No. 12-150

In the Supreme Court of the United States

CHUEN PIU KWONG, AKA PHILLIP KWONG,
PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the immigration judge correctly held that petitioner was previously convicted of first-degree burglary, on the basis of petitioner's admission in the removal proceeding that he had committed first-degree burglary and an abstract of judgment from the California state court that describes petitioner's prior conviction as one for "Burglary—First Deg."

2. Whether the immigration judge correctly held that the California offense of first-degree burglary is a "crime of violence" for purposes of 18 U.S.C. 16(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 671 F.3d 872. The decision of the Board of Immigration Appeals (Pet. App. 17a-19a) is unreported. The decision of the immigration judge (Pet. App. 20a-24a) denying petitioner's motion to terminate removal proceedings is unreported. The final decision of the immigration judge (App., *infra*, 1a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2011. A petition for rehearing was denied on April 2, 2012 (Pet. App. 25a-26a). On June 14, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August

1, 2012, and the petition was filed on July 30, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of China, was admitted to the United States as a lawful permanent resident in 1990. Pet. App. 3a, 21a. In 1997, petitioner was arrested and charged by felony complaint with first-degree burglary, in violation of California Penal Code Ann. § 459 (West 2010), for entering the home of an acquaintance with the intent to steal money or valuables. See Pet. 6-7; App., *infra*, 9a-10a; Administrative Record (A.R.) 843. On April 1, 1997, during his plea colloquy, petitioner's counsel stipulated that there was a factual basis for the plea. *Id.* at 837. The state court judge then asked petitioner:

> [A]re you entering your plea because it's true that on or about February the 18th, 1997, in this judicial district you committed a felony, more particularly burglary, a violation of 459 of the Penal Code, first degree, in that you did then and there enter the inhabited dwelling house occupied by [Peivan Chen] * * * with the intent to commit theft therein?

A.R. 843. Petitioner replied, "Yes." *Ibid.* The state court proceeded to find petitioner guilty of first-degree burglary. A.R. 844. The court scheduled petitioner's sentencing for April 29, 1997. *Ibid.*

On May 1, 1997, the clerk of the California state court endorsed and filed with the court an abstract of judgment, as required by state law. See Cal. Penal Code Ann. § 1213(a) (Supp. 2012); see also Pet. App. 27a. According to that abstract of judgment, petitioner was convicted on April 1, 1997, of "Burglary—First Deg," in

violation of California Penal Code Ann. § 459 (West 2010). Pet. App. 27a. The abstract of judgment states that on April 29, 1997, petitioner was sentenced to two years of imprisonment, to be served at San Quentin State Prison. *Ibid.* The abstract of judgment was signed and certified by the clerk of the court "to be a correct abstract of the judgment made in this action." *Ibid.*

2. a. A year later, in April 1998, petitioner was placed in removal proceedings pursuant to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* He was charged with being removable under 8 U.S.C. 1227(a)(2)(A)(iii), which renders removable any alien who is convicted of an "aggravated felony" at any time after admission. The government alleged that petitioner had been convicted "for the offense of burglary first-degree, in violation of Section 459 of the California Penal Code." A.R. 922 (capitalization omitted). At the removal proceeding in September 1999, petitioner's counsel admitted that factual allegation and conceded that petitioner is removable on that basis. A.R. 559 ("We admit the factual allegations contained in the Notice to Appear. We concede the ground of removal contained therein."). In addition, petitioner and his counsel were given the opportunity to review the abstract of judgment, and counsel expressly stated that he did not object to entering the abstract of judgment into evidence. A.R. 559-560.

b. In June 2001, petitioner moved to reopen the pleadings and terminate the removal proceeding. See A.R. 901-908. Petitioner argued that in light of intervening precedent from the court of appeals, his conviction for "burglary under California Penal Code * * * Section 459" was not an aggravated felony for purposes of the INA. A.R. 902-903. The government responded

that petitioner had been convicted not simply of burglary but of first-degree burglary, which requires entrance into an inhabited dwelling or vessel under California law. See Cal. Penal Code Ann. §§ 459, 460(a) (West 2010). According to the government, the California offense of first-degree burglary is an "aggravated felony" for purposes of the INA both because it is "a burglary offense for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G) (footnote omitted), and because it is "a crime of violence [as defined in 18 U.S.C. 16] for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(F) (footnote omitted). A.R. 898-899. Petitioner then filed a new motion, arguing that his burglary offense is not "a crime of violence." A.R. 874-885. Petitioner did not appear to contest, however, that he had been convicted of first-degree burglary. See, *e.g.*, A.R. 880-883 (explaining why "even first degree burglary is not necessarily a crime of violence") (capitalization omitted).

