U.S. Department of Justice

Executive Office for Immigration Review

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Name: ISLAM, MOHAMMAD BABUL

A 045-052-167

Date of this notice: 10/14/2016

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Wendtland, Linda S.
Pauley, Roger
Cole, Patricia A.

Userteam: Docket

File: A045 052 167 – Arlington, VA Date: OCT 14 2016

In re: MOHAMMAD BABUL ISLAM a.k.a. Muhammad Islam

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Adina B. Applebaum, 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 Department of Homeland Security ("DHS") appeals from an Immigration Judge's August 19, 2015, decision terminating removal proceedings against the respondent. The respondent opposes the appeal. The appeal will be sustained in part and the record will be remanded.

The respondent is a native and citizen of Bangladesh and a lawful permanent resident of the United States. In 2014, the respondent was convicted of unlawful wounding in violation of section 18.2-51 of the Virginia Code,[1] a felony for which he was sentenced to a 5-year term of imprisonment (all but 9 months of which was suspended in favor of probation). The only issue on appeal is whether that conviction renders the respondent removable as an alien convicted of an "aggravated felony"—to wit, a "crime of violence" under 18 U.S.C. § 16 for which the term of imprisonment is at least 1 year. *See* sections 101(a)(43)(F) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii).

According to the Immigration Judge, the DHS failed to prove that unlawful wounding under Va. Code § 18.2-51 is a "crime of violence," which is defined by 18 U.S.C. § 16, as follows:

[1] Va. 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.

> (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.

Specifically, the Immigration Judge found that Va. Code § 18.2-51 does not satisfy the requirements of 18 U.S.C. §§ 16(a) and 16(b) because it is possible for a defendant to be convicted based on poisoning or other conduct which neither has the use of violent physical force as an element nor presents a substantial risk that such force will be used (I.J. at 6-10).

Upon de novo review, we conclude that unlawful wounding under Va. Code § 18.2-51 is not a crime of violence under 18 U.S.C. § 16(a) because it does not have as an element the use, attempted use, or threatened use of violent physical force against the person or property of another. To be precise, defendants have been convicted of unlawful wounding in Virginia based on acts of poisoning and child neglect, neither of which entails *violent* physical force as contemplated by 18 U.S.C. § 16(a). *See Matter of Guzman-Polanco* ("*Guzman-Polanco I*"), 26 I&N Dec. 713, 717-18 & n.7 (BIA 2016) (holding that battery under Puerto Rico law—which requires proof that the accused inflicted bodily injury on the victim—does not have the use of violent physical force as an element where the requisite injury can be inflicted by means of poison). Though the DHS maintains on appeal that poisoning and similar conduct entail the violent use of force by indirect means, the United States Court of Appeals for the Fourth Circuit—in whose jurisdiction this case arises—has determined in analogous circumstances that poisoning does not involve the use of violent physical force. *See United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2012) (holding that the California offense of willfully threatening to commit a crime that would result in death or great bodily injury does not have the threatened use of violent physical force as an element where the offense can be committed by means of a threat to poison another).

The DHS maintains in supplemental briefs that *Guzman-Polanco I* and *Torres-Miguel* have been abrogated by *United States v. Castleman*, 134 S. Ct. 1405 (2014), where the Supreme Court held in relevant part that poisoning entails a "use of physical force" within the meaning of 18 U.S.C. § 921(a)(33)(A)(ii), which defines the term "misdemeanor crime of domestic violence" for sentencing purposes. In support of this argument, the DHS invokes recent precedents of the Second, Seventh, Eighth, and Ninth Circuits, all of which interpret *Castleman* as holding that poisoning necessarily involves the "use of physical force" under 18 U.S.C. § 16 and other similar sentencing statutes. *See United States v. Hill*, No. 14-3872-cr, 2016 WL 4120667, at *6-7 (2d Cir. Aug. 3, 2016), *Arellano-Hernandez v. Lynch*, No. 11-72286, 2016 WL 4073313, at *3 (9th Cir. Aug. 1, 2016), *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016); *De Leon Castellanos v. Holder*, 652 F.3d 762, 765-67 (7th Cir. 2011). The DHS also points out that a number of United States district courts within the jurisdiction of the Fourth Circuit have concluded that *Castleman* overrules *Torres-Miguel*.

