No. 17-1235

In the Supreme Court of the United States

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL,
PETITIONER

v.

WILSON EMILIO PEGUERO MATEO

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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

PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 870 F.3d 228. The decisions of the Board of Immigration Appeals (App., *infra*, 17a-20a) and the immigration judge (App., *infra*, 21a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2017. A petition for rehearing was denied on November 2, 2017 (App, *infra*, 15a-16a). On January 26, 2018, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including

March 2, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent is a native and citizen of the Dominican Republic and a lawful permanent resident of the United States. App., *infra*, 2a. In 2013, respondent was convicted of conspiracy to commit robbery of a motor vehicle, in violation of 18 Pa. Cons. Stat. Ann. § 903 (West 1998), for which he was sentenced to 11 to 23 months in prison. App., *infra*, 2a.

2. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a lawful permanent resident may be removed from the United States if (*inter alia*) he has been convicted of an "aggravated felony" or a "crime involving moral turpitude." 8 U.S.C. 1227(a)(2)(A)(i) and (iii). The INA defines the term "aggravated felony" to include a variety of federal and state offenses, including a "crime of violence" as defined in 18 U.S.C. 16, see 8 U.S.C. 1101(a)(43)(F); a "theft offense," see 8 U.S.C. 1101(a)(43)(G); and a "conspiracy to commit" a crime of violence or a theft offense, see 8 U.S.C. 1101(a)(43)(U). 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 2014, the Department of Homeland Security (DHS) initiated removal proceedings against respondent. App., *infra*, 2a. DHS alleged that respondent's conviction for conspiracy to commit robbery of a motor vehicle qualified as an aggravated felony because it was

a "crime of violence" under 18 U.S.C. 16, a "theft offense" under 8 U.S.C. 1101(a)(43)(G), and a "conspiracy to commit" a crime of violence or a theft offense under 8 U.S.C. 1101(a)(43)(U). Certified Administrative Record (A.R.) 214; see App., *infra*, 2a-3a & n.1, 22a. DHS further alleged, in the alternative, that respondent's conviction qualified as a crime involving moral turpitude under 8 U.S.C. 1227(a)(2)(A)(i). A.R. 214; see App., *infra*, 3a n.1.

An immigration judge determined that respondent was removable and ordered that he be removed. App., *infra*, 31a. The immigration judge concluded that robbery of a motor vehicle qualifies as a crime of violence under 18 U.S.C. 16(b), and thus respondent's "conspiracy to commit" that offense qualified as an aggravated felony under 8 U.S.C. 1101(a)(43)(U). App., *infra*, 29a-30a. The immigration judge rejected DHS's assertions that respondent's offense was itself a crime of violence and a theft offense. *Id.* at 30a-31a. The immigration judge did not address DHS's alternative contentions that respondent's offense also qualified as an aggravated felony because it involved a conspiracy to commit a "theft offense" under 8 U.S.C. 1101(a)(43)(G) and (U), or that it qualified as a crime involving moral turpitude under 8 U.S.C. 1227(a)(2)(A)(i). See App., *infra*, 4a n.2.

The Board of Immigration Appeals (Board) affirmed the order of removal "for the reasons set forth in the Immigration Judge's decision." App., *infra*, 18a.

3. The court of appeals granted respondent's petition for review, vacated the order of removal, and remanded to the Board for further proceedings. App., *infra*, 1a-14a.

After the Board issued its decision affirming the immigration judge's order, this Court held in *Johnson* v.

United States, 135 S. Ct. 2551 (2015), that the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. In *Baptiste* v. *Attorney General*, 841 F.3d 601 (2016), petition for cert. pending, No. 16-978 (filed Feb. 6, 2017), the Third Circuit held that 18 U.S.C. 16(b) is likewise vague under the reasoning of *Johnson*. See 841 F.3d at 621.

The court of appeals determined that it "must * * * follow" *Baptiste* in this case, and that the Board therefore erred in relying on Section 16(b)'s definition of a "crime of violence" to classify respondent's offense as an aggravated felony. App., *infra*, 6a; see *id.* at 10a-14a. The court noted, however, that a circuit conflict exists over whether the definition of a "crime of violence" in 18 U.S.C. 16(b), as incorporated into the INA's definition of an "aggravated felony," is unconstitutionally vague, App., *infra*, 13a-14a, and that this Court has granted review of that question in *Sessions* v. *Dimaya*, No. 15-1498 (reargued Oct. 2, 2017), App., *infra*, 5a-6a. The court stated that, rather than reconsidering *Baptiste*, it would "await the Supreme Court's decision in * * * *Dimaya*." *Id.* at 14a.