3. a. The immigration judge denied petitioner's motion. Pet. App. 20a-24a. The judge observed that "[t]he abstract of judgement reveals that [petitioner] received a two-year sentence for a first-degree burglary conviction." *Id.* at 22a. The judge therefore reviewed the state statute defining first-degree burglary, Cal. Penal Code Ann. § 460 (West 2010), and determined that "[a]ll of the crimes constitutive of first degree burglary in California target a[] habitation and present a substantial risk of violence." Pet. App. 23a. The judge thus concluded that first-degree burglary in California is a "crime of violence" for immigration purposes, because 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." *Ibid.* (quoting

18 U.S.C. 16(b)); see 8 U.S.C. 1101(a)(43)(F) (incorporating the definition of "crime of violence" in 18 U.S.C. 16).

b. The immigration judge thereafter considered petitioner's applications for withholding of removal and deferral of removal under the Convention Against Torture. In July 2002, the judge denied those applications and ordered petitioner's removal. See App., *infra*, 1a-17a (A.R. 533-550). As relevant here, the judge explained that "[o]n September 16, 1999, [petitioner] appeared with counsel, admitted to the factual allegations contained in the [Notice to Appear] and conceded to the ground of removability." *Id.* at 2a. The court determined that "[b]ased on [petitioner's] admission as well as the [g]overnment's submission of the conviction document, and based on the reasons separately stated in the Court's previously issued written order regarding [petitioner's] motion to terminate, the issue of removability has been established as charged." *Id.* at 13a.

4. The Board of Immigration Appeals (Board) dismissed petitioner's appeal in a brief, per curiam order. Pet. App. 17a-19a. As relevant here, the Board "agree[d] with the factual and legal determinations set forth by the Immigration Judge in her decision," and it affirmed "for the reasons stated therein." *Id.* at 18a.

5. The court of appeals denied a petition for review. Pet. App. 1a-16a. The court explained that, under its decisions in *United States* v. *Becker*, 919 F.2d 568 (1990), cert. denied, 499 U.S. 911 (1991), and *Lopez-Cardona* v. *Holder*, 662 F.3d 1110 (2011), "first-degree burglary in violation of California Penal Code § 459 [is] a crime of violence" for purposes of the INA "because it involves a substantial risk that physical force may be used in the course of committing the offense." Pet. App. 8a-9a. The court noted that its en banc decision in

United States v. *Aguila-Montes de Oca*, 655 F.3d 915 (2011), "had no effect on that conclusion because *Aguila-Montes* was based on a different definition of 'crime of violence.'" Pet. App. 9a.

The court of appeals then held that the state court abstract of judgment is sufficient to establish that petitioner was convicted of first-degree burglary. Pet. App. 11a-14a. Although the court had held that an abstract of judgment was insufficient in *United States* v. *Navidad-Marcos*, 367 F.3d 903 (2004), the court explained that its subsequent en banc decision in *United States* v. *Snellenberger*, 548 F.3d 699 (2008), cert. denied, 130 S. Ct. 1048 (2010), "undermines *Navidad-Marcos*." Pet. App. 11a. "Everything that the en banc court said of the minute order in *Snellenberger* applies to the abstract of judgment in [this] case," the court reasoned, because "[t]he abstract is a contemporaneous, statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence." *Id.* at 13a (quoting *People* v. *Delgado*, 183 P.3d 1226, 1234 (Cal. 2008)). The court held that "in the absence of rebuttal evidence," such an abstract of judgment should "be presumed reliable and accurate." *Ibid.* (quoting *Delgado*, 183 P.3d at 1234).

ARGUMENT

Petitioner primarily seeks review (Pet. 13-27) of the question whether an immigration judge and the Board of Immigration Appeals may consider an abstract of judgment in determining whether a particular conviction by guilty plea constitutes an aggravated felony pursuant to the modified categorical approach drawn from *Shepard* v. *United States*, 544 U.S. 13 (2005). The immigration judge and Board correctly held that an abstract of judgment, although not among the documents specifi-

cally listed in *Shepard*, may be considered in determining the nature of a prior conviction. This Court recently declined to review that question, see *Ramirez-Villalpando* v. *Holder*, 132 S. Ct. 1739 (2012), and the same result is warranted here.

Even assuming that the immigration judge and Board were incorrect to consider the abstract of judgment, that was not the only basis for their decision that petitioner is removable. They also relied on petitioner's admission in the removal proceeding that he had committed first-degree burglary—an admission that is confirmed by the state court plea colloquy, which is a document whose use *Shepard* has expressly approved. Petitioner has thus twice admitted—initially to the state court at the time of his plea and subsequently to the immigration judge during the removal proceeding—that he was convicted of first-degree burglary. That alternative and fact-bound basis for the decision below renders further review unwarranted.

1. a. The court of appeals' decision is correct. Under the Immigration and Nationality Act (INA), an alien convicted of an "aggravated felony" "at any time after admission" is removable from the United States. 8 U.S.C. 1227(a)(2)(A)(iii). The term "aggravated felony" includes "a crime of violence [as defined in 18 U.S.C. 16] for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F) (footnote omitted). The courts of appeals have held that the California offense of first-degree burglary is a crime of violence as defined in 18 U.S.C. 16(b), because the offense requires entrance into an inhabited dwelling or vessel. See Cal. Penal Code Ann. § 460(a) (West 2010). The offense thus 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); see *Lopez-Cardona* v. *Holder*, 662 F.3d 1110, 1112-1113 (9th Cir. 2011); *United States* v. *Echeverria-Gomez*, 627 F.3d 971, 974-978 (5th Cir. 2010). The question here is whether the immigration judge erred in considering an abstract of judgment from California state court to determine that petitioner was convicted of first-degree burglary (rather than second-degree burglary).

Because petitioner was convicted under California Penal Code Ann. § 459 (West 2010), which encompasses both first-degree and second-degree burglary offenses, the immigration judge correctly examined documents from the record of conviction to determine whether petitioner's guilty plea necessarily encompassed all the elements of the crime of first-degree burglary. See *Shepard*, 544 U.S. at 16. Among the conviction-record documents that the Court in *Shepard* held could be used for that purpose are the charging document, the written plea agreement, and the transcript of the plea colloquy—or "some comparable judicial record." *Id.* at 26.

