U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - WAS
1901 S. Bell Street, Suite 900
Arlington, VA 22202

Name: ZANABRIA ARTEAGA, FRANCIS... **A 075-844-244**

Date of this notice: 3/21/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Cole, Patricia A.
Pauley, Roger

Userteam: Docket

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ZANABRIA ARTEAGA, FRANCISCO
A075-844-244
c/o FARMVILLE DETENTION CENTER
P.O. Box N, 508 WATERWORKS ROAD
FARMVILLE, VA 23901

DHS/ICE Office of Chief Counsel - WAS
1901 S. Bell Street, Suite 900
Arlington, VA 22202

Name: ZANABRIA ARTEAGA, FRANCIS... **A 075-844-244**

Date of this notice: 3/21/2017

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Cole, Patricia A.
Pauley, Roger

Userteam:

File: A075 844 244 – Arlington, VA Date: MAR 2 1 2017

In re: FRANCISCO ZANABRIA ARTEAGA a.k.a. Francisco Javier Zanabria Arteiga

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ellennita M. Hellmer, Esquire

ON BEHALF OF DHS: Ian N. Gallagher
Assistant Chief Counsel

CHARGE:

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

APPLICATION: Termination

The respondent appeals from the Immigration Judge's January 13, 2016, decision finding him removable as charged and denying his motion to terminate these proceedings. We affirm the Immigration Judge's ruling that the respondent is removable as charged. Accordingly, the appeal will be dismissed.

The respondent, a native and citizen of Mexico and a lawful permanent resident of the United States, was convicted on May 21, 2015 of "unlawful wounding" in violation of section 18.2-51 of the Virginia Code, a felony for which he was sentenced to a 3-year term of imprisonment (I.J. at 1; Exh. 1).

The Immigration Judge concluded that the respondent was removable from the United States as an alien convicted of an aggravated felony under sections 101(a)(43)(F) and 237(a)(2)(A)(iii) of the Act, 8 U.S.C. §§ 1101(a)(43)(F) and 8 U.S.C. § 1227(a)(2)(A)(iii). Specifically, the Immigration Judge determined that unlawful wounding is not a categorical crime of violence under section 18 U.S.C. § 16(a) or (b) (I.J. at 1-2). Finding § 18.2-51 divisible, he applied the modified categorical approach and determined that the respondent's offense constituted a crime of violence (I.J. at 2; Tr. at 18). Accordingly, the Immigration Judge denied the respondent's motion to terminate and ordered him removed from the United States.

I. ISSUE

The issue is whether the respondent's conviction for unlawful wounding is a crime of violence. To determine whether the respondent's conviction is a crime of violence, we employ the categorical approach which requires us to focus on the elements of Va. Code § 18.2-51 rather than the facts underlying the respondent's conviction. *See Matter of Chairez*, 26 I&N Dec. 819, 821 (BIA 2016). In applying the categorical approach, we compare the language of Va. Code § 18.2-51 with the definition of a crime of violence under 18 U.S.C. § 16.

II. ANALYSIS

A. Virginia Code § 18.2-51

The respondent admitted that he was convicted of "unlawful wounding" in violation of Va. Code § 18.2-51 (Respondent's Brief filed before the Immigration Judge on January 11, 2016; Exh. 1). Virginia Code § 18.2-51 provides:

> If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.

This provision has been interpreted as creating four separate crimes: (1) malicious wounding, (2) maliciously causing bodily injury, (3) unlawful wounding, and (4) unlawfully causing bodily injury. *See e.g. Land v. United States*, – F. Supp. 3d –, 2016 WL 6693168 (E.D. Va. Aug. 23, 2016); *Lee v. United States*, 89 F. Supp. 3d 805, 811 (E.D. Va. 2015). *See also* Ronald J. Bacigal, *Assault, Battery, and Wounding: Va. Prac. Criminal Offenses & Defenses* A46 (2016).

The relevant jury instruction also shows there are multiple crimes set forth in § 18.2-51. To convict a person of malicious wounding or maliciously causing bodily injury under Va. Code § 18.2-51, the Commonwealth must prove beyond a doubt each of the following elements of that crime: (1) that the defendant wounded or caused bodily injury by any means to the victim; (2) the wounding or bodily injury was with the intent to kill, or permanently maim, disfigure, disable, or kill the victim; and (3) the act was done with malice. If the Commonwealth proves the first two elements, but not the third (acting with malice), then the defendant is guilty of unlawful wounding or unlawfully causing bodily injury. *See* 2-37 Virginia Model Jury Instructions; Criminal Instruction No. G37-100.

