No. _____

In The
Supreme Court of the United States

ANTELMO ROCHA-AYALA,

Petitioner,

v.

ERIC HOLDER, Jr.,
United States Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

RAED GONZALEZ
Counsel of Record for Petitioner
GONZALEZ OLIVIERI LLC
2200 Southwest Freeway, Suite 550
Houston, TX 77098
(713) 481-3040
rgonzalez@gonzalezolivierillc.com

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

NAIMEH SALEM
GONZALEZ OLIVIERI LLC
2200 Southwest Freeway, Suite 550
Houston, TX 77098
(713) 481-3040
NSalem@gonzalezolivierillc.com

SHERIDAN GREEN
GONZALEZ OLIVIERI LLC

EDWIN REYES
GONZALEZ OLIVIERI LLC

GABRIEL GUZMAN
GONZALEZ OLIVIERI LLC

BRIAN K. BATES
REINA & BATES
123 Northpoint Drive, Suite 190
Houston, TX 77060
(281) 820-6100

ALEXANDER B. WATHEN
WATHEN & ASSOCIATES
13280 Northwest Freeway, Suite F352
Houston, TX 77040
(281) 999-9025
wathenecf@gmail.com

QUESTION PRESENTED FOR REVIEW

Under the Immigration and Nationality Act ("INA"), an alien is deportable for committing an "aggravated felony," which is defined, in part, as a "crime of violence (as defined in section 16 of Title 18, United States Code . . .) for which the term of imprisonment [is] at least 1 year. . . ." 8 U.S.C. § 1101(a)(43)(F). Additionally, a lawful permanent resident alien is barred from seeking cancellation of removal if he or she has committed an aggravated felony. 8 U.S.C. § 1229b(a)(3). The question presented is:

Whether a conviction under Texas Penal Code § 22.04(a)(3) for intentional bodily injury to a child is an aggravated felony crime of violence pursuant to the categorical and modified categorical approach.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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The decision of the Board of Immigration Appeals denying Petitioner's Motion to Reconsider its denial of his appeal affirming the Immigration Judge finding Petitioner deportable from the United States under 8 U.S.C. § 1227(a)(2)(A)(iii) and 8 U.S.C. § 1227(a)(2)(E)(i) is unreported. *In re Antelmo Rocha-Ayala v. Holder*, File A041 103 438 (BIA, June 28, 2013). App. 5-7.

The decision of the Board of Immigration Appeals reissuing its order affirming the decision of the Immigration Judge is unreported. *In re Antelmo Rocha-Ayala v. Holder*, File A041 103 438 (BIA, April 22, 2013). App. 8-9.

The decision of the Board of Immigration Appeals affirming the decision of the Immigration Judge is unreported. *In re Antelmo Rocha-Ayala v. Holder*, File A041 103 438 (BIA, Feb. 12, 2013). App. 11-19.

The decision of the Immigration Judge finding Petitioner deportable is unreported. *In re Antelmo Rocha-Ayala v. Holder*, File A041 103 438 (IJ, Feb. 5, 2012). App. 4.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petitions for review on March 19, 2014. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. § 1254(1) because Petitioner is a "party to any civil or criminal case, before or after rendition of judgment or decree."

CONSTITUTIONAL AND STATUTORY PROVISIONS

INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), which provides: "Aggravated felony. Any alien who is convicted of an aggravated felony at any time after admission is deportable."

INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F), which provides: "The term 'aggravated felony' means – a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year."

18 U.S.C. § 16(b), which provides: "The term "crime of violence" means – 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."

8 C.F.R. § 1003.2(b), which provides: "Motion to reconsider. (1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. A motion to reconsider a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, may be deemed a motion to remand the decision for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with the appeal to the Board. (2) A motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the Board decision or on or before July 31, 1996, whichever is later. A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider. In removal proceedings pursuant to section 240 of the Act, an alien may file only one motion to reconsider a decision that the alien is removable from the United States. (3) A motion to reconsider based solely on an argument that the case should not have been affirmed without opinion by a single Board Member, or by a three-Member panel, is barred."

Texas Penal Code § 22.04(a)(3), which provides: "Injury to a Child, Elderly Individual, or Disabled Individual. (a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury."

Texas Penal Code § 1.07(a)(8), which provides: "'Bodily injury' means physical pain, illness, or any impairment of physical condition."

STATEMENT OF THE CASE AND RELEVANT FACTS

This case involves the Fifth Circuit's interpretation of 18 U.S.C. § 16(b), which defines a "crime of violence," specifically whether a conviction for intentionally causing bodily injury under Texas Penal Code § 22.04(a) necessarily entails a substantial risk of the use of physical force.

Petitioner Antelmo Rocha-Ayala was convicted under the above-stated Texas criminal provision. According to his indictment, the conduct of conviction was "grabbing [a minor] with his hand." App. 15-16. An immigration judge ("IJ") found that this conviction amounted to an aggravated felony "crime of violence." App. 16-17. The BIA affirmed the IJ's decision without opinion. App. 10. The Fifth Circuit Court of

Appeals dismissed the petition for review citing its precedential, on-point case of *Perez-Munoz v. Keisler*, 507 F.3d 357 (5th Cir. 2007), finding the same Texas statute to be a crime of violence under 18 U.S.C. § 16(b). App. 1-4.

Petitioner contends that the Fifth Circuit's analysis is incorrect because a conviction under Texas Penal Code § 22.04(a) for causing bodily injury to a child will lie, in the ordinary case, for conduct which does not require violent or destructive force since "bodily injury" is defined extremely broadly to encompass "minor physical contacts." *Matter of M-C-L*, 110 S.W.3d 591, 600 (Tex. App. 2003). In upholding its previous determination that intentionally causing mere "bodily injury" is a crime of violence, the Fifth Circuit is essentially contradicting its own definition of "force" in the context of 18 U.S.C. § 16 which it determined in *U.S. v. Rodriguez-Guzman*, 56 F.3d 18, 20 n.8 (5th Cir. 1995) necessarily meant force that is "synonymous with destructive or violent force." It is clearly the role of this Court to intercede when the lower courts of appeals apply their own precedents arbitrarily.

