the United States Code, but not including a purely political offense) for which the

term of imprisonment ordered is at least one year. (*Id.*)

On November 9, 2010, the respondent pled guilty to and was convicted of Failure to Stop/Respond at the Command of Police, a third-degree felony.

On July 27, 2015, the Board of Immigration Appeals (Board or BIA) issued a decision in this case holding that the respondent's conviction is categorically a crime of violence and remanded the case so the respondent could apply for relief from removal.

Subsequently, the respondent filed a motion to terminate proceedings, arguing that *Johnson v. United States*, 135 S. Ct. 2551 (2015), which found the residual clause in the definition of "violent felony" in the Armed Career Criminal Act to be unconstitutionally vague—also makes section (b) of the definition of "crime of violence" (18 U.S.C. § 16) unconstitutionally vague and improper for usage in immigration proceedings.

The DHS opposed, arguing that *Johnson* is distinguishable and clearly does not affect the use of the definition of "crime of violence" in 18 U.S.C. § 16 in immigration proceedings.

The issue in this case is whether *Johnson*, invalidates the definition of crime of violence in 18 U.S.C § 16 and precludes its usage in immigration proceedings such that the respondent's motion to terminate should be granted.

For the reasons set forth below, the Court DENIES the respondent's motion to terminate and orders the respondent removed from the United States.

II. SUMMARY OF EVIDENTIARY RECORD

The record comprises eight (8) exhibits. All of the exhibits were admitted into evidence, and the Court has considered all exhibits and evidence in the record of proceeding whether referred to in this decision or not.

A. Documentary Evidence Considered

Exhibit 1 is the NTA. Exhibit 2 is the I-213 form and supporting conviction documents. Exhibit 3 is the text from Utah Code § 41-6a-210, Failure to Respond to Officer's Signal to Stop. Exhibit 4 is Ninth Circuit case *Penuliar v. Mukasey*, 528 F.3d 603 (9th Cir. 2008). Exhibit 5 is an unpublished BIA decision, *In Re: Shohaib Alam Qazi*, 2009 WL 3818032 (BIA). Exhibit 6 is the final judgement for the respondent's conviction for Failure to Stop/Respond at the Command of Police. Exhibit 7 is the DHS' brief in support of charge of removability. Exhibit 8 is the respondent's first motion to terminate proceedings and response to the DHS' brief in support of charge of removability. The rest of the documents in the record of proceeding were not officially marked as exhibits. Subsequent to the exhibits are the following documents: (1) The written decision of the Immigration Judge (IJ) granting the respondent's first motion to terminate proceedings and a transcript of the hearings; (2) The DHS' notice of appeal; (3) Administrative documents from the Board and entries of appearance as attorney; (4) The DHS' brief in support of appeal; (5) Filings by parties to the Board; (6) The respondent's brief in opposition to the DHS' appeal; (7) The BIA's decision sustaining the DHS' appeal and concluding that a violation of section 41-6a-210(1)(a) of the Utah Code is categorically a crime of

violence as defined by 18 U.S.C. § 16(b); (8) The respondent's motion for substitution of counsel; (9) The respondent's current motion to terminate proceedings and supporting memorandum; (10) the DHS' opposition response to motion to terminate; (11) A Seventh Circuit unpublished case, *United States v. Vivas-Ceja*, 2015 WL 9301373 (7th Cir. 2015).

B. Testimony Considered

The respondent has not provided testimony in this case. These proceedings are adjudicated as a matter of law.

III. STATEMENT OF LAW

A. Removability for Conviction for an Aggravated Felony Crime of Violence

A conviction for a crime of violence (as defined in section 16 of title 18 of the United States Code, but not including a purely political offense) for which the term of imprisonment is at least one year constitutes an aggravated felony. INA § 101(a)(43)(F). An alien who is convicted of an aggravated felony at any time after admission is removable. INA § 237(a)(2)(A)(iii).

B. Definition of Crime of Violence

The term "crime of violence" means—

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

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

18 U.S.C § 16.

C. **The Supreme Court of the United States on the residual clause of the definition of "violent felony" in the Armed Career Criminal Act:**

> At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses. "*Begay*, 553 U.S., at 143, 128 S. Ct. 1581. Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

Johnson v. United States, 135 S. Ct. 2551, 2558 (2015).

D. The United States Supreme Court has held that the vagueness doctrine applies in immigration proceedings:

> Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation. The Court has stated that deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. Fong Haw Tan v. Phelan, supra. We shall, therefore, test this statute under the established criteria of the "void for vagueness" doctrine.

Jordan v. De George, 341 U.S. 223, 231 (1951).

IV. ANALYSIS

At issue in this case is whether the respondent's conviction for Failure to Respond to Officer's Signal to Stop, which the BIA has found categorically to be a crime of violence under 18 U.S.C. § 16(b), constitutes an aggravated felony (in light of *Johnson v. United States*, *infra*) and serves as grounds for the respondent's removability.

A. *Johnson v. United States*, 135 S. Ct. 2551 (2015), Does Not Invalidate the Definition of Crime of Violence in 18 U.S.C § 16

The Supreme Court case, *Johnson v. United States*, 135 S. Ct. 2551 (2015) has no effect on the definition of the term "crime of violence" such that an alien who has been convicted of a crime of violence is an aggravated felon for immigration purposes.

In *Johnson*, the Court found the residual clause of the definition of "violent felony" in the Armed Career Criminal Act to be unconstitutionally vague. The respondent argues that the definition of violent felony and crime of violence are so similar that the Court's decision in *Johnson* effectively deems the residual clause in the definition of "crime of violence" to be unconstitutional as well. However, the Court specifically pointed to the presence of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives —in the definition of "violent felony" in making its decision. The Court held that it is the fact that the "violent felony" statute requires courts to interpret "serious potential risk" *in light of the four enumerated crimes* that creates unconstitutional vagueness. The Court indicates that it *would* be acceptable to apply an "imprecise 'serious potential risk' standard to real-world facts" but that it is "quite another [thing] to apply it to a judge-imagined abstraction" in light of those four enumerated crimes.

The Court's reasoned that the four crimes are "far from clear in respect to the degree of risk each poses," and gave examples of the lack of clarity of the degree of risk each crime poses in application. Without the presence of those four enumerated crimes in the statute, the Court would not have found the residual clause of the definition of "violent felony" to be unconstitutionally vague. The four enumerated crimes in the "violent felony" definition are not present in the definition of "crime of violence"; and, therefore, the Court's holding does not apply to 18 U.S.C. § 16(b), the definition of "crime of violence."