ARGUMENT

The decision below concerning the constitutionality of 18 U.S.C. 16(b) rested on the Third Circuit's decision in *Baptiste* v. *Attorney General*, 841 F.3d 601 (2016), petition for cert. pending, No. 16-978 (filed Feb. 6, 2017), which held that Section 16(b), as incorporated into the INA, see 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. App., *infra*, 5a-6a, 10a-14a. This Court has granted a petition for a writ of certiorari to review the same question in *Sessions* v. *Dimaya*, No. 15-1498 (re-

argued Oct. 2, 2017). As the court of appeals acknowledged, the decision in *Dimaya* will likely resolve the question presented in this case. App., *infra*, 5a-6a, 14a. The Court should accordingly hold this petition for a writ of certiorari 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 *Sessions* v. *Dimaya*, No. 15-1498 (reargued Oct. 2, 2017), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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MARCH 2018

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-1160

WILSON EMILIO PEGUERO MATEO,
PETITIONER

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA,
RESPONDENT

Argued: Apr. 28, 2016
Opinion Filed: Sept. 6, 2017

OPINION

On Petition for Review of a Decision of the
Board of Immigration Appeals
(Agency Case No. A061-490-292)
Immigration Judge: Honorable Walter A. Durling

Before: MCKEE, JORDAN, and VANASKIE, *Circuit Judges.*

VANASKIE, *Circuit Judge.*

This appeal requires us to determine whether Wilson Emilio Peguero Mateo's conspiracy plea for Robbery of a Motor Vehicle under Pennsylvania law qualifies as a "crime of violence" under 18 U.S.C. § 16(b), as incorporated into 8 U.S.C. § 1101(a)(43)(F) of the Im-

migration and Nationality Act ("INA"). In light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and our decision in *Baptiste v. Attorney General*, 841 F.3d 601, 621 (3d Cir. 2016), *petition for cert. filed* (U.S. Feb. 6, 2017) (No. 16-978), we hold that § 16(b), as incorporated into the INA, is unconstitutionally vague. We will therefore grant the Petition for Review, vacate the order of removal, and remand for further proceedings.

I.

Mateo is a twenty-one-year-old native and citizen of the Dominican Republic who was admitted to the United States on August 11, 2010 as a lawful permanent resident. On June 17, 2013, he pleaded guilty to the felony charge of criminal conspiracy pursuant to 18 Pa. Cons. Stat. § 903. The underlying offense for his conspiracy plea was Robbery of a Motor Vehicle under Pennsylvania law, which dictates that "[a] person commits a felony of the first degree if he steals or takes a motor vehicle from another person in the presence of that person or any other person in lawful possession of the motor vehicle." 18 Pa. Cons. Stat. § 3702. On December 3, 2013, Mateo was convicted and sentenced to eleven to twenty-three months' confinement, and thirty-six months' probation.

On January 16, 2014, the United States Department of Homeland Security ("DHS") served Mateo with a Notice to Appear, charging Mateo as removable as an alien convicted of an aggravated felony pursuant to § 237(a)(2)(A) of the INA, 8 U.S.C. § 1227(a)(2)(A). Specifically, DHS stated that Mateo was subject to removal because his Robbery of a Motor Vehicle conviction constituted an aggravated felony under INA

§ 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), and was a "crime of violence" as defined in INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).[1] To define a "crime of violence," the INA incorporates 18 U.S.C. § 16, which defines the phrase as follows:

> 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.

Mateo filed a Motion to Terminate Proceedings, challenging his removability on the ground that Robbery of a Motor Vehicle is not an aggravated felony because it is not a crime of violence as defined in § 16(b). The Immigration Judge ("IJ") disagreed, finding that Robbery of a Motor Vehicle is a crime of

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[1] Though not relevant to this case, the DHS also charged that Mateo was removable as an alien convicted of a crime involving moral turpitude pursuant to 8 U.S.C. § 1227(a)(2)(A). Specifically, the DHS stated that Mateo was subject to removal because his conviction also constituted a crime involving moral turpitude, pursuant to 8 U.S.C. § 1227(a)(2)(A)(i), because it was a crime of theft, as defined in 8 US.C. § 1101(a)(43)(G); and a crime of attempt or conspiracy to commit an aggravated felony, as defined in 8 U.S.C. § 1101(a)(43)(U).

violence, and sustained the charge of removability based on Mateo's conspiracy conviction.[2]

Mateo appealed the IJ's decision to the Board of Immigration Appeals ("BIA"). The BIA adopted and affirmed the IJ's decision with regard to Mateo's removability as an alien convicted of conspiracy to commit an aggravated felony that was deemed a crime of violence. The BIA did not address the remaining aspects of the IJ's decision and Mateo's appeal was dismissed. This Petition for Review ensued.

On appeal before this Court, Mateo initially argued that the BIA improperly determined, as a matter of law, that Robbery of a Motor Vehicle is a "crime of violence" under § 16(b), as incorporated into the INA. Accordingly, he requested that, per this Court's opinion in *Aguilar v. Attorney General of the United States*, 663 F.3d 692 (3d Cir. 2011), we find that the Robbery of a Motor Vehicle statute is "overly broad" and that, using the categorical approach, his conviction under the statute was not a crime of violence under the INA. The case was initially submitted on the briefs without argument.

Just before the case was submitted, however, the Government filed a letter pursuant to Federal Rule of Appellate Procedure 28(j) informing the Court that the Ninth Circuit, in *Dimaya v. Lynch*, 803 F.3d 1110 (2015), held that § 16(b), as incorporated into the INA,

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[2] The IJ dismissed the other charges with respect to crimes of theft because Mateo was only convicted of a conspiracy to commit Robbery of a Motor Vehicle; not the underlying offense itself. The IJ did not address the charge based on a conviction for a crime involving moral turpitude.

is unconstitutionally vague in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Mateo then sent his own Rule 28(j) letter, arguing we should also find that § 16(b), as incorporated into the INA, is unconstitutionally vague. Thereafter, we ordered supplemental briefing and oral argument addressing whether the vagueness standard should be applied in the immigration context and, if so, whether § 16(b), as incorporated into the INA, is unconstitutionally vague given the Supreme Court's decision in *Johnson*.