Additionally, because the present case deals with Texas' statutory definition of "bodily injury," and Texas lies in the jurisdiction of the Fifth Circuit Court of Appeals, the Fifth Circuit's determination that any statute of conviction with intentional conduct causing "bodily injury" as an element is necessarily a crime of violence is likely to be extremely persuasive to any other federal jurisdiction attempting to determine

whether various assault crimes under the Texas Penal Code or in the penal codes of other states that have similarly broad definitions of "bodily injury" are "crime[s] of violence." Moreover, the Fifth Circuit's interpretation has already influenced the Board of Immigration Appeals. *See Matter of Singh*, 25 I&N Dec. 670, 677 (BIA 2012) (applying *Perez-Munoz v. Keisler* in a case arising out of the Fourth Circuit Court of Appeals). Moreover, this decision goes beyond the proper application of Texas Penal Code § 22.04 because "bodily injury" is a common standard in other Texas assault conviction statutes. *See* Texas Penal Code §§ 22.01(a)(1); 22.041(c); 22.041(e); and 22.05(a).

Furthermore, tens of thousands of aliens are removed each year. In Federal Year 2013, ICE removals of individuals apprehended in the interior of the U.S. topped 133,000. *See* U.S. Immigration and Customs Enforcement, *Federal Year 2013 ICE Immigration Removals*, available at https://www.ice.gov/removal-statistics/. Of these, 82% had previously been convicted of a crime. Therefore, the Court's resolution of this issue is likely to be critical in the decisions whether to deport or deny cancellation of removal to thousands of lawful permanent residents. *Id.* It is also evident that the question presented has tremendously significant implications for the human beings affected. This Court has previously held on numerous occasions that the consequences of deportation are tantamount to "banishment of exile." *See Padilla v.*

Kentucky, 130 S.Ct. 1473, 1486, 559 U.S. 356, 176 L.Ed.2d 284 (2010).

A. Jurisdiction of the Court of Appeals

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA § 242(a)(1), 8 U.S.C. § 1252(a)(1), which provides for judicial review of a final order of removal.

B. Background

The Petitioner, Mr. Antelmo Rocha-Ayala, is a native and citizen of Mexico who first entered the United States on September 19, 1987 as a legal permanent resident. App. 12. On December 6, 2004, Petitioner was convicted under Texas Penal Code § 22.04(a) for injury to a child under the age of fifteen after "grabbing [a minor] with his hand," according to the indictment. App. 12-16. On May 29, 2012, the Department of Homeland Security issued a Notice to Appear (hereafter "NTA"), charging Petitioner with removability pursuant to INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i), as an alien who at any time after entry had been convicted of a "crime of child abuse." On June 27, 2012, DHS charged Petitioner with an additional charge of removability pursuant to INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), charging him as an alien who at any time after admission was convicted of an aggravated felony "crime of violence." *See*, INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F). App. 11.

C. Before the Immigration Judge

On November 5, 2012, after briefing by both parties, the immigration judge ordered that Petitioner be removed from the United States to Mexico. In support of this decision, the immigration judge reviewed the pertinent statutes, including 18 U.S.C. § 16 (crime of violence) and Texas Penal Code § 22.04(a) (injury to a child), and concluded that Petitioner's conviction for "grabbing [a minor] with his hand" qualified as an aggravated felony "crime of violence" under 18 U.S.C. § 16(b). App. 16-17. The immigration judge employed the modified categorical approach and reviewed the criminal indictment which stated that Petitioner "did then and there unlawfully, intentionally and knowingly cause bodily injury to . . . the Complainant, a child younger than fifteen years of age, by grabbing her with his hand." App. 15-16. Based on the indictment and the conviction record, the immigration judge found the offense to have involved an intentional and knowing act. App. 16. Thus, the immigration judge, relying on the Fifth Circuit's decision in *Perez-Munoz v. Keisler*, 507 F.3d 357 (5th Cir. 2007) – which held that a "crime of violence" is an aggravated felony when the offense was committed by an intentional act rather than by omission – found Petitioner removable as an aggravated felon. App. 16.

Additionally, the immigration judge found Petitioner's conviction for causing bodily injury by "grabbing [a minor] with his hand," qualified as a "crime of child abuse." App. 14-15. The immigration judge,

relying on the Board of Immigration Appeals' (hereafter "BIA" or "Board") decision in *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008) – which held that the "crime of child abuse" meant any "offense involving an intentional, knowing" act of maltreatment of a child, which "[a]t a minimum" included "convictions for offenses involving the infliction on a child of physical harm, even if slight; mental or emotional harm . . . ; sexual abuse . . . including . . . prostitution, pornography . . . ; as well as any act that involves the use or exploitation of a child. . . ." – found that Petitioner's offense fell within the definition of a "crime of child abuse" so as to render him removable. App. 18.

D. Administrative Appeal

On January 14, 2013, Petitioner appealed his case to the BIA, asserting that the immigration judge erred in its decision. Specifically, Petitioner maintained that his conviction for injury to a child was not an aggravated felony pursuant to INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), since the offense did not constitute a "crime of violence" as defined under 18 U.S.C. § 16(b). Petitioner further maintained that his conviction for injury to a child was not a "crime of child abuse" pursuant to INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i), since the act of grabbing a child by the hand, as stated in the indictment, does not place the child in a position where a reasonable probability that his life or health will be endangered. Nevertheless, on February 12, 2013, the BIA

affirmed, without opinion, the immigration judge's decision. App. 10.

On May 22, 2013, Petitioner filed a motion to reconsider with the BIA, pleading that it reconsider its April 22, 2013 decision in light of material changes in the law, as the Fifth Circuit had recently issued an opinion on the issue with *Rodriguez v. Holder*, 705 F.3d 207 (5th Cir. 2013). That case held that in determining whether a conviction categorically rises to the level of an aggravated felony "crime of violence" pursuant to 18 U.S.C. § 16(b), courts must ask whether there is a "strong probability" that the application of "destructive or violent physical force" may be used during the commission of the crime. *Id.* at 213. Thus, because the language of the indictment in this case shows that a conviction will lie under Texas Penal Code § 22.04(a) for an act as non-forceful and non-destructive as grabbing a child with one's hand, categorically the minimum conduct of that offense falls short of "destructive or violent force" and hence can never be a crime of violence under 18 U.S.C. § 16(b)

Therefore, Petitioner maintained that the BIA erred in affirming the decision of the immigration judge on account of the new, precedential case which substantively changed the determinative measure of "crime of violence" from merely "an intentional act rather than by omission" – as initially held in the Fifth Circuit's 2007 case of *Perez-Munoz* – to a "strong probability" that the application of destructive or violent physical force would occur during the

commission of the crime – as recently held in the Fifth Circuit's 2013 case of *Rodriguez*.