As we explained in *Guzman-Polanco I*, however, *Castleman* is distinguishable because the Court there held that 18 U.S.C. § 921(a)(33)(A)(ii) employs the phrase "use of physical force" in a non-violent, common-law sense very different from that which governs 18 U.S.C. § 16(a). *See Guzman-Polanco I*, *supra*, at 717. Indeed, the *Castleman* Court expressly refrained from

adopting Justice Scalia's concurring view—now echoed by the DHS—that the infliction of physical injury necessarily contemplates the use of physical force. *See United States v. Castleman, supra*, at 1414 ("Justice SCALIA's concurrence suggests that [bodily injury] necessitate[s] *violent* force, under [the] ... definition [adopted in *Curtis Johnson v. United States*, 559 U.S. 133, 137 (2010)]. But whether or not that is so—*a question we do not decide*—these forms of injury do necessitate force in the common-law sense." (emphasis added) (citation omitted)). Further, we have clarified in a precedential opinion that applicable circuit law governs the issue of whether indirect applications of force—such as poisoning—satisfy the requirements of 18 U.S.C. § 16. *See Matter of Guzman-Polanco* ("*Guzman-Polanco II*"), 26 I&N Dec. 806, 808 (BIA 2016). The Fourth Circuit's panel decision in *Torres-Miguel* has not been overruled by the Supreme Court or by the Fourth Circuit sitting en banc, and thus it remains controlling here pursuant to *Guzman-Polanco II*.[2] Accordingly, we will dismiss the DHS's appeal as it relates to the applicability of 18 U.S.C. § 16(a).

Although we conclude that unlawful wounding under Va. Code § 18.2-51 is not a crime of violence under 18 U.S.C. § 16(a), the record will nevertheless be remanded because we conclude that the Immigration Judge did not properly examine whether the offense qualifies as a crime of violence under 18 U.S.C. § 16(b). Because 18 U.S.C. § 16(b) is phrased in "probabilistic" terms, we have held that the proper inquiry for determining whether a conviction is for a crime of violence under that subsection is whether the offense's elements define conduct that, in an "ordinary case," would present a substantial risk of the use of violent physical force against another. *Matter of Francisco-Alonzo*, 26 I&N Dec. 594, 597-600 (BIA 2015). The Immigration Judge did not apply this "ordinary case" analysis on remand, however, because he found that the Supreme Court's decision in *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), prohibits him from doing so (I.J. at 6-7).[3] Instead, the Immigration Judge asked whether the "least culpable conduct" punishable under Va. Code § 18.2-51 presented the "substantial risk" of violent physical force contemplated by 18 U.S.C. § 16(b). Concluding that it did not, he terminated the proceedings.

We do not agree with the Immigration Judge's broad reading of *Samuel Johnson* as having invalidated application of the "ordinary case" test. Like the Board in *Francisco-Alonzo*, the United States Court of Appeals for the Fourth Circuit—in whose jurisdiction this case arises—has held that the proper inquiry under § 16(b) is whether the conduct encompassed by the elements of an offense raises a substantial risk the defendant may use physical force in an "ordinary case" arising under the statute. *See United States v. Avila*, 770 F.3d 1100, 1107 (4th Cir. 2014). Though *Avila* was decided before *Samuel Johnson*, it is not for the Immigration Judge or this Board to declare that Fourth Circuit precedent has been implicitly overruled by the Supreme Court. *Accord Matter of Carachuri-Rosendo*, 24 I&N Dec. 382, 387-88 (BIA 2007). If *Avila* needs to be revisited in light of *Samuel Johnson*, the Fourth Circuit (or the Supreme Court)

[2] While we acknowledge that some United States District Courts within the Fourth Circuit have interpreted *Castleman* as having abrogated *Torres-Miguel*, published district court opinions are not precedential in removal proceedings. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

[3] The Immigration Judge expressly (and properly) declined to find that *Samuel Johnson* rendered section 16(b) unconstitutionally vague (I.J. at 6).

is the proper authority to do so.[4] Unless that happens, *Avila* and *Francisco-Alonzo* will remain controlling in removal proceedings arising within the Fourth Circuit.

In conclusion, in Fourth Circuit cases, *Matter of Francisco-Alonzo* and *United States v. Avila* remain controlling as to the application of 18 U.S.C. § 16(b) despite *Samuel Johnson*. Under those precedents, an alien's offense of conviction is a crime of violence under 18 U.S.C. § 16(b) if the offense is a felony and if the conduct encompassed by the elements of the offense presents a substantial risk that physical force may be used in the course of committing the offense in the "ordinary case." The record will be remanded for the Immigration Judge to reconsider the respondent's removability in accordance with this standard.