Furthermore, the Court interpreted 18 U.S.C. § 16(b) in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) and did not find it to be vague. If section 16(b) were unconstitutionally vague, *Leocal* would no longer be good law. The Court did not overturn its decision in *Leocal* in *Johnson* and does not normally overturn or dramatically limit its earlier authority *sub silentio*. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

While the Supreme Court held, in *Jordan v. De George*, that the vagueness doctrine applies to immigration proceedings, applying the vagueness doctrine to the definition of "crime of violence" does not render the statute unconstitutional, for the aforementioned reasons.

B. The Respondent's Conviction Constitutes an Aggravated Felony Crime of Violence

The BIA's July 27, 2015, decision binds this Court and concluded that the respondent's conviction was categorically a crime of violence. Since this Court holds that *Johnson v. United States, supra*, does not invalidate the definition of crime of violence in 18 U.S.C. § 16(b), the respondent's conviction for a crime of violence constitutes an aggravated felony under section 101(a)(43)(F) of the Act, and serves as grounds for his removal under section 237(a)(2)(A)(iii) of the Act.

C. The Respondent Has Not Applied for Relief from Removal

The respondent indicated at his January 5, 2016, hearing that he does not seek further relief from removal but wishes to reserve appeal of the Court's decision to deny his motion to terminate.

CONCLUSION

The respondent's conviction constitutes a crime of violence. The Court finds that *Johnson v. United States, supra,* does not invalidate the definition of crime of violence in 18 U.S.C § 16. The respondent's conviction of a crime of violence with a sentence of at least one year constitutes an aggravated felony and serves as grounds for his removal. The respondent indicated he is not seeking relief from removal. Therefore, the respondent is found to be removable from the United States.

Accordingly, the following orders are entered:

V. ORDERS

IT IS HEREBY ORDERED that the respondent be **REMOVED** from the United States to Moldova based upon the charge contained in the Notice to Appear.

Appeal has been reserved by the respondent. The DHS has waived appeal. The respondent has 30 days from the issuance of this decision to file an appeal.

Jan. 11, 2016 /s/ DAVID C. ANDERSON
DATE DAVID C. ANDERSON
Immigration Judge

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
Falls Church, Virginia 20530

File No. A047-547-785—Salt Lake City, UT

IN RE: CONSTANTINE FEDOR GOLICOV
A.K.A. CONSTANTIN FEDOR GOLICOV A.K.A.
CONSTANTINE FEDO GOLICOV A.K.A. CONSTANTIN
GOLICOV A.K.A. KOSTIK GOLICOV A.K.A. CONSTANTIN
GOLIKOV A.K.A. CONSTANTINE FEDOR GOLICV
A.K.A. CONSTANTINE F. GOLICOV

Date: [Jul. 27, 2015]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Aaron Tarin, Esquire

ON BEHALF OF DHS:

Corina E. Almeida
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 of proceedings

The Department of Homeland Security ("DHS") appeals the Immigration Judge's decision dated February 8, 2013, dismissing the sole charge of removability and terminating the proceedings. The respondent opposes the appeal. The DHS's appeal will be sustained, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

In his decision, the Immigration Judge concluded that the DHS failed to meet its burden of demonstrating the respondent's removability as an aggravated felon under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), by clear and convincing evidence. *See* section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A); 8 C.F.R. § 1240.8(a). Specifically, the Immigration Judge concluded the DHS did not establish that the respondent's November 9, 2010, conviction for failing to stop at a police officer's command pursuant to section 41-6a-210(1)(a)(i) of the Utah Code is a crime of violence aggravated felony as defined by section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). On appeal, the DHS argues that a violation of section 41-6a-210(1)(a) of the Utah Code is categorically an aggravated felony. For the reasons set forth below, we conclude that the respondent's offense is a crime of violence under 18 U.S.C. § 16(b) and

therefore an aggravated felony rendering him removable as charged and ineligible for relief from removal.

The term "aggravated felony" includes a crime of violence as defined by 18 U.S.C. § 16 for which the term of imprisonment is at least 1 year. *See* section 101(a)(43)(F) of the Act. The term "crime of violence" means (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. 18 U.S.C. § 16.

To determine whether a state offense qualifies as an aggravated felony, we generally employ a categorical approach, whereby we look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). A state offense is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involved facts equating to the generic federal offense. *See id.* (citing *Shepard v. United States*, 544 U.S. 13, 24 (2005)). In other words, we must determine whether the minimum conduct criminalized by the state statute is encompassed by the generic federal offense.

The respondent was convicted for failing to stop at a police officer's command, a third degree felony, in violation of section 41-6a-210(1)(a)(i) of the Utah Code (I.J. at 3-4; Exh. 6). For this offense, the respondent re-

ceived an indeterminate sentence of up to 5 years imprisonment, which satisfies the 1-year sentence requirement of section 101(a)(43)(F) of the Act (Exh. 6). *See Matter of S-S-*, 21 I&N Dec. 900 (BIA 1997) (treating an indeterminate sentence as a sentence for the maximum term imposed). In relevant part, Utah defines the offense of failing to stop at an officer's command as follows:

> An operator who receives a visual or audible signal from a peace officer to bring the vehicle to a stop may not:
>
> (i) operate the vehicle in willful or wanton disregard of the signal so as to interfere with or endanger the operation of any vehicle or person; or
>
> (ii) attempt to flee or elude a peace officer by vehicle or other means.

Utah Code § 41-6a-210(1)(a). Because it does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another, the offense is not a crime of violence within the meaning of 18 U.S.C. § 16(a). Thus, the sole question before us is whether failing to stop at a police officer's command under section 41-6a-210(1)(a) of the Utah Code is an 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. *See* 18 U.S.C. § 16(b).

The focus in assessing whether an offense is a crime of violence under 18 U.S.C. § 16(b) is on whether the offense, by its nature, involves a substantial risk that the perpetrator will resort to intentional physical force

in the course of committing the crime. *Matter of U. Singh*, 25 I&N Dec. 670, 677 (BIA 2012). We look to the risk of violent force that is present in the "ordinary" case to determine whether, given the inherent nature of the crime, there is a substantial risk that the perpetrator will intentionally use physical force. *Id.* at 678; *Matter of Francisco-Alonzo*, 26 I&N Dec. 594 (BIA 2015); *see also Leocal v. Ashcroft*, 543 U.S. 1, 10-11 (2004) (holding that 18 U.S.C. § 16(b) covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense).