On June 28, 2013, the BIA denied Petitioner's motion. App. 5. The BIA held that the Fifth Circuit's decision in *Rodriguez* did not establish that Petitioner's "Texas conviction for injury to a child no longer qualifies as a crime of violence under 18 U.S.C. § 16(b), particularly when [Petitioner's] offense involves a child victim and the Fifth Circuit's decision specifically distinguishes its particular holding from those cases where the age of the victim is an element of the offense." (citing *Rodriguez*, 705 F.3d at 214-15). App. 6.

E. Judicial Review

Petitioner timely filed two separate petitions with the Fifth Circuit, seeking review of the BIA's orders dismissing his appeal and also its order denying his motion for reconsideration. Petitioner asserted that the BIA committed legal error by denying and also not reconsidering his case, as the very conduct at issue ("grabbing [a minor] with his hand,") demonstrates that a conviction under Texas Penal Code § 22.04(a) may lie for conduct which does not present a potential risk of using violent or destructive force "in the ordinary case." Petitioner distinguished his case from the merely conceivable and unusual situations which the U.S. Supreme Court in *James v. United States*, 550 U.S. 192, 127 S.Ct. 1586, 1597, 167 L.Ed.2d 532 (2007), found could not be used to

hypothesize a convictable crime which would not rise to the whatever standard was required for deportation, in that case a "serious potential risk of physical injury." Here, Petitioner argued, the very conduct he was convicted of was itself proof that a non-hypothetical action which was not necessarily violent could receive a conviction under Texas Penal Code § 22.04(a), and therefore intentionally causing "bodily injury," as defined in Texas, is not categorically a crime of violence.

Second, Petitioner argued that his offense was not categorically a "crime of child abuse" because the broad Texas definition of "bodily injury" created only the bare potential for non-serious harm to a child. *Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009). Thus, Petitioner maintained that the BIA either made an error of law in holding that its definition of child abuse reached the conduct in this case or that, in the alternative, if the BIA's definition of child abuse did in fact reach the conduct in this case, it was unreasonably broad pursuant to *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

On March 19, 2014, the Fifth Circuit denied Petitioner's petitions for review of both the BIA's order dismissing his appeal, as well as the BIA's order denying his motion for reconsideration. App. 1-5. With regard to whether Petitioner's conviction constituted a "crime of violence," the Fifth Circuit cited to its 2007 decision in *Perez-Munoz* to conclude that "when the offense was committed by an intentional

act rather than by omission, the alien's conviction is for an aggravated felony." App. 3. The Fifth Circuit went on to state,

> [Petitioner] nevertheless argues that [his conviction] was not a [crime of violence] because '*there is no strong probability that physical force (destructive or violent) will be used when grabbing a child with one's hand.*' . . . however . . . *the details of the intentional act committed in a given case are irrelevant* because the commission of the crime by an *intentional act will ordinarily involve the use or risk of use of physical force by the perpetrator*.

App. 3 (citing to *Perez-Munoz,* 507 F.3d at 364) (emphasis added).

Additionally, the Court denied Petitioner's argument relating to a crime of child abuse as being inadequately briefed on the grounds that Petitioner did not cite the standard for judicial review of motions to reconsider, despite the fact that Petitioner's brief devoted seven pages to the issue. App. 4.

REASONS FOR GRANTING THE PETITION

The issue in this case is whether all convictions under the Texas Penal Code involving intentional conduct causing "bodily injury," such as Texas Penal Code § 22.04(a)(3), are necessarily crimes of violence under 18 U.S.C. § 16(b). The Fifth Circuit in its

denial of Petitioner's petition for review cited its precedent decision in *Perez-Munoz v. Keisler*, 507 F.3d 357, 359 (5th Cir. 2007), which in turn relied heavily on this Court's decision in *James*, which stated that the question whether a conviction is a crime of violence turns on whether it presents a serious potential risk of injury to another "in the ordinary case," without focus on bizarre hypothetical situations. *Id.* at 1598.

Petitioner contends that the Fifth Circuit's analysis in *Perez-Munoz* leads to an incorrect result in this case because "bodily injury," as broadly defined in the Texas Criminal Code and as interpreted by Texas criminal cases, necessarily encompasses conduct which falls below the standard of "violent or destructive force" necessary to qualify as a "crime of violence" under 18 U.S.C. § 16(b). Furthermore, such conduct is not "hypothetical," as evidenced by this very case in which Petitioner was convicted of causing bodily injury by "grabbing [a minor] with his hand."

A. *Descamps v. United States* held that a conviction cannot be used as a predicate offense in a later proceeding if the elements of conviction are broader than the "generic offense."

As the Court explained in *Descamps v. United States,* 133 S.Ct. 2276, 2281, 570 U.S. ___, 186 L.Ed.2d 438 (2013) the categorical approach applies when a prior conviction is utilized in a later federal

proceeding, such as sentencing enhancement, to ensure that the defendant was actually convicted of all of the elements necessary for the use of the conviction as a particular predicate. *Id.* at 2283. This applies equally in the deportation context when past federal or state convictions are used as a predicate for grounds of deportability and inadmissibility such as a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F). *See Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) ("This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime.").

In *Descamps*, a federal sentence enhancement case, this Court stated that the appropriate inquiry in determining whether a prior conviction qualifies as an Armed Criminal Career Act predicate is whether "the statute's elements are the same as, or narrower than, those of the generic offense." *Id.* at 2281. If the elements of the statute of conviction all fall within the elements of the generic offense, then the person is said to have committed the generic offense and the sentencing court may then rely on the prior conviction as a predicate.