Pending in our own Court at the time we heard oral argument in this matter was a petition for review in another deportation case, *Baptiste v. Attorney General*, No. 14-4476, which also presented the question of whether the definition of "crime of violence" in 18 U.S.C. § 16(b) is void for vagueness. We deferred reaching a decision in this matter pending a ruling in *Baptiste*. Separately, on September 29, 2016, certiorari was granted in *Dimaya*.[3] In light of this development, we opted to hold this matter C.A.V.[4]

Dimaya was argued before the Supreme Court on January 17, 2017, and a ruling was expected by the end of June, 2017. Then, on June 26, 2017, the Court ordered that *Dimaya* be re-argued during the Court's October 2017 term. Given the further delay and the fact that this proceeding has been pending for a con-

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[3] *Cert. granted*, 137 S. Ct. 31 (U.S. Sept. 29, 2016).

[4] C.A.V. is the abbreviation for the Latin legal phrase, *curia advisari vult*, meaning "the court will be advised, will consider, will deliberate." *In re Mystic Tank Lines Corp.*, 544 F.3d 524, 526 n.1 (3d Cir. 2008). It is the term we use when we hold an appeal in abeyance pending the outcome of another proceeding.

siderable period of time, we have chosen to decide Mateo's petition for review. In doing so, we must now follow our precedential holding in *Baptiste*, which on November 8, 2016, held that 18 U.S.C. § 16(b) is unconstitutionally vague when applied in a removal proceeding.[5] 841 F.3d 601, 621 (3d Cir. 2016).

II.

The IJ had jurisdiction over Mateo's removal proceeding pursuant to 8 U.S.C. § 1229a. The BIA had jurisdiction to consider Mateo's appeal pursuant to 8 C.F.R. § 1003.1(b)(3). Pursuant to 8 U.S.C. § 1252(a), we have jurisdiction to consider "'questions of law raised upon a petition for review,' including petitions for review of removal orders based on aggravated felony convictions." *Tran v. Gonzales*, 414 F.3d 464, 467 (3d Cir. 2005) (quoting 8 U.S.C. § 1252(a)(2)(D)). "Since the interpretation of criminal provisions 'is a task outside the BIA's special competence and congressional delegation . . . [and] very much a part of this Court's competence,' our review is *de novo*." *Aguilar*, 663 F.3d at 695 (quoting *Tran*, 414 F.3d at 467).

III.

This appeal turns on the two questions we posed to the parties for supplemental briefing: (1) whether the constitutional vagueness standard should be applied in

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[5] *Baptiste* was not held C.A.V. pending the Court's ruling in *Dimaya* because the petitioner had also been found removable for having committed a crime involving moral turpitude, and thus was removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii). While the petitioner in *Baptiste* prevailed on the crime of violence issue, he ultimately lost on the crime involving moral turpitude issue and his petition for review was denied. 841 F.3d at 623.

the civil/immigration context and, if so, (2) whether § 16(b), as incorporated into the INA, is unconstitutionally vague given the Supreme Court's decision in *Johnson*. The second question has been answered in the affirmative by *Baptiste*, and we are bound by that holding.[6] We now answer the first question in the affirmative as well.

A.

The Supreme Court has explained that the "'void for vagueness' doctrine [is] applicable to civil as well as criminal actions." *Boutilier v. INS*, 387 U.S. 118, 123 (1967) (citation omitted). In *San Filippo v. Bongiovanni*, this Court noted that "[l]esser degrees of specificity are required to overcome a vagueness challenge in the civil context than in the criminal context . . . because the consequences in the criminal context are more severe." 961 F.2d 1125, 1135 (3d Cir. 1992) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982)). Because the consequences of deportation are likewise severe, we take this opportunity to clarify that the vagueness doctrine should be applied in the civil immigration context just as it is applied in the criminal context, and that lesser degrees of specificity are not sufficient to overcome a vagueness challenge.

Indeed, the Supreme Court invoked the vagueness doctrine in the immigration context in *Jordan v. De*

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[6] Third Circuit Internal Operating Procedure 9.1 states that the holding of a panel in a precedential opinion is binding on subsequent panels. Court en banc consideration is required to overrule such a holding. *See United States v. Brownlee*, 454 F.3d 131, 149 (3d Cir. 2006).

George precisely because of the severity of deportation. 341 U.S. 223, 231 (1951) ("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."). After the Supreme Court's decision in *Jordan*, the Court has since made it clear 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) (citing *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903)). And as Justice Thomas explained in *Johnson*, the Supreme Court has "become accustomed to using the Due Process Clauses to invalidate laws on the ground of 'vagueness,'" as the doctrine "is quite sweeping" where a statute "'authorizes or even encourages arbitrary and discriminatory enforcement.'" 135 S. Ct. at 2566 (Thomas, J., concurring in judgment) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)).