Although we are not aware any court has directly addressed whether a violation of section 41-6a-210(1)(a) of the Utah Code constitutes a crime of violence under 18 U.S.C. § 16(b), the United States Court of Appeals for the Tenth Circuit has determined that the offense is a "violent felony" for purposes of the Armed Career Criminal Act ("ACCA") (I.J. at 4-7). *See United States v. West*, 550 F.3d 952 (10th Cir. 2008); *see also* 18 U.S.C. § 924(e)(2)(B)(defining the term "violent felony"). In *West*, the court concluded that a violation of section 41-6a-210(1)(a) of the Utah Code is categorically a violent felony for ACCA purposes, in part because it involves conduct that presents a serious potential risk of physical injury to another. *See United States v. West*, *supra*, at 965 (citing 18 U.S.C. § 924(e)(2)(B)(ii)). In reaching this conclusion, the court noted that a driver's evading or eluding a police officer will generally involve a deliberate choice to disobey the officer's signal and that this disobedience poses the threat of a direct confrontation between the police officer and the occupants of the vehicle, which, in turn, creates a potential for serious physical injury to the officer, other occupants of

the vehicle, and even bystanders. *Id.* at 964. The court further noted that the offense is likely to lead, in the ordinary case, to a chase or at least an effort to apprehend the perpetrator. *Id.* at 970.

Other courts have found similar offenses to be violent felonies for purposes of the ACCA. *See Sykes v. United States*, 131 S. Ct. 2267 (2011) (holding that the Indiana offense of knowing or intentional flight from a law enforcement officer is a violent felony under the ACCA); *United States v. Petite*, 703 F.3d 1290 (11th Cir. 2013) (holding that Florida's intentional vehicular flight offense is a violent felony under the ACCA); *United States v. Dismuke*, 593 F.3d 582, 596 (7th Cir. 2010) (holding that Wisconsin's vehicular-fleeing crime is a violent felony for purposes of the ACCA); *United States v. Young*, 580 F.3d 373, 381 (6th Cir. 2009) (holding that Michigan's fleeing-and-eluding offense is a violent felony under the ACCA); *United States v. Harrimon*, 568 F.3d 531, 537 (5th Cir. 2009) (holding that a Texas conviction for fleeing by vehicle is a violent felony under the ACCA). At least one court has found a similar offense to be a crime of violence within the meaning of 18 U.S.C. § 16(b). *See United States v. Coronado-Cura*, 713 F.3d 597 (11th Cir. 2013) (holding that Florida's intentional vehicular flight offense is an aggravated felony under the United States Sentencing Guidelines as a 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). *But see United States v. Tyler*, 580 F.3d 722, 725 (8th Cir. 2009) (holding that fleeing a peace officer in a vehicle under Minnesota law is not a crime of violence under the United States Sentencing Guidelines

because it does not typically involve conduct that presents a serious potential risk of physical injury to another and observing that the statute at issue criminalized behavior such as merely extinguishing motor vehicle headlights or taillights).

We agree with the Immigration Judge that the Tenth Circuit's conclusion in *West* that a violation of section 41-6a-210(1)(a) of the Utah Code is categorically a violent felony for ACCA purposes is not dispositive as to the issue of whether it constitutes a crime of violence under 18 U.S.C. § 16(b) (I.J. at 7-9). *See Matter of Alcantar*, 20 I&N Dec. 801, 806 n.3 (BIA 1994) (discussing the differences between crimes of violence under 18 U.S.C. § 16 and violent felonies under the ACCA). Nevertheless, we agree with the DHS that the court's findings and the rationale underlying its conclusion are instructive for the purpose of our analysis of the offense. *See generally United States v. Coronado-Cura, supra* (discussing the similarities between the ACCA's violent felony definition and the 18 U.S.C. § 16(b) crime of violence definition).

In discussing the "classic example" of a crime of violence under 18 U.S.C. § 16(b), the Supreme Court noted that the offense of burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime. *See Leocal v. Ashcroft*, 543 U.S. 1, *supra*, at 10; *see also United States v. Becker*, 919 F.2d 568, 571 (9th Cir. 1990) (noting that "[a]ny time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant

either to accomplish his illegal purpose or to escape apprehension."). As with burglary, there is a substantial risk that an individual who fails to stop at a police officer's command will use physical force to escape apprehension during an ensuing confrontation or pursuit. *See generally Sykes v. United States*, *supra*, at 2273 (observing that while burglary is dangerous because it can end in confrontation leading to violence, the same is true of vehicle flight but to an even greater degree).

A violation of section 41-6a-210(1)(a) of the Utah Code naturally involves a person acting in disregard of the risk that physical force might be used against another in committing an offense. *See Leocal v. Ashcroft, supra*. The offense will, in the ordinary case, create a risk of a direct confrontation with the police. This risk is substantial, particularly in light of the fact that the crime will always involve an overt disobedience of an officer's command, will occur directly in the officer's presence, and will likely occur in the presence of innocent and unsuspecting bystanders. *See United States v. West, supra*, at 963 n.9. Accordingly, we conclude that section 41-6a-210(1)(a) of the Utah Code, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In his decision, the Immigration Judge determined that section 41-6a-210(1)(a)(i) of the Utah Code is "divisible" in terms of whether it is a "crime of violence" because it contains several different *mens rea* (I.J. at

11).[1] The Immigration Judge then applied the modified categorical approach and determined that the conviction documents failed to establish the *mens rea* involved in the offense such that the DHS did not meet its burden to establish the respondent's conviction is a crime of violence and that he is removable under section 237(a)(2)(A)(iii) of the Act (I.J. at 13-14).

Offenses that do not have a *mens rea* component or that require only a showing of negligence are not crimes of violence under 18 U.S.C. § 16. *See Leocal v. Ashcroft, supra*. The Immigration Judge found that the offense is not categorically a crime of violence because an individual may be convicted under section 41-6a-210(1)(a)(i) for "wanton disregard" of an officer's signal, which is tantamount to criminal negligence (I.J. at 11-13). *See State v. Simpson*, 904 P.2d 709, 712 (Utah App. 1995). However, we point out that the Tenth Circuit found the *Simpson* definition was not binding when it made its decision in *West* and that the term, as used

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[1] The Immigration Judge's decision was issued prior to the Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), regarding the "divisibility" of statutes and the proper application of the modified categorical approach. In this regard, we note that, subsequent to *Descamps*, the Tenth Circuit issued its own decision providing an analysis of "divisibility" and application of the modified categorical approach. *See United States v. Trent*, 767 F.3d 1046 (10th Cir. 2014). However, because we find that the Immigration Judge erred in defining the term "wanton disregard" to equate to criminal negligence, and adopt the definition applied by the Tenth Circuit in *West* to encompass deliberate or intentional conduct in the ordinary case, we find that the statute is not divisible in terms of the *mens rea* required for an aggravated felony conviction under 18 U.S.C. § 16(b), since both a "willful" and a "wanton" violation exclude merely reckless or negligent conduct. *See United States v. Trent, supra*.

in section 41-6a-210(1)(a)(i), generally encompasses deliberate or intentional conduct. *See United States v. West, supra*, at 971 ("It is only after the driver has received the officer's signal to stop and then disregards that signal that the driver's conduct becomes criminal. Disregarding a signal after receiving it will, in the ordinary case . . . be knowing and deliberate or intentional."); *see also State v. Bird*, 286 P.3d 11, 15 (Utah Ct. App. 2012) ("The requirement that [the defendant] 'receive' a signal to stop implies that he needed some level of mental appreciation that he was being hailed to a stop by a peace officer.").