ORDER: The appeal is sustained in part, the Immigration Judge's decision is vacated, the removal proceedings are reinstated, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

[4] Four circuits have applied the *Samuel Johnson* Court's reasoning to invalidate 18 U.S.C. § 16(b). *See Shuti v. Lynch*, 828 F.3d 440, 446-451 (6th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719, 723 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015), *cert. granted sub nom. Lynch v. Dimaya*, No. 15-1498 (U.S. September 29, 2016) (Mem.); *Golicov v. Lynch*, No. 16-9530 (10th Cir. September 19, 2016), *available at* 2016 WL 4988012. The Fifth Circuit has disagreed, holding that 18 U.S.C. § 16(b) is valid despite *Samuel Johnson*. *See United States v. Gonzalez-Longoria*, No. 15-40041 (5th Cir. Aug. 5, 2016) (en banc), *available at* 2016 WL 4169127, *5; *see also United States v. Prickett*, No. 15-3486 (8th Cir. October 5, 2016), *available at* 2016 WL 5799691 (holding that 18 U.S.C. § 924(c)(3)(B), which employs the same language as 18 U.S.C. § 16(b), remains valid despite *Samuel Johnson*); *United States v. Hill*, No. 14-3872-cr (2d Cir. August 3, 2016), *available at* 2016 WL 4120667 (same); *United States v. Taylor*, 814 F.3d 340, 375-76 (6th Cir. 2016) (same).

File: A045 052 167 – Arlington, VA Date: OCT 14 2016

In re: MOHAMMAD BABUL ISLAM a.k.a. Muhammad Islam

DISSENTING OPINION: Patricia A. Cole

I respectfully dissent.

I conclude 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 further agree with the Immigration Judge 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 agree with the Immigration Judge 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).

In light of the foregoing, I respectfully dissent from the majority's decision to remand the record for further proceedings. Instead, I would affirm the Immigration Judge's decision and dismiss the appeal.

Patricia A. Cole
Board Member

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
1901 South Bell Street, Suite 200
Arlington, VA 22202

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
	)	
ISLAM, Mohammad Babul,	)	
	)	**File No.:** A 045 – 052 – 167
Respondent.	)	
	)	

APPLICATION: Motion to reconsider.

APPEARANCES

FOR THE RESPONDENT:
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FOR THE GOVERNMENT:
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ORDER AND DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The Respondent is a thirty-four-year-old native and citizen of Bangladesh. He was admitted to the U.S. as a lawful permanent resident ("LPR") on or about August 11, 1995. See Exh. 1. On August 11, 2014, he was convicted of unlawful wounding in violation of Virginia Code § 18.2-51 and sentenced to five years' imprisonment. Id. On April 29, 2015, the Department of Homeland Security ("DHS") served the Respondent with a Notice to Appear ("NTA"), charging him with removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as an alien who, at any time after admission, was convicted of an aggravated felony as defined in INA § 101(a)(43)(F), a crime of violence for which the term of imprisonment ordered is at least one year. Id. On July 1, 2015, the Respondent submitted a motion to terminate removal proceedings, alleging his conviction was not for a crime of violence. Exh. 3. On July 9, 2015, DHS submitted an opposition to the Respondent's motion. On July 14, 2015, the Immigration Court denied the Respondent's motion, agreeing with DHS' reasoning stated in its opposition to the motion.

On July 30, 2015, the Respondent filed a motion to reconsider the denial of the motion to terminate, arguing that the Immigration Court erred both procedurally and substantively in its ruling. On August 3, 2015, DHS submitted an opposition to the Respondent's motion to reconsider, reiterating that the Respondent's crime constitutes an aggravated felony crime of

violence. For the reasons that follow, the Immigration Court grants the Respondent's motion to reconsider.

II. EVIDENCE

Exhibit 1: NTA, served April 29, 2015;
Exhibit 2: DHS submission of criminal conviction documents, filed June 11, 2015;
Exhibit 3: Motion to terminate removal proceedings, and supporting documentation, filed July 1, 2015, and including Tabs A-F:
Tab A: Duplicate of Exhibit 2;
Tab B: Virginia jury instructions;
Tabs C-E: Virginia case law;
Tab F: Sample indictments.