Moreover, it is "'difficult' to divorce the penalty from the conviction in the deportation context." *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (citations omitted). Accordingly, we hold that the vagueness doctrine may be used in the immigration context to challenge the INA's definition of a crime of violence. *Cf. Dimaya*, 803 F.3d at 1112-13; *Shuti v. Lynch*, 828 F.3d 440, 445 (6th Cir. 2016) ("The criminal versus civil distinction is . . . 'ill suited' to evaluating a vagueness challenge regarding the 'specific risk of deportation.'" (citing *Padilla*, 559 U.S. at 365-66)).

The Government nonetheless maintains that the vagueness doctrine should not be applied in the immigration context. Specifically, even though the Supreme

Court invoked the vagueness doctrine in the immigration context in *Jordan*, the Government contends that the Supreme Court "did not squarely decide the extent to which the vagueness doctrine applies to the immigration laws." United States' Suppl. Letter Br. at 1 n.2. To make this point, the Government notes that other Supreme Court cases after *Jordan* have declined to extend Fifth Amendment limitations in some immigration contexts. *See id.* (citing *Galvan v. Press*, 347 U.S. 522, 530-31 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-91 (1952); *Marcello v. Bonds*, 349 U.S. 302, 314 (1955)). The Government's concerns with respect to the application of the vagueness doctrine in the context of the deportation sanction, however, are misguided.

The Government's concerns fail to account for the central tenet of the vagueness doctrine: in this case, affording aliens "fair notice" of the possibility of removal to ensure the "even-handed administration of the law." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972). After all, the Supreme Court has explained that "accurate legal advice for noncitizens accused of crimes has never been more important" because, "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Padilla*, 559 U.S. at 364 (footnote omitted). And even more recently, the Court has further stressed the need for "efficiency, fairness, and predictability in the administration of immigration law" in order to "enable[] aliens 'to anticipate the immigration consequences of guilty pleas in criminal court,' and to enter 'safe harbor' guilty pleas [that] do not expose the [alien de-

fendant] to the risk of immigration sanctions." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (citations omitted).

Any semblance of predictability and fairness would be frustrated if we were to find that the crime of violence language in § 16(b) is subject to vagueness challenges outside of the immigration context, yet the same language is not subject to vagueness challenges when incorporated into an immigration statute. *Cf. Demore v. Kim*, 538 U.S. 510, 523 (2003) (explaining that it "is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings") (internal quotation marks omitted); *A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 239 (1925) ("The ground or principle of the [vagueness] decisions was not such as to be applicable only to criminal prosecutions."). Accordingly, for the sake of predictability and fairness, we find that aliens should get fair notice of the possibility of removal based upon a conviction that the Government contends is for a crime of violence.

B.

Because we find that the vagueness doctrine may be used in the immigration context to challenge the INA's definition of a crime of violence, we must now determine whether § 16(b) is "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. 2556 (citation omitted). As noted above, we are bound by our precedential decision in *Baptiste*, which held that § 16(b) as applied in the immigration context is unconstitutionally vague

and therefore invalid in light of *Johnson*. 841 F.3d at 615-21.

1.

In *Johnson*, the Supreme Court examined whether the residual clause of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. Where certain defendants have three or more prior convictions for a "violent felony," the ACCA provides a sentence enhancement. *Johnson*, 135 S. Ct. at 2555. "Violent felony" is defined as a crime that is "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury." 18 U.S.C. § 924(e)(2)(B)(ii). The portion pertaining to a crime that "otherwise involves conduct that presents a serious potential risk of physical injury" is known as the residual clause.

Prior to *Johnson*, the ACCA required courts to use the categorical approach when deciding whether an offense fell within the residual clause. "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.'" *Johnson*, 135 S. Ct. at 2557 (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)). Thus, determining "whether the residual clause covers a crime [] require[d] a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Id.* (quoting *James v. United States*, 550 U.S. 192, 194 (2007)).

The Supreme Court found that "[t]wo features of the residual clause conspire to make it unconstitutionally vague": the ordinary case inquiry and the serious potential risk inquiry. *Johnson*, 135 S. Ct. at 2557-58; *Baptiste*, 841 F.3d at 616. The ordinary case inquiry, explained above, raised "grave uncertainty about how to estimate the risk posed by a crime." *Id.* at 2557. Application of the categorical approach required the courts to conceptualize what the ordinary case of a crime might look like—which might involve many varying iterations—and the "residual clause offers no reliable way to choose between these competing accounts of what an 'ordinary' [crime] involves." *Id.* at 2558. The serious potential risk inquiry was also troublesome because "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* The Court concluded that "[b]y 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.*

2.

The petitioner in *Baptiste*, like Mateo, faced removal on the basis of his purported status as an alien convicted of a crime of violence under § 16(b). As stated previously, § 16(b) defines a crime of violence as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." In order to determine whether the crime of conviction is a crime of

violence under § 16(b), courts utilize the same categorical approach that was applied to the ACCA's residual clause. *Baptiste*, 841 F.3d at 617.

