[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17536
Non-Argument Calendar

Agency No. A094-059-615

EFRAIN EVELIO VILLALOBOS,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(June 18, 2018)

Before WILLIAM PRYOR, MARTIN and FAY, Circuit Judges.

PER CURIAM:

Efrain Villalobos, a native and citizen of El Salvador, petitions for review of an order affirming the denial of his applications for asylum, 8 U.S.C. § 1158, for cancellation of removal, *id.* § 1229b(a), and for deferral of removal under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 8 C.F.R. § 1208.17. Villalobos argues, in part, that his conviction for aggravated child abuse, Fla. Stat. § 827.03(2)(a), does not qualify as an aggravated felony, 8 U.S.C. § 1101(a)(43)(F), under the residual clause of the definition of crime of violence, 18 U.S.C. § 16(b). While Villalobos's petition was pending, the Supreme Court held in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210 (2018), that section 16(b) is void for vagueness, and we ordered and the parties have submitted supplemental briefs addressing the effect of *Dimaya* on Villalobos's petition. We grant in part Villalobos's petition challenging the denial of his applications for asylum and cancellation of removal, vacate the part of the order classifying his conviction for aggravated child abuse as an aggravated felony, and remand for the Board of Immigration Appeals to consider in the first instance whether Villalobos's conviction qualifies as an aggravated felony under the elements clause of the statute, 18 U.S.C. § 16(a), and, if not, whether he is eligible for asylum or cancellation of removal. Villalobos also challenges the denial of his application for deferral of removal, but we deny that part of Villalobos's petition.

I. BACKGROUND

In 2016, the Department of Homeland Security charged Villalobos, a lawful permanent resident by virtue of marriage to a citizen of the United States, as removable under the Immigration and Nationality Act based on his conviction for a crime of child abuse, 8 U.S.C. § 1227(a)(2)(E)(i), and his conviction for an aggravated felony, *id.* § 1227(a)(2)(A)(iii). The Department based its charges on Villalobos's plea of guilty in 2015 to aggravated child abuse. *See* Fla. Stat. § 827.03(2)(a). The notice stated that Villalobos's offense was an aggravated felony because it involved the "sexual abuse of a minor," 8 U.S.C. § 1101(a)(43)(A), and because it was a "crime of violence (as defined in section 16 of Title 18 . . .) for which the term of imprisonment [was] at least one year," *id.* § 1101(a)(43)(F).

Villalobos conceded that he was removable based on his conviction for a crime of child abuse, but he denied that his crime qualified as an aggravated felony. Villalobos applied for asylum, *id.* § 1158(b), withholding of removal, *id.* § 1231(b)(3), an adjustment of status and a waiver of inadmissibility based on the hardship that his removal would cause his wife and three children, *id.* §§ 1255(a), 1182(i), and cancellation of removal, *id.* § 1229b(a). Villalobos also applied for deferral of removal under the Convention, 8 C.F.R. § 1208.17.

During his removal hearing, Villalobos testified that he feared returning to El Salvador because, if the government knew about his conviction for child abuse,

he "would [be] sen[t] to jail," where gang members would torture and kill him for harming a minor or based on the misperception that he was a homosexual. He also testified that the government and local police in El Salvador would not protect him from gang violence. Villalobos testified that his mother, who still resided in El Salvador, received three letters in which the writers, who Villalobos thought were family members associated with gangs in El Salvador, threatened to harm him. The letters consisted of a few sentences written on lined notepaper, did not mention Villalobos or his mother, and contained statements like, "you old whores thought you could play with us"; "we are only waiting for the moment that we can give you what you deserve dumba**"; and "[i]f they get start running their mouth//illegible sentence//and your entire family will go to//illegible word//, you d*** fag."