The BIA has held that *Descamps* applies in the immigration context. *See Matter of Tavares Peralta,* 26 I&N Dec. 171, 178 (BIA 2013). Therefore, if Petitioner's conviction elements are *more broad* than the charged "generic offense" (in this case, a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F) which in

turn refers to 18 U.S.C. § 16(a) and (b)), he cannot be held deportable as an aggravated felon.

B. A "crime of violence" is a generic offense requiring "destructive or violent force."

18 U.S.C. § 16(b) defines a crime of violence as:

> any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Petitioner was convicted under Texas Penal Code § 22.04(a) for causing bodily injury to a child. Therefore, the issue in this case is whether a conviction for causing bodily injury to a child "always entail[s] a substantial risk that physical force – defined as violent or destructive force – may be used." *Rodriguez v. Holder*, 705 F.3d 207 (5th Cir. 2013). The Fifth Circuit's practice of defining "force" as "violent or destructive force" has a long history. *See*, *e.g., United States v. Rodriguez-Guzman*, 56 F.3d 18, 20 n. 8 (5th Cir. 1995).

The Fifth Circuit stated in *Rodriguez* that "when analyzing the operative phrase 'substantial risk,' it is not necessary that '[the risk] *must* occur in every instance; rather, a substantial risk requires a strong probability that the event, in this case the application of physical force during the commission of the crime, will occur.'" *Id.* at 213 (emphasis in original).

C. Causing "bodily injury" encompasses "minor physical contacts" and causing "any physical pain, however minor."

In Texas, the phrase "bodily injury" is defined as "physical pain, illness, or any impairment of physical condition." Texas Penal Code § 1.07(a)(8). This definition of bodily injury is extremely broad and can encompass "relatively minor physical contacts." *Matter of M-C-L*, 110 S.W.3d 591, 600 (Tex. App. 2003). *See also*, *Lane v. State*, 763 S.W.2d 785 (Tex. Crim. App. 1989) ("In fact, the degree of injury sustained by a victim and the 'type of violence' utilized by an accused appear to be of no moment."); *Garcia v. State*, 367 S.W.3d 683 (Tex. Crim. App. 2012) ("Any physical pain, however minor, will suffice to establish bodily injury.").

D. This case presents a non-hypothetical conviction for "bodily injury to a child" which does not by its nature involve a substantial risk of the use of violent or destructive force.

Perez-Munoz v. Keisler, 507 F.3d 357, 361 (5th Cir. 2007), decided the same issue as in this case, whether a conviction under Texas Penal Code § 22.04(a) for bodily injury to a child was a crime of violence under 18 U.S.C. § 16(b). In that case, the Fifth Circuit cited to this Court's decision in *James v. United States*, 550 U.S. 192, 127 S.Ct. 1586, 1591, 167 L.Ed.2d 532 (2007), for the proposition that a crime need only present a potential risk of the use of

physical force 'in the ordinary case' to qualify as a crime of violence. 507 F.3d at 364. The Supreme Court, dealing with a similar statute requiring "conduct that presents a serious potential risk of physical injury to another," stated: "We do not view that approach as requiring that every *conceivable* factual offense must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." *James*, 127 S.Ct. 1586, 1597 (emphasis added). The Court further stated that "[o]ne can always *hypothesize unusual* cases in which a prototypically violent crime might not present a genuine risk of injury." *Id.* (emphasis added). The Court went on to invent a number of such fanciful, hypothetical scenarios such as an attempted murder where the shooter did not realize he had no bullets. *Id.* The Fifth Circuit in *Perez-Munoz* thus concluded: "Being able to imagine *unusual* ways the crime could be committed without the use of physical force does not prevent it from qualifying as a crime of violence under § 16(b)." *Perez-Munoz v. Keisler*, 507 F.3d at 364 (emphasis added).

The respondent's argument in *Perez-Munoz* was based on such a hypothetical, that of poisoning a child's drink. *Id.* at 364. The court rejected this argument because "this is not the ordinary, usual way the crime is committed." *Id.* In fact, Perez-Munoz had been convicted of striking a child, not poisoning the drink of a child. *Id.* at 359. Therefore, relying on *James*, the Fifth Circuit held that just because Perez-Munoz could dream up an unusual way he *could* have

committed the crime did not mean that the conviction, in the ordinary case, did not involve a "substantial risk of physical force." *Id.* at 362.

This Court's emphasis on disregarding unusual hypothetical scenarios is the key to the present case. Perez-Munoz was not charged with putting poison in a child's drink. He was charged with causing bodily injury by striking a child. *Id.* at 359. The court did not have to consider whether an actual Texas criminal conviction for causing injury to a child by poisoning would have been a crime of violence because it was able to dismiss the made-up factual scenario as hypothetical and distinguish it under *James* as not "the usual way the crime is committed." *Id.* at 364.

In the present case, Petitioner was actually charged in the indictment with "grabbing [a minor] with his hand." App. 15-16. This is not a "hypothetical," merely "conceivable," or "unusual" application of Texas Penal Code § 22.04(a)(3). Although no statistical paradigm has been offered by the Fifth Circuit to determine whether this crime is "unusual" or whether it is just "usual," it stands to reason that the majority of Texas non-serious bodily injury convictions *could* be for conduct not involving "destructive force." Recall that the definition of bodily injury is "physical pain, illness, or any impairment of physical condition." Texas Penal Code § 1.07(a)(8). There is not even a hint in that definition that destructive force is required for a conviction "in the ordinary case." *Perez-Munoz*, 507 F.3d at 364. Petitioner contends that if Perez-Munoz had *actually*

been convicted of poisoning a child's drink, he would not have been found deportable for committing a crime of violence under 18 U.S.C. § 16(b) because the fact of conviction would have shown, in and of itself, that the non-violent scenario *was not hypothetical*. Counsel is not aware of any actual Texas convictions under Tex. Penal Code Ann. § 22.04 for poisoning a child's drink. Therefore, we cannot disagree with the Fifth Circuit's decision that "this is not the usual way the crime is committed." *Perez-Munoz*, 507 F.3d at 364.