The petitioner in *Baptiste* argued that the Supreme Court's holding in *Johnson* striking down the residual clause should apply to negate § 16(b). After comparing the features of the § 16(b) analysis to those found to contribute to the unconstitutionality of the residual clause in *Johnson*, we agreed that the same defects were present in § 16(b), rendering the provision unconstitutional. Regarding the first feature, we recognized that the same "ordinary case inquiry" is used when applying the categorical approach in both contexts. *Id.* Like the residual clause, § 16(b) "offers no reliable way to choose between . . . competing accounts of what" that "judge-imagined abstraction" of the crime involves. *Johnson*, 135 S. Ct. at 2558. Thus, we concluded in *Baptiste* that "the ordinary case inquiry is as indeterminate in the § 16(b) context as it was in the residual clause context." 841 F.3d at 617. Turning to the second feature—the risk inquiry—we observed that despite slight linguistic differences between the provisions, the same indeterminacy inherent in the residual clause was present in § 16(b). *Id.* "[B]ecause the two inquiries under the residual clause that the Supreme Court found to be indeterminate—the ordinary case inquiry and the serious potential risk inquiry—are materially the same as the inquiries under § 16(b)," we concluded that "§ 16(b) is unconstitutionally vague." *Id.* at 621. This conclusion applies equally to Mateo's petition.

Our treatment of § 16(b) is in step with the Sixth, Ninth, and Eleventh Circuits, which have all similarly

deemed the provision to be void for vagueness in immigration cases. *See Shuti*, 828 F.3d at 451; *Dimaya*, 803 F.3d at 1120; *Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016). The Seventh Circuit has also taken this position in the criminal context. *See United States v. Vivas-Ceja*, 808 F.3d 719, 723 (7th Cir. 2015). In fact, the only circuit that has broken stride is the Fifth Circuit.[7] *See United States v. Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016) (en banc). In the meantime, we await the Supreme Court's decision in the appeal of *Dimaya*.

IV.

For the reasons discussed herein, we will grant the Petition for Review, vacate the order of removal, and remand for further proceedings consistent with this opinion.

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[7] We note that the Second, Sixth, Eighth, Eleventh, and D.C. Circuits have concluded that 18 U.S.C. § 924(c), which contains language nearly identical to § 16(b), survives *Johnson*. *See United States v. Hill*, 832 F.3d 135 (2d Cir. 2016); *United States v. Taylor*, 814 F.3d 340, 375-79 (6th Cir. 2016); *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016); *Ovalles v. United States*, 861 F.3d 1257, 1267 (11th Cir. 2017); *United States v. Eshetu*, 863 F.3d 946, 961 (D.C. Cir. 2017). But, as the Sixth Circuit recognized in reconciling its holding in *Shuti* that § 16(b) is void with its earlier decision in *Taylor*, "[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." *Shuti*, 828 F.3d at 449. In short, reasonable minds can and do differ over how the Supreme Court's reasoning in *Johnson* applies in different contexts.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-1160

WILSON EMILIO PEGUERO MATEO, PETITIONER

v.

ATTORNEY GENERAL UNTIED STATES OF AMERICA,
RESPONDENT

Filed: Nov. 2, 2017

SUR PETITION FOR PANEL REHEARING

On Petition for Review of a Decision of the Board of Immigration Appeals
(Agency Case No. A061-490-292)
Immigration Judge: Hon. Walter A. Durling

Present: MCKEE, JORDAN, and VANASKIE, *Circuit Judges*

The petition for rehearing by the panel filed by Respondent in the above-entitled case having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision of the court having voted for rehearing, it is hereby ORDERED that the petition for rehearing by the panel is denied.

BY THE COURT,

/s/ Thomas I. Vanaskie
Circuit Judge

Dated: Nov. 2, 2017

sb/cc: All Counsel of Record

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
York, Pennsylvania

File: A 061 490 292

IN RE: WILSON EMILIO PEGUERO MATEO

Date: [Dec. 17, 2014]

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT:
Tracey M. Hubbard, Esquire

ON BEHALF OF DHS:
Jeffrey T. Bubier
Senior Attorney

CHARGE:

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

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

237(a)(2)(A)(i), I&N Act [8 U.S.C. § 1227(a)(2)(A)(i)]—Convicted of crime involving moral turpitude

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

APPLICATION:

Termination

The respondent, a native and citizen of the Dominican Republic, appeals from the Immigration Judge's decision of August 7, 2014, concluding the respondent was removable for having engaged in a conspiracy to commit an aggravated felony crime of violence. The Department of Homeland Security argues the Immigration Judge's decision should be affirmed. The appeal will be dismissed.

The Board reviews Immigration Judges' findings of fact, including credibility determinations, for clear error, and we review all other matters on appeal de novo. 8 C.F.R. § 1003.1(d)(3).

We adopt and affirm the Immigration Judge's conclusion that the respondent's conviction under 18 PENNSYLVANIA CONSOLIDATED STATUTE § 903 for conspiracy to commit the crime of Robbery of a Motor Vehicle in violation of 18 PA. CONS. STAT. § 3702(a) constitutes an aggravated felony crime of violence for the reasons set forth in the Immigration Judge's decision (I.J. at 2-5).