The record before the immigration judge and the Board included at least two documents pertaining to petitioner's California conviction: the transcript of the plea colloquy and the abstract of judgment. See A.R. 829-846; Pet. App. 27a. An abstract of judgment is a "contemporaneous, statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence." *People* v. *Delgado*, 183 P.3d 1226, 1234 (Cal. 2008). Prepared by the court clerk "at or near the time of judgment, as part of his or her official duty," the abstract "is cloaked with a presumption of regularity and reliability." *Ibid.* In those respects, the abstract of judgment is a court record comparable to the other documents specified in *Shepard*. See *ibid.* (holding that an abstract

of judgment is a "presumptively reliable official record of [a] defendant's prior conviction"). Here, the abstract of judgment identifies petitioner's conviction under California Penal Code Ann. § 459 as "Burglary—First Deg." Pet. App. 27a. The abstract of judgment thus clearly states by its description of petitioner's conviction that he was convicted of first-degree burglary (not second-degree burglary).

b. The immigration judge did not, however, rely solely on the abstract of judgment. To be sure, that was the only basis cited by the judge for her decision denying petitioner's motion to reopen the pleadings and terminate the removal proceeding. See Pet. App. 20a-24a. But in her final decision ordering petitioner's removal, the judge explained that "[o]n September 16, 1999, [petitioner] appeared with counsel, admitted to the factual allegations contained in the [Notice to Appear] and conceded to the ground of removability." App., *infra*, 2a. Specifically, petitioner's counsel had admitted at the removal proceeding in September 1999 that petitioner had been convicted of first-degree burglary and that he is removable on that basis. See A.R. 559, 922. In her final decision, the immigration judge determined that "*[b]ased on [petitioner's] admission* as well as the [g]overnment's submission of the conviction document, and based on the reasons separately stated in the Court's previously issued written order regarding [petitioner's] motion to terminate, the issue of removability has been established as charged." *Id.* at 13a (emphasis added).

Petitioner says nothing before this Court about his factual admission: he does not argue that he attempted to withdraw it (even if he did belatedly contend that he was not removable), let alone that the immigration judge

was required to ignore it. Petitioner's admission that he had been convicted of first-degree burglary and that he is removable on that basis is itself an adequate basis for the immigration judge's decision.

c. Moreover, although the immigration judge did not discuss it, the record contains the transcript of petitioner's plea colloquy in California state court. That colloquy transcript—reliance on which this Court in *Shepard* expressly approved, see 544 U.S. at 16, 26—leaves no doubt that petitioner was convicted of first-degree burglary. During his plea colloquy, petitioner's counsel stipulated that there was a factual basis for the plea. A.R. 837. The state court judge then asked petitioner:

> [A]re you entering your plea because it's true that on or about February the 18th, 1997, in this judicial district you committed a felony, more particularly burglary, a violation of 459 of the Penal Code, first degree, in that you did then and there enter the inhabited dwelling house occupied by [Peivan Chen] * * * with the intent to commit theft therein?

A.R. 843. Petitioner replied, "Yes." *Ibid.* The state court proceeded to find petitioner guilty of first-degree burglary. A.R. 844.

That plea colloquy, especially in tandem with petitioner's admission during the removal proceeding that he was convicted of first-degree burglary, makes this case a particularly poor vehicle to resolve the question presented. Assuming *arguendo* that an abstract of judgment could never be consulted under the modified categorical approach—even in conjunction with petitioner's admission to the immigration judge—the result in this case would be the same. Either petitioner's admission

or the state court plea colloquy is sufficient standing alone, let alone taken together, to support a finding that petitioner was convicted of first-degree burglary. Resolving the question presented in petitioner's favor would therefore make no difference to the disposition of this case.

2. Petitioner contends (Pet. 13-22) that the decision below conflicts with this Court's decision in *Shepard*, as well as with decisions of other courts of appeals. As explained above, this case is not an appropriate vehicle for resolving any conflict. In any event, there is no conflict.

a. Contrary to petitioner's contention (Pet. 18-22), the decision below does not conflict with this Court's decision in *Shepard*. As an initial matter, *Shepard* addressed proof of a conviction for purposes of a *criminal* sentencing enhancement under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)—not for purposes of a *civil* removal proceeding under the INA. Indeed, the INA expressly provides that immigration judges may consider as "proof of a criminal conviction," *inter alia*, "[a]n abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence." 8 U.S.C. 1229a(c)(3)(B)(v). On its face, the abstract of judgment in this case meets that standard.

But even assuming *Shepard* determines what documents may provide proof of a criminal conviction in a removal proceeding under the INA, *Shepard* does not address consideration of an abstract of judgment (or an equivalent document)—let alone in conjunction with petitioner's admission during the removal proceeding—but

rather leaves the door open to consideration of "comparable judicial records." 544 U.S. at 26. Indeed, petitioner concedes as much. See Pet. 19. Petitioner contends (*ibid.*) that an abstract of judgment is not "a comparable judicial record" because it is prepared after a defendant is convicted, but *Shepard* nowhere imposes any requirement of contemporaneity. The abstract of judgment is "a record of facts explicitly found by the court in its determination of guilt," *ibid.*, even if it is prepared at a later date.