III. LAW, ANALYSIS, AND FINDINGS

A motion to reconsider must be filed within thirty days of the date of entry of a final administrative order of removal. INA § 240(c)(6)(B); 8 C.F.R. § 1003.23(b)(1). The motion must state the reasons for reconsideration by specifying the errors of fact or law in the Immigration Court's prior decision. INA § 240(c)(6)(C); 8 C.F.R. § 1003.23(b)(2). Such a motion requests that the original decision be reexamined in light of additional legal arguments, a change in the law, or an argument or aspect of the case that was overlooked. Matter of Cerna, 20 I&N Dec. 399, 402 n.2 (BIA 1991). A party may not submit new evidence with a motion to reconsider. Id. at 402-03. The Board of Immigration Appeals ("BIA" or "Board") has clarified that a motion to reconsider does not permit parties to raise additional legal arguments unrelated to issues previously raised or arguments that "could have been raised earlier." Matter of O-S-G-, 24 I&N Dec. 56, 58 (BIA 2006). Ultimately, the decision to grant or deny a motion to reconsider is within the Immigration Court's discretion. 8 C.F.R. § 1003.23(b)(1)(iv).

The Respondent's motion is timely filed. The Immigration Court sustained the charge on July 14, 2015, and the Respondent filed his motion on July 30, 2015, within the thirty-day deadline. The motion alleges the Immigration Court's prior decision was in error because 1) it improperly ruled based solely on the reasons stated in the opposition's motion; 2) DHS' reasoning in its opposition brief was erroneous; 3) 18 U.S.C. § 16(b) is void for vagueness, or if not, DHS improperly applied Moncrieffe v. Holder, 133 S. Ct. 1678 (2013); and 4) the Immigration Court failed to apply the divisibility analysis in the Respondent's brief. See Motion to Reconsider (July 30, 2015).

A. Procedural Error

First, the Immigration Court analyzes whether its prior decision was procedurally proper. The Respondent alleges that the Immigration Court's decision to adopt DHS' arguments violated his due process rights and potentially denied the BIA the opportunity for "meaningful appellate review." Motion to Reconsider at 3 (July 30, 2015). He states that federal regulations and case law require the Immigration Court to make a removability finding and explain its reasoning. Id. (citing Matter of S-H-, 23 I&N Dec. 462, 463-65 (BIA 2002); 8 C.F.R. § 1240.12(a)). The

federal regulations, however, do not require what the Respondent demands. The relevant statute provides, in relevant part:

> The decision of the immigration judge may be oral or written. The decision of the immigration judge shall include a finding as to inadmissibility or deportability. The formal enumeration of findings is not required. The decision shall also contain reasons for granting or denying the request.

8 C.F.R. § 1240.12(a). The regulations clearly state that a formal enumeration is not required and only "reasons" should be provided. The Immigration Court's decision clearly provided reasons for denying the Respondent's request—"The court agrees with the reasons stated in the opposition to the motion." Order of the Immigration Judge (July 14, 2015).

The Respondent also argues that prevailing case law requires more than what the Immigration Court provided. Upon further consideration, the Immigration Court agrees with the Respondent's contention that it erred procedurally in making its decision. The Respondent claims the Immigration Court should have provided "complete findings of fact" supported by the record and complying with controlling law. Motion to Reconsider at 3 (July 30, 2015). The Respondent further argues that the Immigration Court did not fully explain its reasons for denying the motion and therefore deprived him of a fair opportunity to contest the decision and to provide the Board an opportunity for "meaningful appellate review." Id. (citing Matter of M-P-, 20 I&N Dec. 786 (BIA 1994)). In M-P-, the Board found that when a motion is denied and the reasons for the denial are either "unidentified or not fully explained, an alien is deprived of a fair opportunity to contest that determination on appeal." 20 I&N Dec. at 787-88. The Respondent cites various unpublished BIA decisions remanding cases where Immigration Judges failed to provide "sufficient legal reasoning explaining the basis for their rulings," such as adopting DHS' arguments "without further explanation." Motion to Reconsider at 3-4 (July 30, 2015). Although the cases cited by the Respondent are unpublished, they clarify the BIA's expectations for the completeness of Immigration Court decisions. See id., Tab A at 18 (remanding the matter to the Immigration Judge based on the insufficiency of the statement "[b]ased on the submission of the evidence from the Government, the Court found all allegations to be true and sustained the three charges of removability"); id. at 25 (citing M-P-, 20 I& Dec. 786; Matter of A-P-, 22 I&N Dec. 468 (BIA 1999) and finding the record was insufficient for review because the decision lacked sufficient analysis and only stated that the motion was being denied "for the reasons stated in the DHS's Opposition"); id. at 28 (citing A-P- 22 I&N Dec. 468, and holding that incorporating by reference the reasoning in DHS' brief is insufficient); id. at 31 (citing A-P-, 22 I&N Dec. at 477, and finding that a handwritten notation by an Immigration Judge indicating concurrence with DHS' position was insufficient for review as it did not "adequately address the relevant facts and clearly set forth the Immigration Judge's legal conclusions"); id. at 36 (citing M-P-, 20 I&N Dec. 786, and remanding the case to the Immigration Judge for further decision, finding it inappropriate to adopt the DHS' opposition, and finding that the BIA needs a "full analysis and consideration of the totality of the circumstances").