On appeal, the respondent argues that the level of "force" required under the Robbery of a Motor Vehicle statute "is satisfied by the mere act of a defendant

entering an unoccupied vehicle, activating it, and driving away," citing to *Commonwealth v. Jones*, 771 A.2d 796 (Pa. Super. 2001). However, that was not the fact pattern in *Jones*, in which the court emphasized that the owner of the vehicle was visible in the bed of the truck at the time of the robbery, "was unable to escape because of the truck's speed, and was tossed around during [the perpetrator's] reckless flight." *Commonwealth v. Jones, supra*, at 797. The court in *Jones* did note that "[t]aking control of a car and driving it away is enough," but did so in the context of explaining that a carjacking might occur "whether the possessor is kidnapped or discarded," noting that "indeed, the circumstances here were more dangerous than if the victim had been left behind." *Id.* at 798. In *Commonwealth v. Bonner*, 27 A.3d 255 (Pa. Super. 2011), also relied on by the respondent, immediately prior to taking the car the perpetrator had sexually assaulted the possessor, held a knife to her throat, and threatened to kill her if she did not provide him with the vehicle's keys. The decisions in *Jones* and *Bonner*, which focused on the threats to the victims' safety in the consideration of the conviction as well as the loss of the vehicle, support the Immigration Judge's interpretation of Pennsylvania law.

The respondent also argues that, though neither the statute itself nor any case addressing 18 PA. CONS. STAT. § 3702(a) uses the term "force however slight" that is nonetheless the standard in Pennsylvania.[1] The respondent points out that *Commonwealth v. Jones*

[1] In other contexts in Pennsylvania robbery may involve the use of "force, however slight." *See, e.g.*, 18 PA. CONS. STAT. § 3701(a)(1)(v).

cited an explanation of force provided in *Commonwealth v. Williams*, 550 A.2d 579 (Pa. Super 1988), which was addressing a statute which did use the phrase "force however slight." *Commonwealth v. Jones, supra*, at 799; *Commonwealth v. Williams, supra.* However, the issue in *Williams* was not the level of force used in the commission of a crime but the victim's awareness of it, and *Jones* seems to be citing *Williams* for that principle rather than for any standard regarding the level of force needed to commit the offense of Robbery of a Motor Vehicle. We are not persuaded by the respondent's argument that Robbery of a Motor Vehicle may be committed in Pennsylvania through the use of "force, however slight." *See Johnson v. United States*, 559 U.S. 133 (2010).

As we affirm the Immigration Judge's conclusions regarding the respondent's removability for conspiracy to commit an aggravated felony crime of violence, and this issue is dispositive of the case, we do not address the party's remaining arguments.

ORDER: The appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

File: A 061-490-292

IN THE MATTER OF PEGUERO MATEO, WILSON E.,
RESPONDENT

[Date: Aug. 7, 2014]

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT:
Tracey Hubbard, Esq.

ON BEHALF OF THE DHS:
Jeffrey Bubier
Senior Attorney

GROUND OF REMOVAL:
INA § 237(a)(2)(A)(iii)

Decision and Order

A. Facts and Procedural History

Respondent is a native and citizen of the Dominican Republic. On August 11, 2010, he was admitted to the United States as a lawful permanent resident. On December 3, 2010, respondent was convicted of Criminal Conspiracy in violation of 18 Pa. Cons. Stat. § 903, and Possession of an Instrument of a Crime in violation

of 18 Pa. Cons. Stat. § 302(a). He was sentenced to 11 to 23 months' imprisonment.

On January 16, 2014, respondent was placed into these removal proceedings by personal service of a Notice to Appear, Form I-862, charging him as being removable pursuant to section 237(a)(2)(A)(iii) of the INA, as having been convicted of an aggravated felony "crime of violence" as defined in section INA § 101(a)(43)(F). He was further charged as removable as an aggravated felon as defined in section 101(a)(43)(G) of the INA, a theft or burglary offense for which the term of imprisonment is at least one year. A third aggravated felony as defined in INA § 101(a)(43)(U) was charged, any attempt or conspiracy to commit an offense described in section 101(a)(43).

Respondent submitted a "Motion to Terminate Proceedings." In his motion, respondent first contends that the government cannot meet its burden of proof to establish that he was convicted of the substantive offense of robbery of a motor vehicle, and therefore the aggravated felony grounds under subsection (F), a crime of violence, and subsection (G), a theft crime, cannot be sustained. As for subsection (U), respondent contends that only if the underlying offense, here robbery of a motor vehicle, constitutes an aggravated felony under INA § 101(a)(43), can the conspiracy aggravated felony stand. To this end, respondent essentially argues that since the Pennsylvania statute is divisible where merely reckless misconduct may be sufficient to violate the statute, the subsection (U) aggravated felony, too, must be dismissed.

Government counsel submitted a "DHS Opposition to Motion to Terminate Proceedings." Therein gov-

ernment counsel argues that all three aggravated felony grounds of removal are supported by the evidence and case law and therefore respondent's motion to terminate must be denied. To this end, government counsel stresses that if there is a substantial risk that force could be used to carry out respondent's crime, in this case a conspiracy to commit robbery of a motor vehicle, a crime of violence under 18 U.S.C. § 16(b) is met under both subsections(F) and (U), citing Aguilar v. Att'y Gen., 663 F.3d 692 (3d Cir. 2011).