Petitioner further contends (Pet. 19) that every abstract of judgment is inherently ambiguous as to whether it lists the crime charged or the crime to which the defendant pleaded, but that contention is incorrect for the reasons given by the California Supreme Court in *Delgado*. See 183 P.3d at 1233-1235. Although a particular abstract of judgment could be ambiguous, the one here is not and petitioner did not argue otherwise below: the abstract of judgment at issue in this case states that petitioner was convicted of violating California Penal Code Ann. § 459—which covers both first-degree and second-degree burglary offenses—and then lists petitioner's offense as "Burglary—First Deg." Pet. App. 27a. Accordingly, there is no merit to the assertion that the decision below conflicts with *Shepard* in a manner warranting this Court's review.

b. Petitioner is also incorrect (Pet. 13-18) in contending that the decision below conflicts with the Fifth Circuit's decision in *United States* v. *Gutierrez-Ramirez*, 405 F.3d 352, cert. denied, 546 U.S. 888 (2005), or the Third Circuit's decision in *Evanson* v. *Attorney General*, 550 F.3d 284 (2008).

In *Gutierrez-Ramirez*, the Fifth Circuit held that it was insufficient to rely solely on an uncorroborated ab-

stract of judgment in applying the modified categorical approach. 405 F.3d at 357-359. *Gutierrez-Ramirez* was a criminal case and therefore governed by *Shepard*, which does not control in the immigration context. See p. 11, *supra*. Moreover, in *Gutierrez-Ramirez*, no other documents from the conviction record were available to confirm the abstract of judgment. See *id.* at 355 (noting that before the district court, "[t]he government was able to locate neither" the indictment nor judgment and produced only an abstract of judgment); *id.* at 359 ("The record contains no other evidence to narrow [defendant's] conviction to permit a determination whether it qualifies as a 'drug trafficking offense.'").[1] Here, by contrast, the immigration judge relied not only on the abstract of judgment but also on petitioner's admission during the removal proceeding. And petitioner's plea colloquy in California state court establishes beyond any doubt that he pleaded guilty to committing first-degree burglary.

Notably, the Fifth Circuit relied heavily on the Ninth Circuit's decision in *United States* v. *Navidad-Marcos*, 367 F.3d 903 (2004), which declined to accept reliance on an uncorroborated abstract of judgment in a criminal case. As the Ninth Circuit has explained, however, reliance on an abstract of judgment is permissible if the document describes a defendant's specific crime and is corroborated by other conviction-record documents. See *Ramirez-Villalpando* v. *Holder*, 645 F.3d 1035, 1040-1041 (2010), cert. denied, 132 S. Ct. 1739 (2012).

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[1] The court of appeals allowed the government to supplement the record with the indictment, but the indictment there "merely track[ed] the language of the statute" and thus provided no additional probative value for application of the modified categorical approach. *Gutierrez-Ramirez*, 405 F.3d at 359.

Indeed, in *Gutierrez-Ramirez*, the Fifth Circuit discussed with apparent approval the distinction that the Ninth Circuit drew between "looking to the abstract of judgment, in combination with [other documents]," and "using the abstract of judgment alone." 405 F.3d at 358 n.11. The decision below, which relied on an abstract of judgment in combination with petitioner's admission at the removal proceeding, is thus not inconsistent with *Gutierrez-Ramirez*.

In *Evanson*, an immigration case, the Third Circuit rejected under the modified categorical approach reliance on factual assertions contained solely in a "judgment of sentence" from a Pennsylvania court. 550 F.3d at 292-294. Even accepting petitioner's questionable assertion that a Pennsylvania "judgment of sentence" is equivalent to a California "abstract of judgment" (Pet. 14),[2] *Evanson* is distinguishable on much the same grounds as *Gutierrez-Ramirez*. As the Third Circuit noted, "no transcript of the plea colloquy was presented" despite the immigration judge's suggestion to provide it. *Evanson*, 550 F.3d at 287. The government did produce the criminal information (a charging document), but the court stated that it could "only consider the charging document to the extent that the petitioner was actually convicted of the charges," and the counts of conviction

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[2] The Third Circuit stated that a judgment of sentence in Pennsylvania includes factual assertions, used by the court for discretionary sentencing determinations, that are not necessarily admitted by the defendant and are not necessarily based on "clear and convincing" evidence—the standard of proof for removability. *Evanson*, 550 F.3d at 293 & n.8. In contrast, as explained above (pp. 8-9, *supra*), an abstract of judgment is an official clerical record of the conviction and sentence only, devoid of the type of factual assertions in a judgment of sentence that the court in *Evanson* held to be insufficient.

did not reflect the amount of drugs involved in the defendant's offense (a critical element of the inquiry in that case). *Id.* at 293-294. As a result, the Third Circuit held that "factual assertions contained *only* in a judgment of sentence may not be considered under the modified categorical approach." *Id.* at 293 (emphasis added). *Evanson* therefore does not foreclose reference to an abstract of judgment where, as here, it is considered in conjunction with petitioner's admission at the removal proceeding (and where, as here, it is confirmed by a state court plea colloquy in the record).