While it is theoretically possible for an individual to be convicted under section 41-6a-210(1)(a)(i) for criminally negligent conduct, the respondent has not identified—and we are not aware of—any cases in which an individual has been convicted under section 41-6a-210(1)(a)(i) for conduct that was not knowing and deliberate or intentional. As such, he has not met his burden of demonstrating that such hypothetical situations constitute the "ordinary case." *See Matter of Francisco-Alonzo, supra.*

Thus, we find that a conviction under section 41-6a-210(1)(a)(i) requires a showing that the defendant had a mental appreciation that he was being hailed to stop by a police officer and that the purpose of his actions was to flee or elude the police. *See State v. Bird, supra*, at 15. Because it does not encompass reckless, negligent or merely accidental conduct, a violation of section 41-6a-210(1)(a)(ii) satisfies the *mens rea* requirements of 18 U.S.C. § 16(b). In sum, we conclude that a violation of section 41-6a-210(1)(a) of the Utah Code is categorically a crime of violence as defined by 18 U.S.C.

16(b). Thus, the DHS has met its burden of demonstrating the respondent's removability pursuant to section 237(a)(2)(A)(iii) of the Act. The DHS has requested a remand to the Immigration Judge to explore the respondent's potential eligibility for relief from removal

Accordingly, the DHS's appeal will be sustained, the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

ORDER: The DHS's appeal is sustained, and the record is remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

/s/ ROGER A. PAULEY
FOR THE BOARD

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SALT LAKE CITY, UTAH

File No. A047-547-785
IN THE MATTER OF CONSTANTINE GOLICOV,
RESPONDENT

Date: Feb. 8, 2013

IN REMOVAL PROCEEDINGS

WRITTEN DECISION OF THE IMMIGRATION JUDGE TERMINATING THE CHARGE OF REMOVABILITY

ON BEHALF OF THE RESPONDENT:

Aaron Tarin, Esq.
Ishola-Tarin, PLLC
1750 West Valley Research Way, Suite 204
West Valley City, UT 84119

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Mindy Hoeppner
Assistant Chief Counsel
2975 S. Decker Lake Dr., Stop C
West Valley City, Utah 84119

CHARGES:

INA § 237(a)(2)(A)(iii), 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 (as defined in section 16 of Title 18, United States Code, but not including a purely political offense) for which the term of Imprisonment ordered is at least one year.

I. INTRODUCTION

Respondent is a 26-year old single male, native and citizen of Moldova. The United States Department of Homeland Security (DHS or Department) has brought these removal proceedings against the respondent under the authority of the Immigration and Nationality Act (INA or Act) pursuant to the filing of a Notice to Appear (NTA), which is marked in the record as Exhibit 1. 8 C.F.R. § 1003.14(a). The NTA alleges that Respondent: (1) is not a citizen or national of the United States; (2) is a native of Moldova and a citizen of Moldova; (3) his status was adjusted to that of lawful permanent resident on August 15, 2001 under section 245 of the Act and; (4) on November 9, 2010, Respondent was convicted in the West Jordan 3rd District Court, Salt Lake County, State of Utah for the offense of Fail to stop/Respondent at Command of Police, in violation of Utah Code Ann. (UCA) § 41-6A-210, a 3rd degree felony, for which he was sentenced to an indeterminate term of not to exceed 5 years in the Utah State Prison (Case No. 101400500). (Exh. 1).

The Department Charged Respondent with removability pursuant to INA § 237(a)(2)(A)(iii), 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 (as defined in section 16 of Title 18, United States Code, but not including a purely political offense) for which the term of Imprisonment ordered is at least one year." (*Id.*).

At the January 8, 2013 hearing, Respondent denied allegations 1 through 3, admitted allegation 4, and Respondent disputed the charge of removability. (Digital Audio Recording, "DAR," 01/08/2013). Respondent declined to designate a country of removal. (*Id.*). The Department then submitted Exhibit 2 to the Court, containing Respondent's I-213 and documents related to Respondent's criminal history (*Id.*; Exh.2). Based upon Exhibit 2, the Court found the Department met its burden of proof to establish by clear and convincing evidence the contested allegations set forth in the NTA, and accordingly the Court sustained allegations 1 through 3 contained in the NTA. (DAR, 01/08/2013).

As to the charge of removability, Respondent presented arguments at the January 8, 2013 hearing. (*Id.*). The Court permitted the Department to provide further briefing in support of the charge. (*Id.*). On January 22, 2013, the Department submitted a brief to the Court in support of the charge of removability. (Exh. 7). On January 25, 2013, Respondent filed a motion to terminate proceedings and a response to the Department's brief. (Exh. 8). The Respondent's motion to terminate the removal proceedings and contest the Department's charge of removability is now before this Court. At issue is the definition of crime of violence under the Act, which is defined in 18 USC § 16. Due to Respondent's statute of conviction at issue in

this case, this Court finds that Respondent did not commit a crime of violence as it is defined in 18 USC § 16(a). The only issue is if Respondent committed a crime of violence under 18 USC § 16(b)

For the reasons set forth below, the Court will **GRANT** Respondent's motion to terminate the charge of removability and accordingly terminate the removal proceedings in this case.

II. SUMMARY OF EVIDENCE

The record of proceedings in this case is comprised of 8 exhibits. All of the exhibits were admitted into evidence, and the Court has considered all exhibits and evidence in the Record of Proceeding whether referred to in this decision or not. Exhibit 1 is the NTA. Exhibit 2 is Respondent's I-213 and documents related to Respondent's criminal history. Exhibit 3 is a copy of UCA § 41-6a-210. Exhibit 4 is a copy of *Penuliar v. Mukasey*, 528 F.3d 603 (9th Cir. 2008). Exhibit 5 is a copy of an unpublished decision from the Board of Immigration Appeals (BIA), Shohaib Alam Qazi, A047-702-922 (BIA Oct. 30, 2009) (unpublished), *available at* http://eoirweb/Biadec/4864183.pdf. Exhibit 6 is a certified record of conviction for Respondent's Case No. 101400500. Exhibit 7 is the Department's Brief in Support of Removability (Jan. 22, 2013). Exhibit 8 is Respondent's Motion to Terminate Proceedings and Response to DHS' Brief in Support of Charge of Removability (Jan. 25, 2013).

III. DECISION AND ORDER OF THE IMMIGRATION JUDGE

The Court finds that the Department has not established by clear and convincing evidence that Respondent is removable pursuant to INA § 237(a)(2)(A)(iii). Accordingly, the Court will terminate these removal proceedings.