B. Law and Analysis

The Information in this matter, appended to the record at **exhibit 2-C**, charged respondent under Count 1 for Criminal Conspiracy, a 1st degree felony, under 18 Pa. C.S. § 903: "The Actor, with the intent of promoting or facilitating the crime of Robbery of a Motor Vehicle, 18 Pa. C.S.A 3.702(a), conspired and agreed with . . . that they or one or more of them would engage in conduct constituting such crime." Also at **2-C** is the Court of Common Pleas Sentencing Order. Hand annotated thereon is the following: "Ct. 1 Crim. Consp. (F1)—11 mo-23 mo; 36 mo Prob Consec—Robb M.V." It is uncontested that respondent's state conviction extends only to Conspiracy and not to Robbery of a Motor Vehicle.[1]

Section 101(a)(43)(U) of the INA defines the term "aggravated felony" as any "attempt or conspiracy to commit an offense described in section 101(a)(43)."

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[1] 18 Pa. Cons. Stat. § 3702(a), states: "A person commits a felony of the first degree if he steals or takes a motor vehicle from another person in the presence of that person or any other person in lawful possession of the motor vehicle."

The terms "attempt" and "conspiracy" are not defined by the INA, and therefore it is presumed that Congress intended to adopt the generic, common law meaning of those terms. United States v. Shabani, 513 U.S. 10,13 (1994) (*citing* Molzof v. United States, 502 U.S. 301, 307-308 (1992)). At common law, the crime of conspiracy does not require an overt act. United States v. Shabani, *supra*, at 13. Following this logic, the Board held that the "conspiracy to commit an offense described in this paragraph" language found in section 101(a)(43)(U) of the INA, is not limited to conspiracies that require a member of the conspiracy to perform an overt act in furtherance of the conspiracy. Matter of Richardson, 25 I&N Dec. 226, 228 (BIA 2010). Rather, for the alien to be removable, he must have a conviction for participating in a conspiracy the object of which is an aggravated felony as defined elsewhere in section 10l(a)(43) of the INA. *See* Matter of S-I-K-, 24 I&N Dec. 324 (BIA 2007).

Because respondent was convicted under the general conspiracy statute, 18 Pa. Cons. Stat. § 903, it must be determined, as respondent correctly contends, whether the object of that conspiracy, in this case Robbery of a Motor Vehicle, is an aggravated felony defined elsewhere in section 101(a)(43) of the INA. To this end, there are two possibilities, either as an aggravated felony "crime of violence" or a "theft offense," both of which the government has charged separately.

1. Whether 18 Pa. Cons. Stat. § 3702(a) constitutes an aggravated felony as defined in section 101(a)(43)(F) of the INA, a crime of violence.

Section 101(a)(43)(F) of the INA defines the term "aggravated felony" to include a crime of violence (COV) as defined in 18 U.S.C. § 16 for which the term of imprisonment is at least one year. Under 18 U.S.C. § 16, a COV is defined 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.

See Matter of Sweetser, 22 I&N Dec. 709, 716 (BIA 1999).

In Leocal v. Ashcroft, 543 U.S. 1 (2004), the Supreme Court interpreted the statutory definition of crime of violence in 18 U.S.C. § 16. In assessing whether the statute at issue "ha[d] as an element the use . . . of physical force against the person or property of another," the Supreme Court held:

> *In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term "crime of violence." The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes. . . .*

Leocal, 543 U.S at 11. With respect to 18 U.S.C. § 16(b), Leocal had this to say:

> *Section 16(b) sweeps more broadly than § 16(a), defining a crime of violence as including "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." But § 16(b) does not thereby encompass all negligent misconduct, such as the negligent operation of a vehicle. It simply 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. The reckless disregard in § 16 relates not to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime. The classic example is burglary. A burglary would be covered under § 16(b) not because the offense can be committed in a generally reckless way or because someone may be injured, but 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.

The Third Circuit has held that a crime that can be committed with a *mens rea* of *recklessness* may still qualify as a crime of violence under 18 U.S.C. § 16(b) if that crime, by its nature, raises a substantial risk that the perpetrator will *intentionally* use force against the victim; actual force need not be present, only the potential that force could be brought to bear. *See* Agui-

lar v. Att'y Gen., *supra* at 701 (sexual assault under 18 Pa. Cons. Stat. § 3124.1, by its nature, creates a substantial risk that the assailant will use physical force to overcome a victim's desire to protect his or her body from non-consensual sexual penetration); *but see* Tran v. Gonzales, 414 F.3d 464 (3d Cir. 2005) (reckless burning involves the risk that the fire started by the offender will spread and damage the property of another, which is not a risk that involves the intentional use of force).[1]

Pennsylvania C.S. § 3702(a) is a felony, and thus falls within the ambit of 18 U.S.C. § 16(b). Respondent contends that his conviction for robbery of a motor vehicle is not a crime of violence as defined by 18 U.S.C. § 16(b) because 18 Pa. Cons. Stat. § 302(c), dictates that "when the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly, or recklessly with respect thereto". 18 Pa. Cons. Stat. § 302(c) (2014). *See* Respondent's Brief at 8. That is, respondent submits that because 18 Pa. C.S. § 3702(a) has no specific *mens rea* attachment, the *least culpable mens rea* that would attach would be *recklessness*. Not so.