However, the Fifth Circuit in the present case denied Petitioner's petition for review, stating that "the details of the intentional act committed in a given case are irrelevant because the commission of the crime by an intentional act will ordinarily involve the use or risk of use of physical force by the perpetrator." App. 3. But the court misunderstood Petitioner's argument. He was not contending that the details of his particular case should be considered in an ultimate determination of whether violent or destructive force *was actually involved*. This would be a violation of the categorical approach, as explained *supra*. Petitioner was arguing that his case is an objective example of the fact that a conviction *will* lie under Texas Penal Code § 22.04(a)(3), or any Texas criminal statute requiring mere "bodily injury" as an element, for conduct falling below the level of destructive or violent force in the ordinary case. There is nothing hypothetical or extraordinary about Petitioner's criminal conviction. Therefore, the Fifth Circuit has misunderstood the manner in which

Texas criminal courts apply the term "bodily injury" in an actual, usual sense.

The fact that Petitioner was convicted of committing bodily injury by "grabbing [a minor] with his hand" is evidence that grabbing with one's hand is not merely a "conceivable" or hypothetical way in which the crime of bodily injury to a child could be committed. It is the actual, non-inherently violent way in which the crime could probably be committed in the "ordinary case" or in every case. *Perez-Munoz*, 507 F.3d at 364.

It is clear that there is not a strong probability of the application of violent force in every usual circumstance that could give rise to a conviction for causing bodily injury because grabbing a minor with one's hand is easily accomplished without violence and will in fact be accomplished without violence "in the ordinary case." *Id.* It does not matter whether violence actually occurred during the commission of the crime in this case. The question is whether it was likely to occur, given the nature of the crime. *Rodriguez v. Holder*, 705 F. 3d at 213. Violence was likely to occur when Perez-Munoz struck a child. Strike is defined by Merriam Webster as "to aim and *usually* deliver a blow," and "to come into contact *forcefully*."[1] The very definition bespeaks force and violence in the *usual* case. On the contrary, "grab" is defined as "to

[1] *Available at*, http://www.merriam-webster.com/dictionary/strike?show=0&t=1375391672 (emphasis added), accessed 6/17/2014.

take or seize by or as if by a sudden motion."[2] Grab elicits notions of haste, but not force. It is common to intentionally grab a child without violence, such as to keep him or her from running into traffic or falling down a flight of stairs. Therefore, the conviction in this very case shows that causing mere "bodily injury" in Texas encompasses non-violent conduct in the ordinary case. Therefore, it is categorically not a crime of violence.

This very case demonstrates why not *every* intentional act which forms the basis of a conviction under Texas Penal Code. § 1.07(a)(8) is necessarily a crime of violence. Because the conviction in this case shows that convictions under Texas Penal Code § 22.04(a)(3) may not amount to violent or destructive force *in the ordinary case*, the elements of Petitioner's conviction statute are indeed more broad than the "generic offense," i.e., a "crime of violence." *Descamps,* 133 S.Ct. at 2281.

In *Descamps*, this Court held that a federal sentencing court could not utilize Descamp's burglary conviction as a predicate because he *could have* been convicted for a "burglary" without "breaking and entering," an element required in the generic offense. *Descamps v. U.S.*, 133 S.Ct. at 2282. Similarly, in this case, Petitioner *could have* been convicted of merely grabbing a child with his hand and causing minimal pain. As such, a non-violent conviction under Texas

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[2] *Available at*, http://www.merriam-webster.com/dictionary/grab, accessed 6/17/2014.

Penal Code § 22.04 is not hypothetical or unusual, per *James*, and because the definition of "bodily injury" is so broad that it encompasses minimum contacts and the least possible pain, the statute of conviction does not categorically involve the risk of "violent or destructive force" and hence cannot be a crime of violence under 18 U.S.C. § 16(b).

CONCLUSION

Petitioner was convicted of a crime requiring an element of causing "bodily injury" as defined in the Texas Penal Code. However, as evidenced by the criminal conviction in this very case, causing "bodily injury" does not require in the *ordinary* case a substantial risk of "violent or destructive" force. For this reason a conviction under Texas Penal Code § 22.04(a)(3) for causing bodily injury to a child does not rise to the level of destructive or violent force that even the Fifth Circuit has held is necessary to determine whether a statute is a crime of violence. Therefore, Petitioner was not deportable on a crime of violence charge and we ask that this Court grant certiorari in this matter.

Respectfully submitted,

RAED GONZALEZ
Counsel of Record for Petitioner
GONZALEZ OLIVIERI LLC
2200 Southwest Freeway, Suite 550
Houston, TX 77098
(713) 481-3040
rgonzalez@gonzalezolivierillc.com

NAIMEH SALEM
GONZALEZ OLIVIERI LLC
2200 Southwest Freeway, Suite 550
Houston, TX 77098
(713) 481-3040
NSalem@gonzalezolivierillc.com

SHERIDAN GREEN
GONZALEZ OLIVIERI LLC

EDWIN REYES
GONZALEZ OLIVIERI LLC

GABRIEL GUZMAN
GONZALEZ OLIVIERI LLC

BRIAN K. BATES
REINA & BATES
123 Northpoint Drive, Suite 190
Houston, TX 77060
(281) 820-6100

ALEXANDER B. WATHEN
WATHEN & ASSOCIATES
13280 Northwest Freeway, Suite F352
Houston, TX 77040
(281) 999-9025
wathenecf@gmail.com

ANTELMO ROCHA-AYALA also known as Antelmo Rocha, also known as Antelmo Yala Rocha, also known as Antelmo Ayal Rocha, also known as Antelmo Rocha-Ayal, also known as A. A. Rocha, also known as Antelmo A. Rocha, also known as Anthelmo A. Rocha, Petitioner,

v.

ERIC H. HOLDER, JR., U. S. ATTORNEY GENERAL, Respondent.

No. 13-60344. Summary Calendar.

United States Court of Appeals, Fifth Circuit.

Filed: March 19, 2014.

