No. 07-487

In the Supreme Court of the United States

DERICK ANTHONY HENRY, PETITIONER

v.

BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether second-degree possession of a loaded firearm with intent to use the same unlawfully against another, in violation of New York law, is a "crime of violence" under 18 U.S.C. 16(b), and therefore qualifies as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 493 F.3d 303.[1] The decisions of the Board of Immigration Appeals (Pet. App. 17-21) and the immigration judge (Pet. App. 22-30) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2007. The petition for a writ of certiorari was filed on October 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Although the decision below is captioned *Henry* v. *Bureau of Immigration and Customs Enforcement*, 8 U.S.C. 1252(b)(3)(A) provides that the proper respondent to a petition seeking judicial review of a final order of removal is the Attorney General.

STATEMENT

1. Petitioner is a native and citizen of Jamaica. Pet. App. 3, 22. In 1990, he was admitted to the United States as a lawful permanent resident. *Ibid.* In 2000, he pleaded guilty in a New York state court to second-degree criminal possession of a weapon in violation of New York law. *Id.* at 3, 18, 22. The statute under which petitioner was convicted provided:

> A person is guilty of criminal possession of a weapon in the second degree when, with intent to use the same unlawfully against another:
>
> (1) He possesses a machine-gun; or
> (2) He possesses a loaded firearm; or
> (3) He possesses a disguised gun.
>
> Criminal possession of a weapon in the second degree is a class C felony.

N.Y. Penal Law § 265.03 (McKinney 1998). Petitioner was indicted for, and pleaded guilty to, possessing a loaded revolver with intent to use it unlawfully against another person. Pet. App. 3. He was sentenced to four years of imprisonment. *Id.* at 4, 18, 22.

2. In 2004, the Department of Homeland Security (DHS) commenced removal proceedings against petitioner based on his 2000 conviction. Pet. App. 22, 31. DHS charged petitioner under 8 U.S.C. 1227(a)(2)(C), which makes illegal possession of a firearm a removable offense, and 8 U.S.C. 1227(a)(2)(A)(iii), which makes commission of an "aggravated felony" a removable offense. DHS alleged that petitioner's 2000 conviction qualified as a "crime of violence" within the meaning of 18 U.S.C. 16, and was therefore an "aggravated felony." Pet. App. 4, 18, 31; see 8 U.S.C. 1101(a)(43)(F) (defining

"aggravated felony" as, *inter alia*, "a crime of violence," as defined in 18 U.S.C. 16, for which the term of imprisonment was at least one year). Under 18 U.S.C. 16, a "crime of violence" is:

> (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 immigration judge (IJ) found petitioner removable on the ground that his 2000 conviction qualified as a removable firearm possession offense under 8 U.S.C. 1227(a)(2)(C). Pet. App. 5, 30. But in an interlocutory order, the IJ dismissed the aggravated felony charge, finding that petitioner's firearm possession conviction was not a "crime of violence" under 18 U.S.C. 16(b). Pet. App. 31-36. The IJ accordingly found petitioner to be eligible for cancellation of removal—relief available only to an alien who can demonstrate, among other things, that he "has not been convicted of any aggravated felony," 8 U.S.C. 1229b(a)—and exercised his discretion to cancel petitioner's removal. Pet. App. 22-30.

3. The Board of Immigration Appeals (BIA) reversed. Pet. App. 17-21. The BIA found that petitioner's firearm possession conviction qualified as a "crime of violence" under 18 U.S.C. 16(b) because "a crime that involves possession of a loaded firearm with the intent to use the firearm unlawfully against another '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.'" Pet. App. 20

(quoting 18 U.S.C. 16(b)). The BIA thus concluded that petitioner's 2000 conviction was an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F), and therefore rendered him ineligible for cancellation of removal. Pet. App. 21.

4. The court of appeals affirmed. Pet. App. 1-16. The court held that, because the New York offense of second-degree criminal possession of a weapon has as an element the intent to use the firearm unlawfully against another person, it 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," and is thus a "crime of violence" under 18 U.S.C. 16(b). See Pet. App. 3, 9-12.