On November 9, 2010, Respondent was convicted of violating UCA § 41-6a-210, a third degree felony, and sentenced to serve an indeterminate sentence not to exceed five years imprisonment in Utah State Prison. (Exh. 2; Exh. 6).[1] The Court must consider if Respondent's conviction was a crime of violence, as it is

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[1] Utah Code § 41-6a-210 (2005): 41-61-210. Failure to respond to officer's signal to stop—Fleeing—Causing property damage or bodily injury—Suspension of driver's license—Forfeiture of vehicle—Penalties.

(1)(a) An operator who receives a visual or audible signal from a peace officer to bring the vehicle to a stop may not:

(i) operate the vehicle in willful or wanton disregard of the signal so as to interfere with or endanger the operation of any vehicle or person; or

(ii) attempt to flee or elude a peace officer by vehicle or other means.

(b)(i) A person who violates Subsection (1)(a) is guilty of a felony of the third degree.

(ii) The court shall, as part of any sentence under this Subsection (1), impose a fine of not less than $1,000.

(2)(a) An operator who violates Subsection (1) and while so doing causes death or serious bodily injury to another person, under circumstances not amounting to murder or aggravated murder, is guilty of a felony of the second degree.

defined in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *Johnson v. United States* 130 S Ct. 1265, 1271 (2010), and *Zuniga-Sota*, 527 F.3d 1110 (10th Cir. 2008). In determining if the crime was a crime of violence, the Court first utilizes a categorical approach by examining the statute of conviction. *Taylor v. United States*, 495 US 575 (1990); *Efagene v. Holder*, 642 F.3d 918, 921 (10th Cir. 2011). Only if the Court finds that the statute is not categorically a crime of violence, can the Court engage in step two of the analysis, in which the Court would examine the records of conviction. *See Shepard v. United States*, 544 US 13 (2005).

A. Respondent's conviction is a crime of violence under the Armed Career Criminal Act and the United States Sentencing Guidelines

The Court finds Respondent has been convicted of a crime, which is categorically a crime of violence, under the Armed Career Criminal Act (ACCA). As cited by the Department, Respondent's statute of conviction has been addressed in several 10th Circuit cases. *See United States v. West*, 550 F.3d 952 (10th Cir. 2008)

(b) The court shall, as part of any sentence under this Subsection (2), impose a fine of not less than $5,000.

(3)(a) In addition to the penalty provided under this section or any other section, a person who violates Subsection (1)(a) or (2)(a) shall have the person's driver license revoked under Subsection 53-3-220(1)(a)(ix) for a period of one year.

(b)(i) The court shall forward the report of the conviction to the division.

(ii) If the person is the holder of a driver license from another jurisdiction, the division shall notify the appropriate officials in the licensing state. *available at* http://le.utah.gov/code/TITLE41/htm/41_06a021000.htm

(holding that Utah Code § 41-6a-210 categorically presents a serious potential risk of physical injury for purposes of 18 USC 924(e)(2)(B)(ii), the definition of a violent felony for the ACCA, and categorically qualified as a violent felony under the residual clause of the ACCA). In *United States v. McConnell*, 605 F.3d 822 (10th Cir. 2010), the 10th Circuit concluded that the analysis of Utah Code § 41-6a-210 was applicable to the Kansas Statute at issue in *McConnell*, and in *McConnell* the 10th Circuit reaffirmed its holding in *West*. *Id*. at 828.

Respondent's crime is a violent felony under the United States Sentencing Guidelines (USSG), and remains good law despite the United States Supreme Court case *Chambers v. United States*, 129 S. Ct. 687 (2009). *See United States v. Wise*, 597 F.3d 1141 (10th Cir. 2010) (holding that a conviction under Utah Code § 41-6a-210 was a crime of violence under the residual clause of the USSG). Furthermore, in *Wise*, the 10th Circuit reaffirmed that a violation of Utah Code § 41-6a-210 was a crime of violence, despite *Chambers v. United States*, 129 S. Ct. 687 (2009), in which the Supreme Court held that not all escape crimes are crimes of violence. *Id*. at 1146 (stating, "[e]ach of the two subsections of Utah Code § 41-6a-210 sets out a crime of violence, and so in that respect, *West* remains good law notwithstanding *Chambers*"). In reaffirming *West*, despite *Chambers*, the 10th Circuit Stated the statutes at issue in *Chambers* and *West* were distinguishable: UCA § 41-6a-210 requires active, violent escape crimes and deliberate action; will occur in the presence of a police officer; and is "far more likely to endanger third parties." *Id*. at 1146-1147 (10th Cir. 2010).

A conviction of UCA § 41-6a-210 involves purposeful and violent conduct, and poses a dangerous risk of injury to the police officer. In *West*, and reaffirmed in *McConnell*, the 10th Circuit stated that, "a conviction under the Utah statute would, in the ordinary case, involve violent, aggressive and purposeful conduct." *United States v. McConnell, supra* at 828, *citing United States v. West*, 550 F.3d 952, 964 (10th Cir. 2008). Furthermore, that "the driver's evading or eluding police officers will generally involve a deliberate choice to disobey the officer's signal," which in turn, "poses the threat of a direct confrontation between the police officer and occupants of the vehicle, which in turn, creates a potential for serious physical injury to the officer, other occupants of the vehicle, and even bystanders." *United States v. McConnell, supra* at 827, *citing United States v. West, supra* at 964 (10th Cir. 2008), quoting *United States v. James*, 337 F.3d 387, 391 (10th Cir. 2008). The 10th Circuit further stated that a conviction under Utah Code § 41-6a-210, "will always involve the use of a motor vehicle. It will always involve an overt, rather than covert, disobedience of an officer's command and will occur directly in the officer's presence. And it will likely occur in the presence of innocent unsuspecting bystanders." *United States v. McConnell, supra* at 828, *citing United States v. West, supra* at 963 (10th Cir. 2008).

Although case law has been presented by Respondent which would support that fleeing a police officer is not a violent crime, that case law has been undermined by recent changes in the state of the law. (Exh. 5). The United States Supreme Court has found that fleeing a police officer is a violent felony under the ACCA. *See Sykes v. United States*, 131 S. Ct. 2267 (2011). In

Shohalb AlamQazi, A047-702-922 (BIA Oct. 30, 2009) (unpublished), the BIA examined a statute similar to the statute at issue in the present case.[2] (Exh. 5). The BIA, *citing United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009),[3] found that the Florida Statute at issue in that case, was not a crime of violence under the Act. (*Id.*). However, that BIA decision was decided on October 30, 2009. (*Id.*). In 2011, the United States Supreme Court ruled that eluding was a crime of violence under the ACCA. *Sykes v. United States, supra*. In *Sykes*, the Supreme Court stated," [s]erious and substantial risks are an inherent part of vehicle flight," and concluded that "[f]elony vehicle flight is a violent felony for purposes of ACCA." *Id.* at 2276, 2277. The Supreme Court stated that the risk involved in vehicle flight was potentially lethal. *Id.* at 2269. Specifically, the Supreme Court stated:

> When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of

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[2] Florida Statute § 316.1935(1). 316.1935 Fleeing or attempting to elude a law enforcement officer; aggravated fleeing or eluding.—(1) It is unlawful for the operator of any vehicle, having knowledge that he or she has been ordered to stop such vehicle by a duly authorized law enforcement officer, willfully to refuse or fail to stop the vehicle in compliance with such order or, having stopped in knowing compliance with such order, willfully to flee in an attempt to elude the officer, and a person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. *Available at*, http://www.flsenate.gov/Laws/Statutes/2011/316.1935

[3] The BIA had cited additional 11th Circuit decisions as well; however, given the recent developments related to *United States v. Harrison* as of January 3, 2013, the Court has only examined that line of development, as it is directly on point for the present case.