Before: DAVIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM.*

Antelmo Rocha-Ayala (Rocha), a native and citizen of Mexico, was admitted to this country as an immigrant in 1987. In 2004, Rocha was convicted of injury to a child in violation of § 22.04(a)(3) of the Texas Penal Code Annotated, and he was sentenced to a two-year term of imprisonment. Subsequently, Rocha was charged with removability under 8 U.S.C. § 1227(a)(2)(A)(iii) as an alien convicted of an aggravated felony, which was a crime of violence ("COV") as

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

defined at 8 U.S.C. § 1101(a)(43)(F). He was also charged with removability under § 1227(a)(2)(E)(i) as an alien who had been convicted of a crime of child abuse. Rocha conceded the fact of his prior conviction and the fact he had received a two-year sentence. Thus, the only pertinent questions for the immigration judge (IJ) to determine were whether Rocha's prior conviction was a COV for purposes of § 1101(a)(43)(F) or a crime of child abuse for purposes of § 1227(a)(2)(E)(i). The IJ sustained both charges of removability, and the BIA affirmed that decision, dismissing Rocha's appeal without a written order. Rocha filed a motion for reconsideration that was denied by the BIA. He has filed two separate petitions seeking review of the BIAs orders dismissing his appeal and denying his motion for reconsideration.

We first consider Rocha's challenge to the BIAs order dismissing his appeal from the IJ's order finding him removable as charged. Because Rocha was found to be removable due to his commission of an aggravated felony as defined at § 1101(a)(43), our jurisdiction to review the order of removal is limited to legal or constitutional questions. *See* 8 U.S.C. § 1252(a)(2)(C), (d).

The first issue Rocha presents, whether his prior conviction constituted a COV and, thus, an aggravated felony under § 1101(a)(43)(F), is a legal one. *See Martinez v. Mukasey*, 519 F.3d 532, 538 (5th Cir. 2008). Rocha's conviction for injury to a child under § 22.04(a)(3) stemmed from Rocha's act of grabbing a child with his hand. We have previously addressed

whether a conviction under § 22.04(a)(3) is a COV, and we held that when the offense was committed by an intentional act rather than by omission, the alien's conviction is for an aggravated felony for purposes of § 1101(a)(43)(F). *See Perez-Munoz v. Keisler*, 507 F.3d 357, 360-64 (5th Cir. 2007). Conceding that his crime involved an intentional act, Rocha nevertheless argues that it was not a COV because "there is no 'strong probability' that physical force (destructive or violent) will be used when grabbing a child with one's hand." We made clear in *Perez-Munoz,* however, that the details of the intentional act committed in a given case are irrelevant because the commission of the crime by an intentional act will ordinarily involve the use or risk of use of physical force by the perpetrator. *Id.* at 364. An offense under § 22.04(a)(3) committed by an intentional act, then, is by its nature a COV. *Id.* Accordingly, the BIA correctly found that Rocha had been convicted of an aggravated felony and was removable under § 1227(a)(2)(A)(iii). *Id.* at 360-64.

Rocha also asserts that the BIA erred in dismissing his appeal from the finding of removability under § 1227(a)(2)(E)(i) because his conviction did not qualify as a crime of child abuse for purposes of that statute. As the decision that Rocha was removable under § 1227(a)(2)(A)(iii) would not be altered even if we were to rule favorably on his challenge to the determination that he was convicted of a crime of child abuse for purposes of § 1227(a)(2)(E)(i), we need not address the legal issue raised by Rocha or the exhaustion issue raised by the respondent with respect to this point of error. *See Capital Concepts*

Properties 85-1 v. Mutual First, Inc., 35 F.3d 170, 176 (5th Cir. 1994). Accordingly, Rocha's petition for review of the BIA's order dismissing his appeal is DENIED.

We turn next to Rocha's challenge to the BIA's denial of his motion for reconsideration. We have jurisdiction to consider the denial of a motion to reconsider, but our review involves a "highly deferential abuse-of-discretion standard." *Nolos v. Holder,* 611 F.3d 279, 281 (5th Cir. 2010); *accord Zhao v. Gonzales,* 404 F.3d 295, 303-04 (5th Cir. 2005). The BIAs ruling will stand, even if we conclude it is erroneous, "so long as it is not capricious, racially invidious, utterly without foundation in the evidence, or otherwise so irrational that it is arbitrary rather than the result of any perceptible rational approach." *Zhao,* 404 F.3d at 304 (internal quotation marks and citation omitted).

Rocha's attorney-drafted brief contains no discussion of the legal standards applicable to motions for reconsideration. Nor does it address the specific reasons stated by the BIA for denying Rocha's motion for reconsideration. We thus deem Rocha's challenge to the denial of that motion to be inadequately briefed and consequently abandoned. *See Rui Yang v. Holder,* 664 F.3d 580, 589 (5th Cir. 2011). Accordingly, Rocha's petition for review of the BIAs order denying his motion for reconsideration is DENIED.

PETITIONS FOR REVIEW DENIED.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A041 103 438 – Houston, TX Date: JUN 28 2013

In re: ANTELMO *ROCHA*-AYALA a.k.a. Antelmo Rocha a.k.a. Antelmo Yala Rocha a.k.a. Antelmo Ayal Rocha a.k.a. Antelmo Rocha-Ayal a.k.a. A A Rocha a.k.a. Antelmo A Rocha a.k.a. Anthelmo A Rocha

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Raed Gonzalez, Esquire

ON BEHALF OF DHS: Pamela Perillo
Assistant Chief Counsel

APPLICATION: Reconsideration

This matter was last before the Board on April 22, 2013, when we reissued our February 12, 2013, decision dismissing the respondent's appeal. The respondent has filed a timely motion requesting the Board to reconsider its decision affirming the Immigration Judge's findings of removability in light of the United States Court of Appeals for Fifth Circuit's recent decision in *Rodriguez v. Holder,* 705 F.3d 207 (5th Cir. 2013). The Department of Homeland Security ("DHS") has filed a brief in opposition to the motion. The motion will be denied.

The respondent has not demonstrated that reopening is warranted in this case. A motion to reopen must state the new facts to be considered at the reopened hearing and be supported by evidence that is material, and that was previously unavailable. *See* section 240(c)(7) of the Act; 8 C.F.R. § 1003.2(c); *see also INS v. Abudu,* 485 U.S. 94 (1988). Here, the respondent urges the Board to reconsider its decision affirming his removability in light of the Fifth Circuit's decision in *Rodriguez, supra.* However, the respondent has not established that the Fifth Circuit's decision relating to whether a Texas sexual assault conviction constitutes an aggravated felony crime of violence under 18 U.S.C. § 16(b) effects the Immigration Judge's determination that he is removable under both sections 237(a)(2)(E)(i) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(E)(i) and 1227(a)(2)(A)(iii). Moreover, we are not persuaded that the Fifth Circuit's decision establishes that the respondent's 2004 Texas conviction for injury to a child no longer qualifies as a crime of violence under 18 U.S.C. § 16(b), particularly when the respondent's offense involves a child victim and the Fifth Circuit's decision specifically distinguishes its particular holding from those cases where the age of the victim is an element of the offense. *See Rodriguez, supra,* at 214-15.