As government counsel aptly points out, Pennsylvania courts have held that the state statute inherently

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[1] In Aguilar v. Att'y Gen., the Third Circuit reviewed case law on crimes of violence and recklessness, concluding, "we have never categorically foreclosed the possibility that a recklessly committed crime may be a crime of violence under § 16(b). . . . " 663 F.3d at 700. The court explained that the lesson of Tran v. Gonzales was that there is a subset of "pure" recklessness crimes that do not fit under § 16(b). *Id*. at 698.

ascribes a *mens rea* of knowledge. *See* Commonwealth v. Jones, 771 A.2d 796, 798 (Pa. Super. Ct., 2001) (defendant's taking was knowing and in the presence of the victim). Further, the seminal case interpreting 18 Pa. Cons. Stat. § 3702 specifies that the intent of the sponsor of the statute was to criminalize carjacking. *Commonwealth v. George*, 705 A.2d 916, 919 (Pa. Super. Ct., 1998). Because of this, it necessarily incorporates a theft offense into a robbery offense, in essence combining a forcible taking with the intent to deprive the victim of their car. *Id.*

From a common sense perspective, this only makes sense. Frankly, this court cannot quite fathom how a perp would manage to pull off a robbery of a motor vehicle through some level of recklessness, or enter into a conspiracy to do so through recklessness—it defies logic. As government counsel further points out, entering into a conspiracy necessarily connotes "a shared criminal intent." *Brief at 4*, citing Commonwealth v. Schomaker, 461 A.2d 1220.

Moreover, the Pennsylvania courts have found that 18 Pa. C. Stat. § 3702(a) contains three elements which must be proven before a conviction can be sustained: (1) the stealing, taking or exercise of unlawful control over a motor vehicle; (2) from another person in the presence of that person or any other person in lawful possession of the vehicle; and (3) the taking must be accomplished by the use of force, intimidation or the inducement of fear in the victim. Commonwealth v. George, 705 A.2d at 919-20. The *force* element was explained further as that "of which the victim is aware and by reason of that force, is compelled to part with

his property". Commonwealth v. Jones, 771 A.2d at 799).

All of this discussion, when viewed from its lowest common denominator, completes a circle back to Leocal. Given that the aggravated felony for Conspiracy under INA § 101(a)(43)(U) does not require any overt act in furtherance of the underlying offense, all such cases, where the modified categorical approach is utilized to determine whether it's a crime of violence, must be examined with a view towards the *nature* of the crime. As Leocal instructs, if the *nature* of the crime involves the potential for using force, "the reckless disregard in § 16 relates not to the general conduct, but to the risk that the use of physical force against another might be required in committing a crime." Leocal at 10. Can it be seriously be doubted that the risk of force is present whenever an individual confronts the owner or driver of a motor vehicle and takes the vehicle against the victim's wishes? If the owner/driver seeks in any way to defend his property from the taking, a potential response that is always present in such circumstances, the clear risk also follows that force could be employed to complete the crime. Robbery of a motor vehicle, like the burglary example used by the Supreme Court in Leocal, in this court's mind, is the prototypical case contemplated by 18 U.S.C. § 16(b).

C. Conclusion

Robbery of a Motor Vehicle under 18 Pa. Cons. Stat. § 3702(a) constitutes a crime of violence as defined in 18 U.S.C. § 16(b). The state statute requires as one of its inherent elements the use of force, intimidation, or inducement of fear in the victim. Commonwealth v.

George, 705 A.2d at 920. Physical force is defined as force causing physical pain or injury to another person, thus satisfying the risk that there be a substantial risk that physical force will be used. Johnson v. U.S., 130 S. Ct. at 1271; Aguilar v. Att'y Gen., 663 F.3d at 701.

The "substantial risk" requirement in Aguilar is established through both the force element and the requirement that the owner be present. That is, the statute requires that the owner be present when the robbery takes place, increasing the substantial likelihood that the perpetrator will intentionally use physical force against the victim. Therefore, the statute under which respondent was convicted, 18 Pa. Cons. Stat. § 3702(a), qualifies as an aggravated felony under INA Section 101(a)(43)(F), as further defined in 18 U.S.C. § 16(b). Respondent's Conspiracy conviction meets the definition of aggravated felony as set forth in INA § 101(a)(43)(U).

Finally, while there's no need to delve at length on whether the government has met its burden of proof that respondent's state Conspiracy conviction also meets the definition of aggravated felony under subsections (F) and (G), the court does concur with respondent that these grounds must be dismissed. For either aggravated felony subsection to apply, respondent must have been convicted of robbery of a motor vehicle; as we know, he was not. As respondent aptly points out, the "inchoate offense of conspiracy does not contemplate nor require the consummation of the ultimate substantive offense underlying the conspiracy. . . . Stated another way, under the conspiracy statute, the 'essence' of conspiracy is the agreement between the parties to commit a substantive crime, not

the actual crime itself. Iannelli v. United States, 420 U.S. 770, 777 (1975)." *Motion to Terminate*, at 4-5. *See also* Mater of Richardson, *supra*, at 227. Those grounds of aggravated felony will be dismissed.

Order: The aggravated felony ground of removal, INA § 237(a)(2)(A)(iii) as defined under INA § 101(a)(43)(U), is sustained.

Further Order: The grounds of aggravated felony as defined in INA §§ 101(a)(43)(F) and (G), are dismissed.

Further Order: Respondent is ordered removed to the Dominican Republic

/s/ WALTER A. DURLING
WALTER A. DURLING
Immigration Judge

Aug. 7, 2014