> property and persons of pedestrians and other drivers an inherent part of the offense. *Even if the criminal attempting to elude capture drives without going at full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody. A perpetrator's indifference to these collateral consequences has violent—even lethal—potential for others*. A criminal who takes flight and creates a risk of this dimension takes action similar in degree of danger to that involved in arson, which also entails intentional release of a destructive force dangerous to others. This similarity is a beginning point in establishing that vehicle flight presents a serious potential risk of physical injury to another.

Id. (emphasis added).

In light of *Sykes*, the 11th Circuit revisited *Harrison*. *United States v. Petite*, 2013 U.S. App. LEXIS 146; 23 Fla. L. Weekly Fed. C 1765 (Jan. 3, 2013). In *Petite*, the 11th Circuit held that Sykes had so undermined *Harrison*, that *Harrison* was no longer good law.[4] (*Id*. at 24 stating, "[i]t does not go too far to say that the foundations of *Harrison* were demolished by the Supreme Court's subsequent decision in *Sykes*, which in fact arose directly out of this circuit conflict"; *Id*. at 27 further stating " . . . . we are compelled to conclude that *Harrison* has been undermined to the point of abrogation by *Sykes*"). Accordingly, in the 11th circuit, vehicle flight is now a violent felony under the

[4] *Harrison* is the case the BIA relied in part upon to determine that the Florida statute at issue in the BIA case was not a crime of violence. That BIA decision is found in Exhibit 6 of this record.

ACCA. *Id.* at 32. Therefore, it would seem that there is a general consensus that the crime of Respondent's conviction specifically, and similar crimes, would be a violent felony under the ACCA. However, that is not the proper standard in determining a crime of violence pursuant to the Act.

B. The ACCA definition of a crime of violence is distinct from the definition of a crime of violence in the Act.

For immigration purposes, a crime of violence is defined in 18 USC § 16. INA § 101(a)(43)(F). In contrast, the ACCA and USSG have their own internal definitions of crimes of violence.[5] The ACCA requires a

[5] ACCA defines a violent felony as, "crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and (C) the term "conviction' includes a finding that a person has committed an act of juvenile delinquency involving a violent felony." 18 USC § 924(e)(2)(B). USSG defines a crime of violence as, ""any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 USCS Appx § 2Ll.2(a)(1)(B)(ii). In *Zuniga-*

risk of physical injury. Under 18 U.S.C 16(b), which is the provision relevant in this case, risk of physical injury is not sufficient. This matter was directly addressed in *Leocal*. 543 U.S. 1 (2004). The Supreme Court expressly stated:

> § 16(b) plainly does not encompass all offenses which create a "substantial risk" that injury will result from a person's conduct. The "substantial risk" in § 16(b) relates to the use of force, not to the possible effect of a person's conduct. Compare § 16(b) (requiring a "substantial risk that physical force against the person or property of another may be used"), with United States Sentencing Commission, Guidelines Manual § 4B1.2(a)(2) (Nov. 2003) (in the context of a career-offender sentencing enhancement, defining "crime of violence" as meaning, inter alia, "conduct that presents a serious potential risk of physical injury to another").

Leocal, *Id*. at 383 n.7

The Court cannot comingle the ACCA's definition of a crime of violence with the definition of crime of violence in the Act. In both USSGand the ACCA, when defining a violent crime which does not involve an aggravated felony as it is defined in the Act, the analysis is risk of injury whereas 18 USC § 16 the only analysis is risk of force that could cause injury. A risk of injuring someone is substantially different than risk of force

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Soto, the 10th Circuit held that the USSG definition of crime of violence was substantially identical to 18 USC 16(a), but that the USSG was not similar to 18 USC 16(b). 527 F.3d1110 (10th Cir. 2008). It is 18 USC 16(b) that is at issue in this case.

which pursuant to *Leocal* and *Johnson* must be active force. This is precisely the reason the First Circuit held that the definitional standards set forth in the ACCA cannot be used to analyze the INA. *See Aguiar v. United States*, 438 F.3d 86 (1st Cir. 2006).

The First Circuit has held that the ACCA definition of a crime of violence is distinct from the INA definition of a crime of violence. *Id.*[6] In *Aguilar*, the 1st Circuit stated, "[i]n sum, while an offense may create a risk of *physical injury* to another and therefore be a "violent felony" under the ACCA, it does not necessarily follow that the offense will involve a substantial risk of the use of *physical force* and therefore be a "crime of violence" under *Section 16(b)*." *Id*. at 88 (emphasis in original). The 1st Circuit in *Aguilar* relied upon the same footnote in *Leocal* that the Court cites herein.

The 10th Circuit has not commingled the tests and definitions applicable to the ACCA, USSG, and the Act. In *Zuniga-Sota*, 527 F.3d 1110 (10th Cir. 2008), the 10th Circuit analyzed a crime of violence under the Act, applied *Leocal*, despite the surrounding issue being one of sentencing. In *Zuniga-Sota*, the 10th Circuit was addressing the INA, because an aggravated felony under the Act was the reason for the defendant's sentencing enhancement in that case. *Id.* The 10th Circuit was not addressing the ACCA or USSG, other than as the USSG address aggravated felonies. Therefore, a violent crime in USSG and ACCA were inapplicable in *Zuniga-Sota*. *Id.* The Court points out that in *Zuniga-Soto*, the 10th Circuit specifically addresses

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[6] The Court acknowledges it is not bound by case law arising out of the 1st Circuit; however, the Court finds the reasoning set forth in *Aguiar v. United States* persuasive in this case.

Leocal, whereas in *Wise*, and the other USSG and ACCA cases, *Leocal* is not mentioned.[7]

After reviewing the statutory language in the ACCA, USSG, 18 USC § 16, *Leocal, supra*, and *Aguilar, supra*, the Court finds that the standards set forth in 18 USC § 16(b) are narrower than the standards set forth in the ACCA and USSG.[8] Therefore, merely because Respondent's crime would appear to be a crime of violence under the ACCA, does not mean it automatically renders Respondent's conviction a crime of violence under the Act.