To the extent that the respondent is attempting to raise new arguments related to his additional charge of removability under section 237(a)(2)(E)(i) of the Act, these arguments are not properly raised for

the first time in a motion to reconsider. *See O-S-G-*, 524 I&N Dec. 56, 58 (BIA 2006) (stating that "[a] motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied" and "arguments for consideration on appeal should all be submitted at one time, rather than in piecemeal fashion.") (citation omitted). A motion to reconsider is neither a vehicle for advancing supplemental legal arguments that could have been previously raised nor a mechanism for submitting a late-filed brief. Moreover, we are not persuaded that the respondent's supplemental arguments affect the ultimate determination that the respondent's 2004 conviction for injury to a child renders him removable under section 237(a)(2)(E)(i) of the Act. Therefore, the motion to reconsider will be denied.

ORDER: The motion to reconsider is denied.

/s/ DM
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A041 103 438 – Houston, TX Date: APR 22 2013

In re: ANTELMO *ROCHA*-AYALA a.k.a. Antelmo Rocha a.k.a. Antelmo Yala Rocha a.k.a. Antelmo Ayal Rocha a.k.a. Antelmo Rocha-Ayal a.k.a. A A Rocha a.k.a. Antelmo A Rocha a.k.a. Anthelmo A Rocha

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Raed Gonzalez, Esquire

REISSUED DECISION

The Board dismissed the respondent's appeal on February 12, 2013. The respondent on March 20, 2013, filed a motion seeking reissuance of the Board's prior decision. Given the totality of the circumstances presented in the unopposed motion, the Board's February 12, 2013, decision will be reissued and treated as if entered on today's date. *See Roy v. Ashcroft,* 389 F.3d 132, 136 (5th Cir. 2004) (reissuance of prior Board decision may be warranted).

ORDER: The respondent's motion to reissue is granted.

FURTHER ORDER: The Board's decision dated February 12, 2013, attached hereto, is hereby reissued and shall be treated as entered as of today's date.

/s/ DM
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A041 103 438 – Houston, TX Date: FEB 12 2013

In re: ANTELMO *ROCHA*-AYALA a.k.a. Antelmo Rocha a.k.a. Antelmo Ayala Rocha a.k.a. Antelmo Yala Rocha a.k.a. Antelmo Ayal Rocha a.k.a. Antelmo Rocha-Ayal a.k.a. Antelmo A. Rocha a.k.a. Anthelmo A. Rocha a.k.a. A.A. Rocha

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Raed Gonzalez, Esquire

ON BEHALF OF DHS: Nora E. Norman
Assistant Chief Counsel

APPLICATION: Termination of proceedings

ORDER: The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON SERVICE PROCESSING CENTER
Houston, Texas

IN THE MATTER OF ANTELMO ROCHA AYALA, A.K.A. ANTELMO ROCHA, Respondent.	)	IN REMOVAL PROCEEDINGS File No. A041-103-438

Charges:

Notice: INA § 237(a)(2)(E)(i) – Convicted of a crime of domestic violence, stalking, or child abuse, neglect, or abandonment

Lodged: INA § 237(a)(2)(A)(iii) – Convicted of aggravated felony (as defined in INA § 101(a)(43)(F))

Application: Motion to Terminate Removal Proceedings

ON BEHALF OF RESPONDENT:
Raed Gonzalez, Esquire
Gonzalez Olivieri, LLC
2200 Southwest Freeway, Suite 320
Houston, Texas 77098

ON BEHALF OF THE GOVERNMENT:
Pamela Perillo,
Assistant Chief Counsel
Department of Homeland Security

CORRECTED MEMORANDUM AND DECISION OF THE IMMIGRATION JUDGE

I. INTRODUCTION

Respondent is a citizen and native of Mexico who was admitted to the United States at Lewiston-Queenston Bridge, New York, on or about September 19, 1987, as a lawful permanent resident. Exh. 1. On December 7, 2004, Respondent was convicted of injury to child, in violation of Texas law, and was sentenced to two years of confinement. Exh. 4. On May 29, 2012, the Department of Homeland Security (DHS) served Respondent with a Notice to Appear (NTA), charging him with removability pursuant to INA § 237(a)(2)(E)(i), for having been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment. Exh. 1. On June 27, 2012, DHS lodged an additional charge of removability against Respondent under INA § 237(a)(2)(A)(iii), for having been convicted of an aggravated felony, as defined in INA § 101(a)(43)(F). Exh. 3.

On August 20, 2012, at a master calendar hearing, Respondent, through counsel, admitted all of the factual allegations contained in the NTA. Respondent, however, contested removability as charged. Consequently, the Court allowed both parties to brief the issue of whether Respondent's conviction for injury to a child under Texas law is an aggravated felony, as defined in INA § 101(a)(43)(F), and a crime of child abuse, neglect, or abandonment under INA

§ 237(a)(2)(E)(i). The Court adjourned the case to November 19, 2012, for a decision on removability.

II. REMOVABILITY

A. Burden of Proof

DHS has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. INA § 240(c)(3)(A). No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. *Id.*

III. ANALYSIS

i. Removability under INA §237(a)(2)(A)(iii) – Convicted of aggravated felony (as defined in Section 101(a)(43)(F))

INA § 237(a)(2)(A)(iii) states: "Any alien who is convicted of an aggravated felony at any time after admission is deportable." The term "aggravated felony" means – a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year. INA § 101(a)(43)(F). The term "crime of violence" is defined in 18 U.S.C. § 16 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.