Given these cases cited the same published Board precedent decision, which requires an Immigration Judge to identify and fully explain reasons for a decision, and to make clear and

complete findings of fact, the Immigration Court acknowledges it erred in making its prior decision.

B. Substantive Error

The Respondent next argues that the Immigration Court erred in relying on DHS' reasoning because it was erroneous. He states the analysis was erroneous in three ways: 1) the analysis of 18 U.S.C. § 16(a) impermissibly conflated the use of physical force with the existence of physical injury; 2) the brief ignores the occurrences of prosecutions for poisoning under the Virginia statute; and 3) the case law the government cites is distinguishable from the Respondent's case.

In reevaluating the record evidence and case law, the Immigration Court finds it prudent to reexamine whether the Respondent's conviction is one for an aggravated felony. The Respondent was convicted of unlawful wounding in violation of Virginia Code § 18.2-51. The statute provides, in relevant part:

> 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.

DHS charged the respondent with removability under INA § 237(a)(2)(A)(iii) for having been convicted of an aggravated felony crime of violence under INA § 101(a)(43)(F). A crime of violence under the INA is any offense that meets the federal definition at 18 U.S.C. § 16, which defines a crime of violence as

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

To constitute a crime of violence under 18 U.S.C. § 16(a), a criminal conviction must involve the active employment of physical force with a higher degree of intent than mere negligence or accidental conduct. Leocal v. Ashcroft, 543 U.S. 1, 9 (2004). Section 16(b) looks not at the elements of the offense, but at whether the offense, by its nature, involves a substantial risk of physical force. The Supreme Court has noted that section 16(b) encompasses "offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." Leocal, 543 U.S. at 10. The level of force required under 18 U.S.C. § 16 is substantial. The Supreme Court has previously held that "physical force" means "violent force…capable of causing physical pain or injury to another person." Johnson v. U.S., 559 U.S. 133, 140 (2010); see Matter of Velasquez, 25 I&N Dec. 278, 283 (BIA 2010).

To determine whether the Respondent's conviction under Virginia Code § 18.2-51 is a crime of violence under INA § 101(a)(43)(F), the Immigration Court applies the categorical approach. The state crime of unlawful wounding will be a categorical match to the federal, or generic, crime of violence only if the "minimum conduct that has a realistic probability of being prosecuted" under the state statute is also addressed by the generic offense. See Matter of Chairez-Castrejon, 26 I&N Dec. 349, 351 (BIA 2014) (citing Moncrieffe, 133 S. Ct. at 1684-85). In determining whether state and generic federal crimes match, the key is "elements, not facts." Descamps v. U.S., 133 S. Ct. 2276, 2283 (2013). Where the state crime is not a categorical match to the generic crime, the Immigration Court must then determine whether the state statute of conviction is divisible. See id. at 2279. Where "the crime [for] which the [Respondent] was convicted has a single, indivisible set of elements," courts may not apply the modified categorical approach. Id. at 2282; see also Moncrieffe, 133 S. Ct. at 1684; Taylor v. U.S., 495 U.S. 575, 599 (1990). However, if the state statute is divisible, the Immigration Court may apply the modified categorical approach and review a limited set of documents to determine whether the elements of the particular offense for which the respondent was convicted match the generic crime of violence. See Shepard v. U.S., 544 U.S. 13, 26 (2005).