The court of appeals relied on its prior decision in *Impounded*, 117 F.3d 730 (3d Cir. 1997), which considered whether the Virgin Islands offense of possessing a "dangerous or deadly weapon" with "*intent to use* the same unlawfully against another" qualified as a predicate for transferring a juvenile from state to federal court for criminal prosecution under the mandatory transfer provisions of 18 U.S.C. 5032. See *Impounded*, 117 F.3d at 738. The court in that case held that the Virgin Islands weapons offense did qualify for mandatory transfer because an offense that "includes as an element the *intent* to use a dangerous weapon" is an offense that, "by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense." *Id.* at 737-738 (quoting 18 U.S.C. 5032). Noting that both the Virgin Islands criminal statute at issue and the language of the juvenile transfer provisions"for all relevant purposes are identical to the statute of conviction and enumerating statutes applicable" to petitioner, Pet. App. 9-10, the court of ap-

peals considered the reasoning of *Impounded* to be both binding and persuasive, *id.* at 12.

The court of appeals rejected petitioner's contention that a violation of N.Y. Penal Law § 265.03 does not involve a substantial risk of the use of force "in the course of committing the offense" for purposes of Section 16(b). Pet. App. 13-16. Petitioner argued that this statutory language meant that a court may not consider any risks that force will be used after "the crime is complete," and for support cited the Third Circuit's prior decision in *United States* v. *Hull*, 456 F.3d 133 (2006), which held that possession of a pipe bomb is not a crime of violence under Section 16(b) because "[t]here is no risk that physical force might be used against another to commit the offense of *possession*," *id.* at 139 (brackets in original). See Pet. App. 13.

The court distinguished *Hull* on the ground that, while "possession *alone* does not permit the inference that there is a substantial risk of the use of force," Pet. App. 13-14 (emphasis added), "the New York statute under which [petitioner] was convicted * * * require[s] proof not only of possession but also of intent to use a weapon unlawfully against another," *id.* at 14. The court concluded that, "[u]nder *Hull*, proof of the intent element satisfies the requirement that [Section] 16(b) 'crimes are those raising a substantial risk that the actor will intentionally use force in the furtherance of the offense.'" *Id.* at 15.

The court also noted that petitioner's argument would exclude burglary, "[t]he classic example" of a crime that falls within Section 16(b). Pet. App. 15 (brackets in original) (quoting *Leocal* v. *Ashcroft*, 543 U.S. 1, 10 (2004)). The court explained that "the requisite elements of a burglary are complete once the burglar en-

ters [a building or other structure] and possesses the necessary mental element," but the "substantial risk that the burglar will use force comes from the possibility that the burglar will encounter another during the course of the burglary," after "the technical elements have already been accomplished." *Id.* at 15-16.

ARGUMENT

Petitioner renews his contention (Pet. 7-17) that the court below erred in finding that his conviction for possession of a loaded firearm with intent to use it unlawfully against another person is a "crime of violence" under 18 U.S.C. 16(b), and therefore qualifies as an "aggravated felony" that renders him ineligible for cancellation of removal under 8 U.S.C. 1229b(a). Further review of that contention is unwarranted.

1. a. The court of appeals correctly held that petitioner's 2000 conviction for violation of N.Y. Penal Law § 265.03 qualifies as a "crime of violence" because it 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," 18 U.S.C. 16(b). As the court of appeals concluded, when a crime includes "intent to use a dangerous weapon" against another person as an element of the offense, as in this case, "the commission of the crime will therefore present a substantial risk that physical force will be used." Pet. App. 10 n.3 (quoting *Impounded*, 117 F.3d 730, 731 (3d Cir. 1997)).

b. Petitioner contends (Pet. 15-17) that the decision below "in effect reads the phrase 'in the course of committing the offense' out of the statute * * * [b]y holding that the substantial risk of physical force may arise at any time." Pet. 16. Petitioner contends that, because

"all elements of a possession offense are satisfied as soon as the offender takes possession of the weapon and has the requisite mental state," "few, if any, weapons possession crimes" in fact present a substantial risk that force will be used "in the course of committing the offense." Pet. 7-8.

Petitioner's contention is incorrect. Far from "read-[ing] the phrase 'in the course of committing the offense' out of the statute," Pet. 16, the court of appeals properly found that there is a substantial risk that a criminal defendant will use physical force against another person "in the course of" unlawfully intending to do so.[2] See Pet. App. 13-16. Moreover, categorically to exclude