3. Petitioner also contends that the Court should grant review to decide whether "a conviction for non-generic burglary in California categorically qualifies as a 'crime of violence' under 18 U.S.C. § 16(b)." Pet. 28. According to petitioner, the California offense of burglary (whether first-degree or second-degree) does not require an unprivileged or unlawful entry and thus does not involve "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); see Pet. 29. Neither the immigration judge, nor the Board, nor the court of appeals addressed that specific argument. They all considered and rejected petitioner's different argument that the California offense of first-degree burglary is not a crime of violence because it does not require entry into an inhabited dwelling. See Pet. App. 9a, 18a, 23a. This Court typically does not review a question that was not passed upon below, see, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) ("This Court * * * is one of final review, not of first view.") (internal quotation marks omitted), and there is no reason to depart from that rule here.

In any event, as the court of appeals has previously explained, "[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." *Lopez-Cardona*, 662 F.3d at 1112 (quoting *United States* v. *Becker*, 919 F.2d 568, 571 (9th Cir. 1990), cert. denied, 499 U.S. 911 (1991)). Because the California offense of first-degree burglary requires entry into an inhabited dwelling with the intent to commit larceny or a felony, that offense involves "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," regardless of whether the offense requires an unprivileged or unlawful entry. 18 U.S.C. 16(b).

Petitioner recognizes (Pet. 35) that every court of appeals to consider the question has concluded that the California offense of first-degree burglary is a crime of violence for purposes of 18 U.S.C. 16(b). See *Echeverria-Gomez*, 627 F.3d at 976 ("We hold that first-degree burglary under California Penal Code §§ 459 & 460(a) is a 'crime of violence' within the meaning of 18 U.S.C. § 16(b)."). Petitioner contends (Pet. 31-32) that the decision below is in conflict with this Court's decision in *Taylor* v. *United States*, 495 U.S. 575 (1990), but *Taylor* concerned the meaning of the generic term "burglary" in the ACCA. Even assuming *Taylor* governs in the immigration context, but see p. 11, *supra*, it did not interpret the meaning of the term "crime of violence" in 18 U.S.C. 16(b). As the court of appeals has explained, the California offense of first-degree burglary can create the requisite level of risk to qualify as a "crime of violence" for purposes of 18 U.S.C. 16(b),

even if the offense does not qualify as generic "burglary" for purposes of the ACCA. See *Lopez-Cardona*, 662 F.3d at 1113.

Finally, petitioner is incorrect (Pet. 32, 35) that the decision below is in tension with *Leocal* v. *Ashcroft*, 543 U.S. 1, 10 (2004), because the California offense of first-degree burglary is an "active" crime that "involves a substantial risk that the burglar will use force" against a person or property in completing the offense. *Id.* at 10-11. In observing that generic burglary qualifies as a crime of violence, the Court in *Leocal* did not suggest that forms of nongeneric burglary could not also qualify, particularly when, as here, the offense necessarily requires entry into an inhabited dwelling. "That a first-degree burglary in California could, in theory, involve a privileged or lawful entry does not change the fact that 'in the *ordinary* case,' there is a substantial risk that a burglar will use physical force against the occupant of a residence." *Echevarria-Gomez*, 627 F.3d at 978 (quoting *James* v. *United States*, 550 U.S. 192, 208 (2007); footnote omitted). Further review is not warranted.[3]

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[3] In *Descamps* v. *United States*, cert. granted, No. 11-9540 (oral argument scheduled for Jan. 7, 2012), this Court will consider how to apply the modified categorical approach in determining whether a particular California conviction for second-degree burglary "is burglary" for purposes of the ACCA. 18 U.S.C. 924(e)(2)(B)(ii). That is a different question from whether a California conviction for first-degree burglary—which has an element that the defendant have entered an inhabited dwelling—qualifies as a "crime of violence" for purposes of 18 U.S.C. 16(b), because 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." Moreover, petitioner has not challenged the decision by the immigration judge and the Board to employ the modified categorical approach in this case; he simply contends that they erred by looking to a particular document, *i.e.*, the California state

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2012

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court's abstract of judgment. *Descamps* could not bear on that question either, and accordingly this case should not be held pending this Court's decision in *Descamps*.

APPENDIX

United States Department of Justice
Executive Office for Immigration Review
Immigration Court
San Francisco, California

File No.: A 42 024 428 Date: July 31, 2010

In the matter of: CHUEN PIU KWONG, Respondent

IN REMOVAL PROCEEDINGS

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ORAL DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

Respondent, Chuen Piu Kwong, is a native and citizen of People's Republic of China who was admitted as a lawful permanent resident or as an immigrant to the United States at San Francisco, California, on or about June 3, 1990.

On April 3, 1998, the Immigration and Naturalization Service (INS) issued a Notice to Appear (NTA) charging that the respondent is subject to removal pursuant to Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act as a individual having been convicted of an aggravated felony as defined under Section 101(a)(42)(F) and, alternatively, (G) of the Act.

On September 16, 1999, the respondent appeared with counsel, admitted to the factual allegations contained in the NTA and conceded to the ground of removability. Subsequently, the respondent's former attorney of record withdraw from representation and the current counsel, Mr. Dominic Kapachi, entered his notice of appearance sometime in August of the year 2000.

The respondent's current counsel requested to reopen pleadings, withdraw the pleading entered previously, and requested the Court to terminate the proceeding arguing that the respondent is not subject to removal in that he has not been convicted of an aggravated felony.