The relevant statute sets forth four distinct offenses: 1) malicious wounding; 2) maliciously causing bodily injury; 3) unlawful wounding; and 4) unlawfully causing bodily injury, with different penalties. See Johnson v. Commonwealth, 35 S.E.2d 594, 596-97 (Va. 1945) (recognizing that broadening the statute to include "to cause bodily injury" introduced a new, distinct offense, comprised of new elements); see also Dawkins v. Commonwealth, 41 S.E.2d 500, 505 (Va. 1947) (noting that malicious stabbing and maliciously causing bodily injury by any means are distinct offenses). Therefore, Virginia Code § 18.2-51 is disjunctive and requires inquiry into the specifics of the Respondent's conviction to determine the particular offense under which he was convicted.[1] The Respondent's conviction documents identify the offense to which he pleaded guilty as unlawful wounding, which requires proof that the actor did "shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill." See Exh. 2; Va. Code Ann. § 18.2-51 (West 2015).

The Respondent's conviction under Virginia Code § 18.2-51 is not a crime of violence under section 16(a) because violent force is not a necessary element of the offense. To convict an individual under section 18.2-51, the Commonwealth must prove three elements: 1) the offender shot, stabbed, cut, or wounded any person, or caused bodily injury by any means; 2) the wounding or bodily injury was with the intent to maim, disfigure, disable, or kill that individual; and 3) the act was done either maliciously or unlawfully but not maliciously. 2-37 Virginia Model Jury Instructions - Criminal Instruction No. G37.100. Shooting, stabbing, cutting, or wounding would unquestionably involve "violent force...capable of causing physical pain or injury." Johnson, 559 U.S. at 140. This first element, however, can also be satisfied by showing that the offender caused bodily injury "by any means." Thus, a conviction under section 18.2-51 can presumably encompass acts that do not involve violent force.[2]

[1] The Respondent urges the Immigration Court to adopt the divisibility analysis he proposed in his brief. The Immigration Court finds, however, based on prevailing Virginia law, that the statute is divisible.

[2] The Respondent provided several examples demonstrating physical force is not necessary for a conviction under the statute. See Motion to Terminate at 16-18 (July 1, 2015).

The Respondent alleges that DHS disregards the Leocal 18 U.S.C. § 16(a) analysis by arguing all acts that could fall under the "any means" prong of the statue "are capable of causing physical pain or injury *because the statute requires that they result in bodily injury.*" Motion to Reconsider at 5 (July 30, 2015) (citing DHS Motion in Opposition at 2 (July 9, 2015)). DHS claims the Respondent mischaracterized its argument. DHS argues all of the acts in the statute "can cause injury because they are required to have actually caused it and are therefore a match to physical force and the conviction is a crime of violence." DHS Opposition at 2 (Aug. 3, 2015). DHS is incorrect; merely because all the acts may cause injury does not mean that they require *force* capable of causing injury. DHS conflates the test for physical force and physical injury. The parties agree physical force is intentional, violent force, capable of causing physical pain or injury. See Velasquez, 25 I&N Dec. at 283. Under DHS' reading, *any* act that causes physical pain or injury would involve physical force; this cannot be. Rather, under BIA and Supreme Court precedent, any *force* that causes physical pain or injury qualifies as *physical force*. There must be *force* involved that causes the injury. Mere existence of pain or injury will not suffice. Thus, the Respondent is correct. DHS' reasoning is erroneous and a conviction under Virginia Code § 18.2-51 is not a crime of violence under 18 U.S.C. § 16(a).

Although unlawful wounding is not a crime of violence under subsection (a), it may be a crime of violence under subsection (b). The conviction need only be for a felony that, by its nature, involves a substantial risk that physical (i.e. violent) force against the person or property of another may be used in the course of committing the offense. The Supreme Court in Leocal instructed that subsection (b) requires that there is a substantial risk of use of physical force against another "in the course of committing the offense." 543 U.S. at 11. The Board has decided that in determining the risk of the use of such force, the proper inquiry is whether the crime carries a substantial risk of the use of physical force in the ordinary case. Matter of Singh, 25 I&N Dec. 670, 677 (BIA 2012). Recently, the Board also found that the Supreme Court's decision in Moncrieffe has not affected the "ordinary case" test set forth in prior Supreme Court decisions. Matter of Francisco-Alonzo, 26 I&N Dec. 594, 599 (2015). The Supreme Court, however, more recently determined that the "ordinary case" analysis is unworkable. See Johnson v. U.S., No. 13-7120, 2015 WL 2473450 (June 26, 2015). The Johnson decision rejected the dissent's suggestion of examining actual conduct, and instead confirmed that the "only plausible interpretation of the law . . . requires use of the categorical approach." Id. at *9.