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[2] Petitioner points (Pet. 16-17) to the court of appeals' reliance on its prior decision in *Impounded* as evidence that the court applied the incorrect "crime of violence" standard. Specifically, petitioner contends that *Impounded* "relied heavily" on cases interpreting United States Sentencing Guidelines § 4B1.2, which, following its amendment in 1989, defines "crime of violence" as, *inter alia*, an offense that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 4B1.2(a)(2). Noting that this Court has distinguished the 18 U.S.C. 16(b) definition from the Guidelines § 4B1.2(a)(2) definition, petitioner contends that the court below "erred in relying on [*Impounded*]." Pet. 17; see *ibid.* (citing *Leocal*, 543 U.S. at 10 n.7). But as the court of appeals explained, before 1989, Guidelines § 4B1.2 incorporated the definition of "crime of violence" set forth in 18 U.S.C. 16. See Pet. App. 11-12. The court thus found that "cases interpreting § 16 in the sentencing context remain relevant." *Id.* at 12. In any event, the court of appeals made clear that it was, in fact, applying the Section 16(b) definition, identifying the relevant inquiry as "whether the possession of a loaded firearm with intent to use the same unlawfully against another involves a substantial risk that the actor will intentionally use physical force in committing his crime." *Id.* at 8. The text of the statute at issue in *Impounded* (18 U.S.C. 5032) is essentially the same for present purposes. See *id.* at 9.

from consideration any risks that arise immediately after the elements of the crime are satisfied would unduly narrow the scope of the statute. For example, as the court of appeals noted, this Court has identified burglary as "the classic example" of a Section 16(b) offense, because "burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime." *Leocal*, 543 U.S. at 10. On petitioner's view, the burglary would be "complete" once its elements are satisfied: that is, as soon as the burglar unlawfully enters, or remains in, a building or other structure, and has the requisite mental state. See Pet. App. 15 (citing *Taylor* v. *United States*, 495 U.S. 575, 598 (1990)). But this Court has never viewed the offense, nor the risks associated with the offense, so narrowly. As the Court has explained, the risks that force will be used in the course of a burglary relate as much to the possibility that the burglar will provoke a violent confrontation with an occupant, caretaker, or person who comes to investigate *after* he has already gained unlawful entry, as they do to the possibility that the burglar will be intercepted at the threshold. See *James* v. *United States*, 127 S. Ct. 1586, 1594-1595 (2007).

2. Petitioner contends (Pet. 9-14) that this Court's review is warranted because the decision below conflicts with the decisions of other courts of appeals. There is, however, no conflict in the circuits that warrants this Court's review.

a. Petitioner places principal reliance (Pet. 9-10) on a series of Fifth Circuit decisions that have held that weapons possession offenses do not qualify as "crime[s] of violence" under 18 U.S.C. 16(b). See *United States* v. *Diaz-Diaz*, 327 F.3d 410 (5th Cir.) (Texas offense of possessing a short-barreled firearm is not a "crime of vio-

lence"), cert. denied, 540 U.S. 889 (2003); *United States* v. *Medina-Anicacio*, 325 F.3d 638 (5th Cir. 2003) (California offense of carrying a concealed dirk or dagger is not a "crime of violence"), cert. denied, 542 U.S. 911 (2004); *United States* v. *Hernandez-Neave*, 291 F.3d 296 (5th Cir. 2001) (Texas offense of carrying a firearm into a place licensed to sell alcoholic beverages is not a "crime of violence"). Notably, in none of those cases did the statute of conviction have, as an element, intent to use the weapon against another person. See *Diaz-Diaz*, 327 F.3d at 414; *Medina-Anicacio*, 325 F.3d at 644; *Hernandez-Neave*, 291 F.3d at 299. Those holdings are thus consistent with the decision below, which reaffirmed circuit precedent holding that "mere possession" of a weapon, absent intent to use the weapon against another person, is not a "crime of violence." See Pet. App. 13 (discussing *United States* v. *Hull*, 456 F.3d 133 (3d Cir. 2006)).

Petitioner asserts, however, that the two courts have differed in their reasoning, if not in their holdings, in respects that are relevant to the question in this case. Specifically, petitioner notes that the Fifth Circuit has reasoned that possession offenses are not "crime[s] of violence" because the use of force is not "necessary to effectuate the offense" of possession. Pet. 9 (quoting *Medina-Anicacio*, 325 F.3d at 646). Petitioner further notes that, in each case, the Fifth Circuit considered the possession crime to be "complete upon possession of the weapon and the requisite mental state." Pet. 10 (citing *Diaz-Diaz*, 327 F.3d at 414; *Medina-Anicacio*, 325 F.3d at 645-646; and *Hernandez-Neave*, 291 F.3d at 299). Petitioner suggests (Pet. 15-16) that, on the Fifth Circuit's reasoning, possessing a weapon with intent to use it unlawfully against another person would be treated no

differently than "mere possession," because there is no risk that "violence will be used in order to commit" the elements of possession with a certain mental state.