Respondent filed a brief arguing the position for termination and the Government had filed an appropriate response. On October 10, 2001, the Court issued a written decision denying the respondent's request for a motion to terminate finding that based on the case law and 9th Circuit, as well as the Board of Immigration Appeals, and based on the conviction document that was served on the Court and opposing counsel, Exhibit No. 2 and 2.1, the Court finds that the

Government has sustained its burden of proof regarding the respondent's conviction as an aggravated felon.

Particularly, the Court finds that the respondent's conviction of the residential burglary is a crime of violence. While his sentence was over one year, it squarely falls within the definition of 101(a)(43)(F) and, thus, is removable as charged.

The respondent was given additional time after the service of the said order to prepare his relief from removal. The case was set over until July 19, 2002, for the respondent requested relief in the form of asylum, withholding of removal, protection under the Torture Convention, and any other alternative relief. Subsequently, an individual hearing was moved to July 31, 2002.

The respondent submitted application for withholding of removal which was marked and entered into evidence as Exhibit No. 3. Respondent submitted a correction sheet regarding his application for said relief and the said correction sheet was entered into evidence, Exhibit No. 4A.

Additional documentation submitted by the respondent include a photocopy of his passport issued by the People's Republic of China. *See* Exhibit No. 4B. Respondent also submitted a 1999 *Country Report on Human Rights Practices* dated February 25, 2000, which was entered in evidence as Exhibit No. 4C.

Respondent also has submitted a set of material relating to his conviction, probation, and/or completion of various court-imposed conditions for purposes of

determining the circumstances of his conviction and whether his crime would constitute a particularly serious crime for purposes of his relief. The said document will be entered into evidence, Exhibit No. 5A, B, and C.

Respondent has also submitted additional documentation which is Group Exhibit 6A through D. All the documents were entered into evidence and the Court have taken into consideration the documentation in arriving at this Court's decision. The Government submitted Country Condition Profile which is dated March 4, 2002. The said document was entered into evidence as Exhibit No. 7 without opposition from the respondent's counsel.

The decision of this Court is based upon the entire record, Exhibit No. 1 through Exhibit No. 7, as well as the Court's observation of the demeanor of the respondent while he testified, after consideration of testimony consistency and content of the respondent's applications, and after consideration of the argument of counsel, if any.

II. STANDARDS FOR ASYLUM, WITHHOLDING OF REMOVAL, AND PROTECTION UNDER THE TORTURE CONVENTION

A person who has been convicted of an aggravated felony shall be considered, for purposes of determining asylum eligibility, to have been convicted of a "particularly serious crime." INA Section 208(b)(2)(B)(i). A person who has been convicted of a "quote particu-

larly serious crime" is ineligible to be considered for asylum. INA Section 208(b)(2)(A)(ii).

For purposes of determining eligibility for withholding of removal, a person who has been convicted of an aggravated felony and has been sentenced to an aggregate term of at least five years of imprisonment shall be considered to have been convicted of a "particularly serious crime." INA Section 241(b)(3)(B). A person convicted of an aggregated felony but was sentenced to less than five years of imprisonment may still be determined to have committed a "particularly serious crime" id.

However, a determination of whether a person has been convicted of an aggregated felony and sentenced to less than five years has been convicted of a "particularly serious crime" requires an individual examination of the nature of the conviction, the sentence imposed, and circumstances and underlying facts of the conviction. *In re L-S-*, Int. Dec. 3386 (BIA 1999). A person who has been determined to have committed a "particularly serious crime" is ineligible to be considered for withholding of removal. INA Section 241(b)(3)(B)(ii).

An applicant is eligible for consideration for withholding of removal must demonstrate that he has a well-founded fear of being threatened in the country of removal because of the respondent's race, religion, nationality, membership in a particular social group or political opinion. *Matter of Sanchez and Escobar*, 19 I&N Decision 276 (BIA 1985).

The "well-founded" and "fear" standard must be based on a showing by the applicant or respondent that there is a clear probability of persecution or that he would be singled out for persecution should he be required to return to his native country. *INS v. Stevic*, 467 U.S. 407 (1984).

In order to qualify for relief under the United Nations Convention Against Torture and Other Forms of Cruel, Inhumane, or Degrading Treatment or Punishment (Torture Convention) if the applicant request such consideration, or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal. 8 C.F.R. Section 208.13(c)(1).

"Torture" is defined as an act by which severe pain or suffering, which physical or mental, is intentionally inflicted on the person. 8 C.F.R. Section 208.18(a)(1). The severe pain or suffering must be inflicted on the applicant or third person for one of the four purposes, specifically: (1) for obtaining information or a confession; (2) for punishing for an act committed or suspected of having committed; (3) intimidation or coercion; (4) for any reason based on discrimination of any kind. *Id.*

In addition, in order to constitute "torture" the act must be directed toward a person in the offender's custody or physical control. 8 C.F.R. Section 208.18(a)(6). Further, the pain or suffering must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity." 8 C.F.R. Section 208.18(a)(1).

Torture is "extreme form of cruel and inhumane treatment" and does not include pain or suffering arising from lawful sanctions. 8 C.F.R. Section 208.18(a)(2)(3). Lawful sanctions do not include sanctions which defeat the object and purpose of the Torture Convention. 8 C.F.R. Section 208.18(a)(3).

The applicant for withholding of removal under the Torture Convention bears the burden of proving that it is "more likely than not" that he would be tortured if removed to the proposed country of removal. 8 C.F.R. Section 208.16(c)(2). As with asylum, this burden can be established by testimony without corroboration if the testimony is credible. *Id. Matter of Y-B-*, Int. Dec. 3337 (BIA 1998).