The record reflects that on December 7, 2004, Respondent was convicted for the offense of injury to a child, in violation of Texas Penal Code § 22.04(a). Exh. 4. For this offense, Respondent was sentenced to two years of confinement. *Id.* At the time of Respondent's offense, Texas Penal Code § 22.04(a) (West 1993), the statute under which he was convicted provided, in relevant part:

> (a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual:
>
> (1) serious bodily injury;
>
> (2) serious mental deficiency, impairment, or injury; or
>
> (3) bodily injury.

Tex. Penal Code § 22.04(a) (1993).

The Court first holds that Respondent's conviction does not qualify as a "crime of violence" under 18 U.S.C. § 16(a). *See United States v. Gracia-Cantu,* 302 F.3d 308, 311-12 (5th Cir. 2002). Consequently, the Court proceeds to an analysis of whether Respondent's

conviction comprises a "crime of violence" under 18 U.S.C. § 16(b).

The Court observes that Texas Penal Code § 22.04(a) is a divisible statute because it includes offenses that would and would not be considered crimes of violence under 18 U.S.C. § 16(b). For example, the Fifth Circuit of Appeals, the jurisdiction in which this case arises, held that Texas Penal Code § 22.04(a) is not categorically a crime of violence under 18 U.S.C. § 16(b) because many injury to child convictions involve an omission rather than an intentional act. *See United States v. Gracia-Cantu,* 302 F.3d at 312-13. However, under the modified categorical approach, injury to a child under Texas Penal Code § 22.04(a) is a "crime of violence" under 18 U.S.C. § 16(b) when the offense was committed by an intentional act rather than by omission. *See Perez-Munoz v. Keisler,* 507 F.3d 357, 362-64 (5th Cir. 2007).

Because Texas Penal Code § 22.04(a) is a divisible statute, the Court employs a modified categorical approach and examines Respondent's charging instrument. *See Perez-Munoz v. Keisler,* 507 F.3d at 361 (noting that "it is permissible to use a charging instrument to pare down a statute to determine if a violation of part of a statute constitutes a crime of violence when the statute as a whole categorically does not"). The Criminal Indictment relating to Respondent's December 7, 2004 conviction, to which he pled guilty, states that Respondent "did then and there unlawfully, intentionally and knowingly cause bodily injury to . . . the Complainant, a child younger

than fifteen years of age, by grabbing her with his hand." Exh. 4. The trial court classified Respondent's crime as a "third-degree felony" – a classification that is applicable only to those violations of Texas Penal Code § 22.04(a) that involve intentional and knowing conduct that cause "bodily injury" to a victim. *See* Tex. Penal Code § 22.04(f). The statute of conviction can therefore be narrowed down under Texas Penal Code § 22.04(a)(3), to that of "intentionally and knowingly . . . by act . . . causes to a child . . . bodily injury." It is thus clear that Respondent was charged with an intentional and knowing act rather than a passive omission.

Respondent, however, contends that "when [he] was charged with causing bodily injury to a child by grabbing her hand, he [did] not risk the use of physical force in committing the offense." Respondent's Brief in Response to the Government's Brief, at 4 (Sept. 17, 2012). The Court, however, disagrees with Respondent's contention because the proper inquiry is whether the offense naturally presents a substantial risk of the use of physical force in the ordinary case. *See Perez-Munoz v. Keisler,* 507 F.3d at 362-64 (applying *James v. United States,* 550 U.S. 192 (2007) in the § 16(b) context).

After reviewing the relevant statutes and the record of conviction, the Court concludes that Respondent's conviction constitutes an "offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing

the offense." 18 U.S.C. § 16(b). The Court thus sustains the charge of removability under INA § 237(a)(2)(A)(iii), as it relates to INA § 101(a)(43)(F).

ii. Removability under INA § 237(a)(2)(E)(i) – Convicted of crime of child abuse

Based on the conviction for injury to a child, Respondent was also charged with removability under INA § 237(a)(2)(E)(i). Exh. 3. Section. 237(a)(2)(E)(i) of the Act provides that "(a)ny alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable."

The Board of Immigration Appeals (Board) has held that for purposes of INA § 237(a)(2)(E)(i), Title term 'crime of child abuse' . . . mean[s] any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person's physical or mental well-being, including sexual abuse or exploitation." *Matter of Velazquez-Herrera,* 24 I&N Dec. 503 (BIA 2008). The Board further stated that "[a]t a minimum, this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight. . . ." *Id.* at 512. Moreover, in determining whether an alien has been convicted of a "crime of child abuse," the Court confines its "inquiry to [the] elements of the offense, as reflected in the statutory

definition of the crime or admissible portions of the conviction record." *Id.* at 515.

The Court observes that not all of the offenses proscribed under Texas Penal Code § 22.04(a) comprise "crimes of child abuse" under INA § 237(a)(2)(E)(i). *See* Tex. Penal Code § 22.04(a) (including child, elderly individual, or disabled individual). The issue can thus not be resolved under the categorical approach. *See Taylor v. U.S.,* 495 U.S. 575 (1990). Therefore, the Court proceeds to the application of the modified categorical approach. *See Shepard v. United States,* 544 U.S. 13 (2005).

As previously noted, the Criminal Indictment charged that Respondent "did then and there unlawfully, intentionally and knowingly cause bodily injury to . . . the Complainant, a child younger than fifteen years of age. . . ." Exh. 3."[1] It is thus clear that Respondent's crime falls within the definition of a "crime of child abuse." *See Velazquez-Herrera,* 24 I&N Dec. at 512.

Inasmuch as Respondent was convicted of injury to a child, the Court finds that he is removable pursuant to INA § 237(a)(2)(E)(i), for having been convicted of a crime of child abuse. The Court thus sustains the charge of removability under INA § 237(a)(2)(E)(i).

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[1] The Court observes that child is defined as "a person 14 years of age or younger." Tex. Penal Code 22.04(c).

IV. ORDERS

Accordingly, the Court enters the following orders:

IT IS HEREBY ORDERED that the charges under INA § 237(a)(2)(A)(iii) (as defined in INA § 101(a)(43)(F)) and INA § 237(a)(2)(E)(i) be sustained.

It is FURTHER ORDERED that Respondent be REMOVED from the United States to MEXICO on the charges contained in the NTA and Form I-261.

11-5-2012 /s/ Howard Rose

Date **Howard Rose**
Immigration Judge