Petitioner overstates the difference in the language of the decisions, which in any event have not given rise to any conflict in holdings. The Third Circuit, much like the Fifth Circuit, has described Section 16(b) as encompassing those offenses "raising a substantial risk that the actor will intentionally use force *in the furtherance of the offense*." Pet. App. 15 (quoting *Hull*, 456 F.3d at 140 (emphasis added)). The court found that test met in this case, in which the offense of conviction required a finding of intent to use physical force unlawfully against another person. *Ibid.* And the Fifth Circuit, for its part, has left open the possibility of adopting a similar analysis in an appropriate case. In *Medina-Anicacio*, for example, it specifically noted that, under the state law at issue, a "defendant's intended use of the instrument is neither an element of the offense nor a defense," 325 F.3d at 644 (citation omitted), and implicitly suggested that, where "the intent element [of the offense] * * * applies to conduct that is 'violent by nature,'" as opposed to the "non-violent act" of possessing or carrying a weapon, that fact might be relevant to its analysis, *id.* at 646 n.6. The Fifth Circuit has, moreover, made clear that it is irrelevant to its analysis whether one considers possession offenses to be "continuing courses of conduct," as opposed to offenses completed immediately upon acquisition of the weapon. See *id.* at 646-647 & n.8 ("While it is plausible to view the offense of possessing a concealed dirk or dagger as a 'course of conduct', it is not relevant to our analysis."). It is thus unclear that the Fifth Circuit would reach a different result on the facts of this case.

Petitioner also contends that the Second and Fourth Circuits "apparently view Section 16(b)'s 'in the course of committing the offense' requirement similarly to the Fifth Circuit." Pet. 10. Neither *Jobson* v. *Ashcroft*, 326 F.3d 367 (2d Cir. 2003), nor *Bejarano-Urrutia* v. *Gonzales*, 413 F.3d 444 (4th Cir. 2005), however, addressed the question petitioner raises in this case.

In *Jobson*, the court held that second-degree manslaughter under New York law, defined as "recklessly caus[ing] the death of another person," is not a "crime of violence" under Section 16(b). 326 F.3d at 372. The court did, as petitioner notes (Pet. 10), state that "the risk in [S]ection 16(b) concerns the defendant's likely use of violent force as a means to an end," *id.* at 373, but it did not hold that second-degree manslaughter does not qualify as a "crime of violence" because it does not present a risk that the defendant will use violent force as a means to the specific end of accomplishing the elements of that offense. Rather, the court explained: "[T]he verb 'use' in section 16(b), particularly when modified by the phrase 'in the course of committing the offense,' suggests that section 16(b) * * * refers only to those offenses in which there is a substantial likelihood that the perpetrator will *intentionally* employ physical force." *Ibid.* The court held that second-degree manslaughter, which encompasses "unintentional accident[s] caused by recklessness," therefore "cannot properly be said to involve a substantial risk that a defendant will *use* force." *Ibid.* (emphasis added). That holding is consistent with the law in the Third Circuit, which has also concluded that "a crime of violence under [Section] 16(b) must involve a substantial risk that the actor will intentionally use physical force in committing his crime." Pet. App. 8 (quoting *Tran* v. *Gonzales*, 414 F.3d 464, 472

(3d Cir. 2005)). The court in *Jobson* did not consider the distinct question before the court of appeals in this case: whether an offense that has, as an element, the intent to use physical force, qualifies as a "crime of violence" under Section 16(b).

Similarly, in *Bejarano-Urrutia,* the Fourth Circuit held that involuntary manslaughter in violation of Virginia law, which requires "the killing of a person as a proximate result of the defendant's reckless disregard for human life," 413 F.3d at 446, is not a "crime of violence" under Section 16(b). *Id.* at 446-447. Citing *Jobson*, the court reasoned that, although involuntary manslaughter "intrinsically involves a substantial risk that the defendant's actions will cause physical harm, it does not intrinsically involve a substantial risk that force will be applied 'as a means to an end.'" *Ibid.* (quoting *Jobson,* 326 F.3d at 373). But in *Bejarano-Urrutia*, like *Jobson*, the court made clear that its decision rested not on an assessment of whether involuntary manslaughter presents a risk that force will be used as a means to committing the specific end of accomplishing the elements of that offense, but rather on an assessment of whether involuntary manslaughter involves a risk that force will *intentionally* be used in the course of committing that offense. See *id.* at 447 (finding that the "reckless disregard for human life" required under the Virginia involuntary manslaughter statute "is distinguishable from a reckless disregard for whether force will need to be used," which is the touchstone of the Section 16(b) inquiry under *Leocal*, 543 U.S. at 10). That holding is consistent with the decision below, which held that a crime that, by definition, involves an intent to use force, is a "crime of violence" under Section 16(b).