If the Court determines that the respondent is more likely than not to be tortured in the country of removal, the respondent's application for withholding of removal under the Torture Convention shall be granted, unless the respondent is subject to a ground of "mandatory denial." 8 C.F.R. Section 208.16(c)(4) and 208.16(d)(1)(2).

If an applicant has been committed of a particularly serious crime, the Court could find that the respondent would not be entitled to withholding of removal under the Torture Convention as a matter of law and would be considered only for purposes of deferral of removal. 8 C.F.R. Section 208.16.

III. FINDINGS OF FACT

The respondent was admitted to the United States in 1990 as the lawful permanent resident of an immi-

grant. Respondent has not departed the United States since that time period. In 1999 the respondent was arrested for stealing but no conviction has been sustained or suffered by the respondent as a result of the 1994 arrest.

On November 22, 1996, the respondent was convicted of attempted extortion and was sentenced to four years "imposed probation" and three days of jail time. It appears that the respondent was asked to collect some money that was allegedly owed to his friend from another individual. The "friend" who asked the respondent to collect debt on his behalf was arrested and the respondent believes has been convicted of some crime but the respondent had no direct evidence as to the nature of his friend's conviction.

He testified that he simply went to speak to the father of a friend of his and asked his friend's family to pay money back to his "friend" by the name of Curtis. According to the respondent, he did not threaten the victim or victim's family and did not have any particular type of weapon on him when he went to a family restaurant to talk to the victim's family.

The respondent stated that he was arrested not on the location but subsequently in a public place where he was taken to the police and was detained for three days. Based on the conviction document and the respondent's testimony, it appears that the respondent did not ask for any type of trial by jury or bench trial but simply pled guilty and accepted the offering of either the prosecutor or as relayed to him by the Judge

and accepted responsibility or the condition that was imposed on him at that time.

Respondent's suffered his second conviction relating to an incident that occurred sometime in February of 1997. Respondent indicated that he was on probation from the first conviction at that time. He stated that he had incurred some type of gambling debt that he owed to the loan shark or various gang members because he borrowed money from these individuals after he lost money in a gambling situation. He testified that he was being harassed or the loan shark was pressuring him to repay money and he was forced to try to steal money from a house of an acquaintance to satisfy the gambling debt.

According to the respondent, he went over to a house of a friend of his girlfriend whose daily schedule was known to him. Particularly, he stated that he went to this acquaintance's house in daylight during work hours on the weekday. He stated that he went to the front door and pressed the doorbell in order to ascertain whether there was anybody at home.

He stated that he waited a few minutes and after he determined that no one was at home, he went to the back yard and went through the window into the house with the intention of stealing money or valuables from the dwelling. He acknowledged that he knew this was a residential dwelling that is normally occupied by individuals who were his acquaintances but he claimed that he knew and believed that no one was in and that's why he went in. He testified that he would have gone

away or he would have never gone into house if he knew that someone was inside.

He claimed that after he went into the house he found $40 in the master bedroom. when he was in the next room he heard someone ringing the doorbell. He immediately climbed out from the back window but he was encountered by two police in the back yard and he was arrested and taken to the police station.

Respondent submitted the police report and also a certified copy of the sentencing report in support of the circumstances surrounding his arrest and conviction, Exhibit No. 5, Documents A and B. He claimed that he did not ask for any type of trial by jury or by judge but accepted a plea offer of two years in state prison in lieu of a trial.

Respondent indicated that he was represented by a public defender and has accepted the plea as offered and stated that after serving his criminal sentence has also completed his parole satisfactory. Otherwise, he claimed that he was "discharged" from parole. Respondent submitted a document which was entered into evidence, Exhibit No. 5C, without objection from the Government's counsel.

Respondent indicated that he is afraid that if he were returned to China at this time the Chinese government might arrest him. He indicated further that even if he is not arrested, he will not have any employment. He claimed this is because his brother, who is also a resident in the United States, gold him that he would not be allowed any type of employment

opportunity in China because he is a resident of the United States.

He also claimed that he cannot stay in China because he has "canceled" or gave up his residency in China while he left China in 1990. He claimed that at this time if he were required to go to China he cannot work and he would have no place to live. Respondent also claimed that, "I do not know if China will feed me," because he has not been back to China for a long time.

Respondent indicated that he believes if he were return to China he may not be allowed to enter because he is not a Chinese resident. He claimed that the Chinese government might also "lock him up" and that he believes no one will provide him with any kind of employment.

Respondent testified that he had never belonged to any political organization, religious organization, or any particular party or organization when he was in China. He testified that he had never been arrested, mistreated, or have any problem whatsoever when he was in China. He testified that his parents and his siblings know about his hearing today and confirmed that none of his family members are here to testify on his behalf.

He indicated that he is married to a United States resident or citizen and they have one 18-month-old child who is a United States citizen with this individual. However, neither his wife or any other family member was here to testify on his behalf today.

The respondent was the subject of cross-examination and during cross-examination there was no issue raised regarding the completion of his probation and the Court will consider that it was not being challenged by the Government at this time.