C. Respondent was not convicted of a crime of violence as it is defined in the Act.

In this case, the Court finds Respondent's crime is not a crime of violence as it is defined in the Act, despite

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[7] The Court understands that the ACCA and USSG defining violent crimes is applicable to both citizens and noncitizens who appear in district court for criminal law violations whereas the section pertaining to aggravated felonies in the Act is only applicable to noncitizens and previously removed aliens who committed an aggravated felony. Because of this, this Court must apply the standard set forth in *Leocal*, and this Court understands that the *Leocal* decision and interpretation of 18 USC § 16(b) is much more restrictive than the definition of a crime of violence or violent felony under both the USSG and the ACCA, and that the USSG and ACCA tests and definitions for defining those terms are not applicable in defining aggravated felonies in the Act.

[8] The Court acknowledges that both the ACCA and USSG, contain the element of risk of physical injury, when risk of physical force is not an element of the crime itself. Under 18 USC § 16(b), and related case law, which is the issue in this case because risk of physical injury is not an element in Respondent's statute of conviction, the test is risk of violent and active physical force.

being a crime of violence under the ACCA. 18 USC § 16 defines a crime of violence as:

> **(a)** an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> **(b)** any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The United States Supreme Court has held that "force" under 18 U.S.C. is defined as "violent, active force." *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Johnson v. United States* 130 S Ct. 1265, 1271 (2010) (*Johnson* was addressing the definition of a "violent felony.[9] However, the Supreme Court was relying upon its *Leocal* decision, and the BIA stated *Johnson* was controlling in its Interpretation of "crime of violence." *See Matter of Velasquez*, 25 I&N Dec. 278, 283).

The Court finds the Department has not met its burden of proof to establish that Respondent's conviction was for a crime of violence as defined in 18 USC § 16(b). Respondent was convicted of a third degree felony for

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[9] Respondent's conviction documents are not clear if he was convicted under UCA § 41-6a-210(1)(a)(i) or (ii). (See Exh. 2; Exh. 6). However, as stated above, based on the record, it would appear Respondent was convicted of UCA § 41-6a-210(1)(a)(i), and the Department agrees Respondent was convicted under UCA § 41(1)(a)(i). *See* Exh 2 at 11; *See* Utah Code 541-6a-210(1)(a)(i); *See* Exh.7 at 4. UCA § 41-6a-210(1)(a)(i) requires only a risk of injury to a person or vehicle; therefore, it does not state a crime of violence as per *Leocal* and *Zuniga-Soto*. However, UCA §41-6a-210(1)(a)(ii) an attempt to flee or elude may be a crime of violence under *Leocal* and *Zuniga-Soto*.

violating UCA § 41-6a-210. (Exh. 2; Exh. 6). Respondent received an indeterminate sentence not to exceed five years in Utah State Prison. (Exh. 6; *See also* Utah Code § 76-3-203(3) (stating that, unless a particular statute states otherwise, a third degree felony is punishable by a term not to exceed five years). In the 10th Circuit, an indeterminate sentence is a sentence for the maximum term. *See United States v. Reyes-Castro*, 13 F.3d 377, 380 (10th Cir. 1993). Therefore, Respondent's sentence, under 10th Circuit law, was a five year term of imprisonment.[10]

The Statement in Support of Defendant's guilty plea indicates Respondent was convicted under Utah Code § 41-6a-210(1)(a)(i). *See* Exh 2 at 11; *See Utah Code* § 41-6a-210(1)(a)(i). The Department agrees that the record indicates Respondent was convicted under Utah Code § 41-6a-210(1)(a)(i). *See* Exh. 7 at 4. Utah Code § 41-6a-210(1)(A)(i) states:

> (a) An operator who receives a visual or audible signal from a peace officer to bring the vehicle to a stop may not:
>
> (i) operate the vehicle in willful or wanton disregard of the signal so as to interfere with or endanger the operation of any vehicle or person

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[10] "Accordingly, Respondent's crime, had it been a crime of violence, would have qualified as an aggravated felony under the Act. INA § 101(a)(43)(F) (requiring a term of imprisonment of one year or more for a crime to qualify as a crime of violence). This is unlike the USSG which only requires that the crime be one which is *punishable* by one year imprisonment. USSG § 4B1.2(a) (emphasis added). Likewise, the ACCA only examines if the crime was *punishable* for a term of imprisonment exceeding one year. *See* 18 USC § 924(e)(2)(B) (emphasis added).

The statute is divisible, in that it contains several *mens rea*. The Court acknowledges Respondent's arguments as set forth at the January 8, 2013 hearing in that the statute requires several acts and several *mens rea.* (DAR, 01/08/2013); See also *State v. Byrd*, 2012 UT App 239 (2012). In *Byrd*, at issue was UCA § 41-6a-210(1)(a)(ii), and the trial courts failure to give a proper jury instruction as to any *mens rea* associated with that provision of the statute. The court stated the element of "receives" found in UCA § 41-6a-210(1)(a), which also applies to both UCA § 41-6a-210(1)(a)(i) and (ii), implicates a *mens rea*. *Id*. at 15; *Id*. at 16 (stating, "[t]he requirement that [the defendant] "receive" a signal to stop implies that he needed some level of mental appreciation that he was being hailed to a stop by a peace officer"). The court left precisely what *mens rea* jury instruction was to be given for the district court to determine. *Id*. Respondent correctly argued that in Utah, in a criminal law setting, if there is a lack of *mens rea*, the *mens rea* of reckless would be applied. However, in *Byrd*, the court did not clearly resolve that issue. *Id*. at 15 fn 4 (stating "[d]espite the plain language of *section 76-2-101*, we do not necessarily agree with the State that section *76-2-101(2)* automatically removes the concept of *mens rea* from the entire Utah Traffic Code. We note that *Utah Code section* 76-2-102 contains the seemingly contradictory language," "Every offense not involving strict liability shall require a culpable mental state," *Utah Code Ann.* § 76-2-102 (2008), with no exception for offenses found in the Traffic Code." Regardless, the Department has not met its burden to establish if Respondent's conviction was for willful conduct or wanton disregard.