Finally, petitioner contends (Pet. 11) that the Ninth Circuit "has cast the Section 16(b) net even wider than the Third Circuit," by holding that the federal offense of being a felon in possession of a firearm qualifies as a "crime of violence" under the 1988 version of Sentencing Guidelines § 4B1.2, which incorporated the Section 16 definition by reference. See *United States* v. *O'Neal*, 937 F.2d 1369, 1375 (9th Cir. 1991). After the defendant in *O'Neal* committed the relevant offense, however, the Sentencing Commission both (1) adopted a new definition of "crime of violence" that closely tracks the definition of "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B), rather than the definition of "crime of violence" under 18 U.S.C. 16, and (2) clarified in the commentary to Guidelines § 4B1.2 that the crime of being a felon in possession does not qualify as a "crime of violence." See, *e.g.*, *United States* v. *Sahakian*, 965 F.2d 740, 742-743 (9th Cir. 1992). *O'Neal* is thus no longer good law. See, *e.g.*, *ibid.*; *United States* v. *Garcia-Cruz*, 40 F.3d 986, 990 (9th Cir. 1994) (holding that being a felon in possession of a firearm is not a "crime of violence" under either the 1988 version of Guidelines § 4B1.2, or the amended version of that Guideline).

b. Petitioner also contends (Pet. 11-14) that the courts of appeals are divided with respect to whether the federal offense of being a felon in possession of a firearm, see 18 U.S.C. 922(g)(1), qualifies as a "crime of violence" under the definition set forth in the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.* That statute, like Section 16, defines a "crime of violence" as, *inter alia*, "[an] offense that is a felony and that, by its nature, involves a substantial risk that physical force against the

person or property of another may be used in the course of committing the offense." 18 U.S.C. 3156(a)(4)(B).

Petitioner is correct that there has been disagreement among the circuits with respect to whether violation of Section 922(g)(1) is a "crime of violence" for purposes of the Bail Reform Act, which, *inter alia,* provides for pretrial detention of the defendant in a case that involves a "crime of violence." 18 U.S.C. 3142(f)(1)(A). Compare *United States* v. *Dillard*, 214 F.3d 88, 104 (2d Cir. 2000) (holding that being a felon in possession of a firearm is a "crime of violence" for purposes of pretrial detention under the Bail Reform Act), cert. denied, 532 U.S. 907 (2001), with *United States* v. *Ingle*, 454 F.3d 1082, 1085-1086 (10th Cir. 2006) (holding that being a felon in possession of a firearm is not a "crime of violence" under the Bail Reform Act); *United States* v. *Bowers*, 432 F.3d 518, 524 (3d Cir. 2005) (same); *United States* v. *Johnson*, 399 F.3d 1297, 1302 (11th Cir. 2005) (per curiam) (same); *United States* v. *Twine*, 344 F.3d 987, 988 (9th Cir. 2003) (per curiam) (same); *United States* v. *Lane*, 252 F.3d 905, 906-908 (7th Cir. 2001) (same); *United States* v. *Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999) (same). Cf. *United States* v. *Rogers*, 371 F.3d 1225, 1225-1226, 1229-1230 (10th Cir. 2004) (holding that possession of a firearm while subject to a protection order and possession of a firearm following conviction for a misdemeanor crime of domestic violence are "crimes of violence" under the Bail Reform Act, and distinguishing that question from the question whether being a felon in possession qualifies as a "crime of violence").

Congress has since amended the Bail Reform Act to make clear that the government may move for pretrial detention in cases that involve "any felony that is not otherwise a crime of violence * * * that involves the

possession or use of a firearm or destructive device, * * * or any other dangerous weapon." Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 216(2)(B), 120 Stat. 617 (to be codified at 18 U.S.C. 3142(f)(1)(E) (2006)). In any event, this case concerns neither the Bail Reform Act nor the federal felon-in-possession statute. Moreover, Section 922(g)(1) does not have, as an element, an intent to use the firearm against another person. There is therefore no square conflict between the decisions holding that violation of Section 922(g)(1) is not a "crime of violence" under the Bail Reform Act and the decision below, which expressly distinguishes "mere possession" offenses from possession of a weapon with intent to use it unlawfully against another person. See Pet. App. 13-15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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