B. 18 U.S.C. § 16(a)

We affirm the Immigration Judge's determination that the crime of unlawful wounding is not a categorical crime of violence under 18 U.S.C. § 16(a), because violent force is not a necessary element of the offense (I.J. at 1). The term "physical force" as used in 18 U.S.C. § 16 means "violent force," "that is, force capable of causing physical pain or injury to another person." *See Johnson v. United States*, 559 U.S. 133, 140 (2010); *see also Matter of Guzman-Polanco*, 26 I&N Dec. 806 (BIA 2016). Because the first element can be satisfied by showing the offender caused bodily injury "by any other means," the offense can be committed without the use of violent force.

Since the Immigration Judge issued this decision, we have recognized that there is a split among the circuits on whether conduct such as the use or threatened use of poison to injure another person is sufficient "force" to satisfy the "violent force" of *Johnson*, and thus whether conduct of this nature would constitute a crime of violence under 18 U.S.C. § 16(a). *Matter of Guzman-Polanco*, *supra* at 807. Accordingly, circuit court law governs this issue unless resolved by the Supreme Court.

The law of the United States Court of Appeals for the Fourth Circuit governs this case. In *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012), the Court held that a terroristic threat offense in violation of Cal. Penal Code § 422(a) was missing a "violent force" element and therefore did not qualify as a crime of violence under the United States Sentencing Guidelines § 2L1.2. Cal. Penal Code § 422(a) requires only that the offender "threatens to commit a crime which will result in death or great bodily injury to another." The Court observed that a defendant could violate § 422(a) "by threatening to poison another, which involves no use or threatened use of force." *Id*. at 168-69. The *Torres-Miguel* rationale supports the Immigration Judge's determination in this case with regard to 18 U.S.C. § 16(a).

On appeal, the DHS argues that the Supreme Court rejected the rationale in *Torres-Miguel* in *United States v. Castleman*, 134 S. Ct. 1405 (2014). *See* DHS Supplemental Brief at 3-8. The DHS relies on recent United States district court decisions applying the rationale in *Castleman* to find that certain offenses are crimes of violence under the force clause of 18 U.S.C. § 924(c)(3)(A). Notably, in *Land v. United States*, *supra,* the District Court for the Eastern District of Virginia applied the *Castleman* rationale without reference to *Torres-Miguel*, and held that malicious wounding and unlawful wounding under Va. Code. § 18.2-51 are violent felonies under the force clause of 18 U.S.C. § 924(e)(2)(B)(i) (same as 18 U.S.C. § 16(a)). However, we are bound by the law of the Fourth Circuit and we are not bound to follow the published decision of a United States district court even if the case arises within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

The DHS also argues that we should follow the holdings from the Third, Seventh and Ninth Circuits. *See* DHS Supplemental Brief at 8-9. These cases reflect the circuit court split which we recognized in *Guzman-Polanco* as to what force is sufficient to satisfy the "physical force" element under 18 U.S.C. § 16(a). To date, the Fourth Circuit has not ruled on whether *Castleman* overrules *Torres-Miguel*. In *United States v. McNeal*, 818 F.3d 141, 156 (4th Cir. 2016), the Fourth Circuit questioned the Government's argument that *Castleman* repealed the distinction "recognized in *Torres-Miguel* between the use of force and the causation of injury." The Court observed that Justice Sotomayor, writing for the *Castleman* majority, expressly reserved the question of whether causation of bodily injury "necessarily entails violent force." *See* 134 S.Ct. at 1413; *see also id.* at 1414 (emphasizing that the Court was not deciding the question of whether or not causation of bodily injury "necessitate[s] violent force, under *Johnson's* definition of that phrase"). Accordingly, we affirm the Immigration Judge's ruling that the respondent's § 18.2-51 conviction is not a categorical crime of violence under 18 U.S.C. § 16(a).