Willful conduct and wonton disregard encompass two distinctive *mens rea*. Respondent's statute of conviction can be accomplished by either willful or wanton disregard of an officer's signal. UCA § 41-6a-210(1)(a)(i). As correctly cited by the Department, in Utah, willful conduct is not accidental conduct, rather it is deliberate and purposeful conduct. Exh. 7 at 4, *citing State v. Larsen* 865 P.2d 1355 (Utah 1993). However, Respondent correctly cites that, in Utah, wanton conduct constitutes criminal negligence. Exh. 8 at 6 *citing State v. Simpson*, 904 P.2d 709, 712 (Utah App. 1995). Under *Leocal*, negligence is not sufficient for a crime of violence. *See Leocal v. Ashcroft, supra* at 9, 11. The Court notes that at issue in *State v. Simpson* was the predecessor to the statute Respondent was convicted under; however, the language of willful and wanton disregard was in both the predecessor to UCA § 41-6a-210 as well as in UCA § 41-6a-210.[11]

The 10th Circuit has held that willful and wanton are distinct, but has questioned the definition of "wanton" utilized in *Simpson*. In *United States v. West*, the 10th Circuit Stated that "wanton" is separate from "willful," but in the ordinary case will encompass deliberate or intentional conduct. *United States v. West, supra* 971. Furthermore, the 10th Circuit stated, "[i]n *Simpson*, the court was considering an earlier version of this statute which, although using the same language as the current statute, did not divide that language into different

[11] Additionally, *State v. Simpson* was relying upon the interpretation of wanton disregard from a criminal case; however, *State v. Simpson* itself was addressing the predecessor to UCA § 41-6a-210. Therefore, the Court finds the definition applicable here.

sections, as the current statute does. The later revision of the statute into sections may well affect the meaning the Utah Court of Appeals suggested in Simpson." *Id*. at fn 12.

However, despite the 10th Circuit statement that the renumbering of, and dividing of, Utah Code § 41-6a-210 *may* have impacted the meaning of "wanton" under *Simpson*, this Court could not find case law holding that the renumbering and division of Utah Code 41-6a-210 has in fact changed the definition of "wanton" in used in *Simpson*. Furthermore, the Department has presented no case law supporting the proposition that the division and renumbering of UCA § 41-6a-210 altered the definition of "wanton" used in *Simpson*. It would appear, other than distinguishing *Simpson* in West[12] that *Simpson* remains good law in the 10th Circuit. Accordingly, the lowest possible means of violating UCA § 41-6a-210 is wantonly, which *Simpson* defines as negligence, and *Leocal* holds negligence is insufficient for a crime of violence. *Simpson, supra* 712; *Leocal, supra* 9, 11.

The Court recognizes that it must determine the minimum conduct necessary for purposes of defining a crime of violence. *Chery v. Ashcroft*, 347 F.3d 404, 407 (2d Cir. 2003) (quoting *Dalton v. Ashcroft*, 257 F.3d 300 (2d Cir. 2001)) (internal quotation marks omitted).

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[12] In *West*, the court noted that at issue in *Simpson* was the matter of lesser included offenses. *West, supra* at 971 fn 12 (*stating*, "[i]n *Simpson*, the issue the Utah Court of Appeals had to resolve was whether the offense of disobeying a police officer should be deemed a lesser included offense of failing to stop at an officer's command").

Had Respondent's been convicted of a crime only requiring a "willful" violation of UCA § 41-6a-210(1)(a)(i), this Court may have found a crime of violence.[13] However, Respondent was convicted under a divisible statute, which contains the minimum conduct of wanton disregard, defined in *Simpson* as negligent conduct. Therefore, this Court examined Respondent's records of conviction.

Due to the divisibility of the statute, the Court turned to the second step of the crime of violence analysis and examined the records of conviction. *Shepard v. United States*, 544 US 13 (2005). Here, the records of conviction are ambiguous. Respondent's Statement in Support of Guilty Plea states that he pled guilty to: "operate a motor vehicle and having received a visual or audible signal from a peace officer to bring the vehicle to a stop, did operate the vehicle in a will or wanton disregard of the signal so as to interfere with or endanger the operation of any vehicle or person." (Exh. 2 at 11). The certified post-sentencing minutes do not state if Respondent was convicted of violating the Utah Code in a willful manner or if he violated the Utah Code with wanton disregard. (*Id.* at 7-8).

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[13] The Court notes that even if Respondent had been convicted of a willful violation of UCA § 41-6a-210(1)(a)(i), it is not clear it would have been a crime of violence under *Leocal* and *Zuniga-Soto*, because the risk posed in UCA § 41-6a-210(1)(a)(i) is a risk of interference or endangerment to a vehicle or person. Endangerment would be a risk of injury, and a risk of injury is not the definition of a crime of violence under the Act Under *Leocal*, and its progeny, the risk must be one of force, violent and active force, to qualify as a crime of violence in the Act.

When determining a crime of violence under the Act, the Court cannot examine the facts underlying Respondent's conviction; the Court is confined to the two-step analysis. *See Taylor v. United States*, 495 US 575 (1990); *Efagene v. Holder*, 642 F.3d918, 921 (10th Cir. 2011); *See Shepard v. United States*, 544 US 13 (2005). The Department argues that the Court must look at not only the conviction documents, but also include the action of the Respondent, and hence argues that his actions as set forth in the information, affidavit probable cause, and sentencing agreement, would indicate his actions certainly may constitute a crime of violence. (Exh. 7 at 4). Nonetheless the court must consider the conviction documents, and what Respondent pled guilty to, not his actions. The 10th Circuit in *Zuniga-Soto* specifically points out that basing a crime of violence determination on the actions of the respondent and not the elements of conviction is an error. *Id.* at 1114, 1118. In looking at the Respondent's actions in this case, the Court can intuitively agree with the Department's position that Respondent committed a crime of violence, but looking at the conviction documents, he only pled guilty to willful or wanton *mens rea*, which could include proof of only criminal negligence, which is not sufficient for a finding of a crime of violence. *Leocal, supra*, 9, 11.

The Department bears the burden of proof to establish removability by clear and convincing evidence. INA § 240(c)(3)(A); *Cruz-Garza v. Ashcroft*, 396 F.3d 1125 (10th Cir. 2005). Due to the uncertainty as to Respondent's *mens rea*, this Court finds the Department has not met its burden of proof. Accordingly, the follow order is entered:

<u>IV. ORDER</u>

IT IS ORDERED: Respondent's Motion to Terminate Proceedings is **GRANTED**

<u>Feb. 8, 2013</u> /s/ <u>WILLIAM L. NIXON</u>
WILLIAM L. NIXON
Immigration Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-9530

CONSTANTINE FEDOR GOLICOV, A/K/A CONSTANTIN FEDOR GOLICOV, A/K/A CONSTANTINE FEDO GOLICOV, A/K/A CONSTANTIN GOLICOV, A/K/A KOSTIK GOLICOV, A/K/A CONSTANTINE GOLIKOV, A/K/A CONSTANTINE FEDOR GOLICV, A/K/A CONSTANTINE F. GOLICOV, PETITIONER

v.

LORETTA LYNCH, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, RESPONDENT

NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, IMMIGRANT LEGAL RESOURCE CENTER, AMICI CURIAE

Filed: Nov. 4, 2016

ORDER

Before: BRISCOE, HOLMES and MORITZ, Circuit Judges.

Respondent's petition for rehearing is denied.

Entered for the Court

/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER, Clerk