The Respondent argues Johnson explicitly found 18 U.S.C. § 16(b) void for vagueness. Motion to Reconsider at 8-10 (July 30, 2015). He states that the Supreme Court found the residual clause of the Armed Career Criminal Act ("ACCA"), which mirrors subsection (b), void for vagueness. Id. at 9. The Johnson case, however, did not explicitly deal with 18 U.S.C. § 16; it dealt with a separate, albeit similarly worded, federal statute. The Immigration Court declines to extend the Supreme Court's holding to a different statute. Although it is possible that the Supreme Court may find 18 U.S.C. § 16(b) void for vagueness, it has not yet done so.

In the alternative, the Respondent argues DHS' brief does not apply the appropriate analysis under Moncrieffe. Motion to Reconsider at 8-10 (July 30, 2015). He states that the Supreme Court also expressly overruled the "ordinary case" analysis, which the BIA has adopted in analyzing subsection (b). Id. The Immigration Court will not apply the "ordinary case" analysis, because it has found, as discussed above, that the appropriate analysis under the

categorical approach is dictated by Moncrieffe. Under this approach, the factfinder must "presume that the conviction rested on nothing more than the least of the acts criminalized and then determine whether those acts" pose a substantial risk that physical force will be used. Moncrieffe, 133 S. Ct. at 1684. Although Moncrieffe analyzed a drug offense, it nevertheless dealt with the use of the categorical approach for aggravated felonies. Id. at 1685.

The least culpable conduct punishable by the Virginia statute is causing another bodily injury, with the intent to maim, disfigure, disable, or kill. This conduct does not involve physical force. For example, an individual could intend to disable someone by cutting the brake lines in her car. Such an action would not constitute physical force. Causing injury by any means (with intent to harm) does not "by its nature" involve a substantial risk that physical force will be intentionally used. 18 U.S.C. § 16(b). Therefore Virginia Code § 18.2-51 is not a crime of violence under 18 U.S.C. § 16(b).

The Respondent also alleges that DHS ignored the examples provided of poisoning prosecutions, which prove that the statute does not include a required element of physical force under subsection (a) and does not inherently involve a substantial risk of physical force under subsection (b). DHS responded by claiming that poisons are a weapon on the same level as a gun, knife, or bomb. DHS Opposition at 2 (Aug. 3, 2015). DHS then cites several examples that result in "gruesome physical injury" and reasons that such injuries are forceful and violent because they cause injury. Id. at 2-3. DHS argues there is no difference between shooting and poisoning such that one involves physical force and the other does not. Id. at 3. This reasoning again conflates the existence of a physical injury, however gruesome, with the presence of physical force. This cannot be true, or all crimes resulting in physical injuries would be crimes of violence.

Additionally, the Respondent claims that the decisions DHS cites in its brief are distinguishable from his case. In those cases, the petitioners did not establish that the Virginia statute covered conduct that falls outside the federal definition; the Respondent here has demonstrated a range of conduct, including poisoning, that falls outside that definition. Therefore, DHS' citations are distinguishable from this case.

Accordingly, the Immigration Court finds the Respondent's conviction is not a crime of violence under 18 U.S.C. § 16(a) or (b). The Immigration Court emphasizes, however, that it only finds that his crime is not *categorically* a crime of violence under either subsection. Where the facts in the record clearly identify which statutory elements an individual was convicted of, a violation of Virginia Code § 18.2-51 could constitute a crime of violence. Such facts are absent here.

IV. CONCLUSION

DHS has failed to establish that the Respondent has been convicted of a crime of violence as defined in 18 U.S.C. § 16. Therefore, DHS has also failed to prove he has been convicted of an aggravated felony as defined in INA § 101(a)(43)(F). Finding both procedural and substantive error in the Immigration Court's prior decision, the Immigration Court grants the

Respondent's motion to reconsider. Having not sustained the charge, and there being no additional charges of removability, the Immigration Court must terminate proceedings.

Accordingly, the Immigration Court enters the following orders:

ORDER

It is Ordered that: The Respondent's motion to reconsider be **GRANTED.**

It is Further Ordered that: The Respondent's motion to terminate proceedings be **GRANTED.**

AUGUST 19, 2015
Date

Rodger C. Harris
U.S. Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due at the Board of Immigration Appeals within thirty (30) calendar days after the date of service of this decision.