C. 18 U.S.C. § 16(b)

We agree with the Immigration Judge that the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), does not extend to 18 U.S.C. § 16(b) (I.J. at 2). To date, the Fourth Circuit has not ruled on this issue. *See In re Hubbard,* 825 F.3d 225 (4th Cir. 2016); *Matter of Anselmo*, 20 I&N Dec. 25, 30 (BIA 1989) (observing that we are without authority to consider constitutional challenges to the laws we administer). But we disagree with the Immigration Judge that Va. Code § 18.2-51 does not categorically qualify as a crime of violence under section 16(b) (I.J. at 2). We employ a categorical approach to determine whether

a particular offense satisfies the requirements of section 16(b). *See Matter of Francisco-Alonzo,* 26 I&N Dec. 594 (BIA 2015). Because section 16(b) defines a crime of violence in "probabilistic" or risk-based terms, the relevant question under the categorical approach is whether the conduct encompassed by the elements of the offense of conviction would, in the ordinary case, require the accused to disregard a substantial risk of the use of violent physical force against another. *Id.* at 597-99. *See United States v. Avila*, 770 F.3d 1100 (4th Cir. 2014).

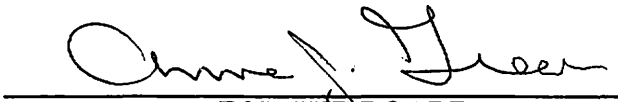
As stated above, to convict a person of unlawful wounding under Va. Code § 18.2-51, the Commonwealth must prove beyond a reasonable doubt that the defendant wounded the victim "with the intent to kill, or permanently maim, disfigure, disable, or kill the victim." Under Virginia law, wounding requires more than a bodily injury. It requires that the victim's skin was broken or cut. *See Johnson v. Commonwealth*, 35 S.E. 2d 594 (1945) (discussing the "distinct offense[s]" of wounding and causing bodily injury). A review of Virginia case law reveals that the conduct encompassed by the elements of the unlawful wounding offense would in the ordinary case require the accused to disregard a substantial risk of the use of violent physical force against another. *See e.g. English v. Com.,* 715 S.E. 2d 391, 395 n. 3 (2011). (evidence supported finding that defendant's beating of victim caused victim "bodily injury" within meaning of malicious wounding statute); *Campbell v. Com.*, 405 S.E.2d 1, 5 (1991) (evidence that the child victim was struck fifteen times with the belt sufficient for malicious wounding conviction); *David v. Com.*, 340 S.E.2d 576, 578 (1986) (evidence was sufficient to sustain conviction for unlawful wounding where defendant armed himself with loaded pistol, approached victims and spoke insulting words to them and when two feet from them fired bullet into cement drive where it could reasonably have been anticipated to be deflected).

Based on the foregoing, the respondent's Va. Code § 18.2-51 conviction qualifies as a crime of violence under 18 U.S.C. § 16(b) because one who undertakes to deliberately maim, disfigure, disable, or kill a victim necessarily disregards the substantial risk that consummation of that offense will require the intentional use of violent physical force, either to inflict the "wound" the statute requires or to overcome the victim's opposition, or both. *See United States v. Avila, supra; Matter of Francisco-Alonzo, supra.*

III. CONCLUSION

In sum, while we disagree in part with the Immigration Judge's analysis, we affirm his conclusion that the respondent's Va. Code § 18.2-51 conviction qualifies as a crime of violence under 18 U.S.C. § 16(b). Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.



FOR THE BOARD

File: A075 844 244 – Arlington, VA

Date: MAR 21 2017

In re: FRANCISCO ZANABRIA ARTEAGA

DISSENTING OPINION: Patricia A. Cole, Board Member

I respectfully dissent.

Although I agree with the majority that the crime of unlawful wounding, in violation of Va. Code § 18.2-51, is not a § 16(a) crime of violence, I disagree that the offense is nevertheless an aggravated felony crime of violence under 18 U.S.C. § 16(b).

I find that the Supreme Court's rejection of the "ordinary case" test for determining whether an offense qualifies as a "violent felony" under the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) (hereafter "the ACCA residual clause")—*see Johnson v. United States*, 135 S. Ct. 2551 (2015)—applies with equal force in the "crime of violence" context under 18 U.S.C. § 16(b). Thus, I disagree with the majority's conclusion that *United States v. Avila*, 770 F.3d 1100 (4th Cir. 2014), and *Matter of Francisco-Alonzo*, 26 I&N Dec. 594 (BIA 2015)—pre-*Johnson* decisions applying the "ordinary case" test in the § 16(b) context—are controlling here.