However, the respondent also testified that after his last fingerprint, which is two years ago, he has not been subject to any additional criminal arrest or conviction and he had the knowledge and confirmed that he will comply with the Court's order and provide fingerprinting immediately or within the time specified by the Court after today's hearing. Assuming the fingerprinting does not turn up any additional criminal conviction or arrest, the Court will take the respondent's testimony regarding his criminal history as true and would base the Court's finding on whether the respondent has committed a particularly serious crime on the evidence as in front of this Court.

The respondent indicated that he had only filed a tax return in 1994 at which time he had worked about six months in a gas station. He indicated that sometime in 1996 he also had about seven months of employment but he had no steady work between 1994 and 1997. He stated that during that period of time he simply helped his cousin in a bakery shop but there is no evidence to show that he had filed any income tax return during that period of time.

Respondent claimed that he had only helped his friend to collect a debt once and it appears that was the time that he was arrested and convicted of the attempted extortion. He indicated that he has obtained

a new chinese passport sometime in the year 2001 and there was no evidence to show that he had any particular difficulty or problem with the Chinese government or had been denied the requested new Chinese passport in the year 2001. The respondent did not offer any evidence to show that the Chinese passport contained any provision that prevented his employment in China.

IV. CREDIBILITY

The Court has observed the respondent's demeanor while he testified and the Court has compared his testimony and contrasted it with his testimony as well as all the evidence in the record. The Court finds that the respondent has basically testified in a sincere and credible manner and would find him to be credible.

However, even having found the respondent to be credible, the Court must nevertheless find that the respondent has not established eligibility for withholding of removal or protection under the Torture Convention as a matter of law.

V. REMOVABILITY

Based on the respondent's admission as well as the Government's submission of the conviction document, and based on the reasons stated separately in the Court's previously issued written order regarding the respondent's motion to terminate, the issue of removability has been established as charged. *See Woodby v. INS*, 385 U.S. 276 (1966).

VI. APPLICATION FOR ASYLUM

As a matter of law, because the respondent has been convicted of a felony, the respondent is not eligible to be considered for asylum and the Court will pretermit the respondent's application for asylum as a matter of law.

VII. APPLICATION FOR WITHHOLDING OF REMOVAL UNDER SECTION 241(B)(3) OF THE ACT

In this particular case, the respondent was convicted of an aggravated felony but has been sentenced for less than five years. Considering the respondent's testimony as well as the circumstances, the Court would give the respondent benefit of the doubt, although taking into consideration that entering into a dwelling is a very serious crime because of the possibility of violence.

Taking the respondent's testimony as true in that he took care in assuring that no one was in the house and considering the time of the occurrence, the Court would consider that under the circumstances as presented, the respondent has not been convicted of a particularly serious crime and, therefore, is eligible for consideration both for withholding of removal under Section 241(b)(3) of the Act. This also goes to consideration for withholding of removal under the Torture Convention pursuant to 8 C.F.R. Section 208.16.

Having found that the respondent is eligible for consideration for the relief sought, the respondent, however, has not presented sufficient evidence that if

he were removed to China, there would be a well-founded fear of persecution or that his life would be subject to threats and harm because of his race, religion, nationality, membership in a particular social group or political opinion. *See* 8 C.F.R. Section 208.l6; and INA Section 241(b)(3) of the Act.

In this particular case, considering the respondent's testimony in the light most favorable to the respondent, the respondent had never been subject to any particular type of harm in China. Respondent has not submitted any evidence to show that his family members have suffered any type of harm that would amount to persecution.

There is no evidence to show that at this time any individual or the extension of the government in China would harm him for any one of the five grounds enumerated for purposes of relief, for purposes of withholding under either Section 241(b)(3) or that the respondent would be subject to torture for the reasons stated as the ground for protection under the Torture Convention.

The respondent has simply failed to demonstrate that he has any well-founded fear of persecution if he is returned to China at this time. Even having found that he is eligible for consideration of withholding of removal, the Court cannot grant his application for withholding of removal.

VIII. APPLICATION FOR CONVENTION AGAINST TORTURE

For the reason assigned for purposes of the respondent's lack of eligibility for the respondent's application for withholding of removal as above stated, the respondent's application for deferral of removal or withholding of removal under 8 C.F.R. Section 208.16 would also be denied because of lack of eligibility.

Otherwise, the respondent is found to have failed to satisfy his burden of proof and has not shown that it is more likely than not that he will be tortured should he be removed to China at this time.

It does not appear that the respondent is entitled to any other form of relief at this time. Accordingly, the following would be the Court's order.

ORDER

IT IS HEREBY ORDERED that the respondent's request for asylum under Section 208 of the Act is, hereby, pretermitted.

IT IS FURTHER ORDERED that the respondent's request for withholding of removal pursuant to Section 241(b)(3) of the Act is, hereby, denied for act of eligibility.

IT IS FURTHER ORDERED that the respondent's request for protection under the Torture Convention pursuant to 8 C.F.R. 208.16-18 is, hereby, denied for lack of eligibility.

IT IS FURTHER ORDERED that the respondent be removed from the United States to the People's Republic of China based on the charges contained in the NTA Exhibit No. 1 in this case.

Should the respondent fail to depart pursuant to final order of removal, the respondent shall be subject to additional civil and criminal penalties according to the law. The respondent also will not be eligible for many forms of relief as prescribed under the Immigration and Nationality Act.

APPROVED AS TO CONTENT ONLY.

/s/ MIMI S. YAM 10/28/02
MIMI S. YAM,
Immigration Judge