In *Avila* and *Francisco-Alonzo*, the Fourth Circuit and the Board applied the "ordinary case" test in reliance on *James v. United States*, 550 U.S. 192 (2007). *See United States v. Avila, supra*, at 1107 (applying *James*); *Matter of Francisco-Alonzo, supra*, at 597-600 (same). The *Johnson* Court's overruling of *James* thus undercuts the holdings in *Avila* and *Francisco-Alonzo*.

The *Johnson* Court explained that when the "ordinary case" test is applied to the language of a "probabilistic" or risk-focused statute such as § 16(b), the result is "grave uncertainty about how to estimate the risk posed by a crime." *See* 135 S. Ct. at 2557 ("How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"). This "grave uncertainty" is no less intolerable in the § 16(b) context than it was in the context of the ACCA residual clause. *See United States v. Vivas-Ceja*, 808 F.3d 719, 722-23 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110, 1118-19 (9th Cir. 2015). Indeed, the vagaries of the "ordinary case" test may be particularly problematic in the § 16(b) context because in such cases those idiosyncrasies overlay what is already a highly speculative and subjective inquiry into the degree of risk the offense of conviction poses "by its nature."

I find that after *Johnson* the relevant test for determining whether an offense satisfies § 16(b)—i.e., whether the 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"—is whether the "least culpable conduct" consistent with the offense's elements would present such a risk. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) ("Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense."). Applying

that test, I find that the respondent's offense of conviction—unlawful wounding under Va. Code § 18.2-51—does not qualify as a crime of violence under § 16(b) because the offense, taken at its minimum, encompasses a risk of unintentional harm (e.g., extreme child neglect) as well as the application of non-violent force to victims (e.g., poisoning). Therefore, I would not find the respondent is statutorily ineligible for withholding of removal under section 241(b)(3)(B)(ii) of the Act and would remand the record for further proceedings.

Patricia A. Cole
Board Member

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ARLINGTON, VIRGINIA

File: A075-844-244 January 13, 2016

In the Matter of

FRANCISCO ZANABRIA ARTEAGA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES:

APPLICATIONS:

ON BEHALF OF RESPONDENT: MATTHEW MUGGERIDGE

ON BEHALF OF DHS: IAN GALLAGHER

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent was convicted in 2015 for unlawful wounding and violation of Virginia Code Section 18.2-51 and sentenced to three years.

That crime, I believe, is not categorically a crime of violence under 18 U.S.C. Section 16(a) or 16(b), although I would welcome the Board's addressing this issue in the context of this or any other case involving the statute.

With respect to 16(a), violent force is not a necessary element of the Virginia unlawful wounding statute. An offender may cause bodily injury, "by any means", thus encompassing acts that do not involve violent force.

With respect to 16(b), I will not find that statute void for vagueness despite the Supreme Court decision in U.S. v. Johnson, which addressed a different statute. However, I do find that the Virginia unlawful wounding statute can be violated without the use of physical force and thus, is not categorically a crime that involves a substantial risk that physical (i.e., violent) force be used as required by 16(b).

However, the Virginia unlawful wounding statute in my opinion is a divisible statute.

In conducting a modified categorical analysis, I may look at the records of conviction, including the indictment. In doing so, it is clear that the respondent "did feloniously and unlawfully **wound** JMZ, a child eight months of age with intent to maim, disfigure, disable, or kill". Wounding meets the requirements of a crime of violence under 18 U.S.C. Section 16(a).

Thus, given the three year sentence, he has been convicted of an aggravated felony crime of violence pursuant to 237(a)(2)(A)(iii). The charge in the Notice to Appear is sustained and the motion to terminate is denied.

Based on the charge sustained today, January 13, 2016, that is that the respondent has been convicted of an aggravated felony crime of violence, and in the absence of any pending request for relief:

ORDERS:

IT IS HEREBY ORDERED that the respondent be removed from the United States to Mexico on the charge in the October 6, 2015 Notice to Appear.

The respondent did indicate an interest in pursuing readjustment with a waiver under 212(h) for his criminal offense, however, at this point no I-130 has been filed. That relief is speculative at this point and consequently I denied a request for a continuance to pursue it at this stage. However, it is my understanding the respondent

will appeal the order of removal based on my legal finding sustaining the aggravated felony charge. If he does so, he may pursue the I-130 with a readjustment and a 212(h) waiver while that appeal is pending.

Please see the next page for electronic signature

THOMAS G. SNOW
Immigration Judge

//s//

Immigration Judge THOMAS G. SNOW

snowt on March 1, 2016 at 4:55 PM GMT