Dr. Robert Kirkland, who holds a Ph.D. in Latin American studies, testified that Villalobos could be harmed if he returned to El Salvador. Dr. Kirkland testified that the local police might consider Villalobos a "person of interest" and "keep[] an eye on him" because of his conviction for child abuse and that there was a "trend with the PNC over the last four to five years of . . . sometimes arbitrarily detaining criminal deportees." Dr. Kirkland testified that, if Villalobos was imprisoned, he could be in danger because jails contain "between 9,000 and 15,000 gang members" and "[h]e's not a gang member" and because he might be perceived as "being a homosexual," which "tend[s] to [be] frown[ed] upon" in El

Salvador. Dr. Kirkland also testified that Villalobos could be "targeted by gangs, particularly for extortion" because if a person has resided "a long time in the United States, you're assumed to have money or people in the United States that . . . can give you money if you're extorted or threatened." And Dr. Kirkland testified that "it would be very difficult for [Villalobos] to turn to the police" for help "because of his criminal record." During cross-examination, Dr. Kirkland testified that, if Villalobos "keeps his nose clean" in El Salvador, he "would not be incarcerated if he doesn't do anything that would be against the law."

Villalobos submitted evidence about discrimination and gang violence in El Salvador. The 2014 Country Report stated that there were cases of harassment and violence against lesbian, gay, bisexual, and transgender persons and that gang activities remained a serious problem in the prisons. The January 2016 Travel Warning prepared by the State Department and the 2015 Crime and Safety Report issued by the Overseas Security Advisory Council also warned of violent gang activity in El Salvador.

The immigration judge denied Villalobos's applications for relief. The immigration judge examined the Florida statute that defined the offense of aggravated child abuse, determined that it was divisible, and found that Villalobos was removable for having been convicted of a crime of child abuse, 8 U.S.C. § 1227(a)(2)(E)(i), and of an aggravated felony, *id.* § 1227(a)(2)(A)(iii). The

immigration judge ruled that Villalobos was statutorily ineligible for cancellation of removal and for asylum because his conviction, which "pertain[ed] to abusing a child, and [in] so doing cause[d] great bodily harm," qualified as an aggravated felony under the residual clause in the definition of crime of violence, 18 U.S.C. § 16(b). *See* 8 U.S.C. § 1101(a)(43)(F). Because the Florida statute did not "reference[] sexual gratification or sexual abuse of any kind," the immigration judge found that Villalobos's conviction did not qualify as sexual abuse of a minor. *Id.* § 1101(a)(43)(A). The immigration judge also found that Villalobos's "particularly serious crime" made him "ineligible for withholding of removal under the Act and under the Convention Against Torture, leaving him only with deferral of removal." And the immigration judge found that Villalobos's "speculation" was insufficient to prove that it would be more likely than not that he would "be tortured by the police and by society in general" if he returned to El Salvador. The immigration judge credited Dr. Kirkland's testimony that Villalobos would not be arrested and face "harm[] by the inmates" if he did not "violate the laws of El Salvador" and that "[t]he government of El Salvador has made efforts to control the violence" by imprisoning gang members. The immigration judge also found that the "criminal elements" extorting money "ha[d] nothing to do with the government of El Salvador." The immigration judge also refused to adjust Villalobos's status or to grant him a waiver of inadmissibility based on his

commission of "a crime involving moral turpitude" that was "very recent and very serious" and the evidence that his wife and children would continue to receive emotional and financial support from her family in the United States.

The Board dismissed Villalobos's appeal. The Board "agree[d]" that Villalobos's conviction for aggravated child abuse qualified as an aggravated felony under the residual clause of the definition of a crime of violence, 18 U.S.C. § 16(b), which made him statutorily ineligible for asylum and cancellation of removal, and constituted a particular serious crime, which made him ineligible for withholding of removal. The Board also "agree[d] that Villalobos had "not established that he merit[ed] a favorable grant of discretion" warranting an adjustment of status or a waiver of inadmissibility. And the Board "affirm[ed]" that Villalobos's "general[] assert[ions] that he may be harmed by authorities in El Salvador or gang members" did not "me[e]t [the] burden of proof to establish eligibility for a grant of deferral of removal under the [Convention]." The Board explained that Villalobos could "not string together a series of suppositions to show that he will be tortured in El Salvador without establishing that each step in the series is more likely than not to occur" and that he did "not establish[] that the government of El Salvador would acquiesce in his torture" when "the record of evidence reflect[ed] that the government . . . ha[d] made efforts to control violence in the country."

Villalobos petitioned this Court to review the denial of his applications for cancellation of removal and for deferral of removal and repeats that request in his supplemental letter brief. The government responds that Villalobos waived, by failing to challenge in his petition, the denial of most of his applications for relief. We agree and deem abandoned Villalobos's applications for withholding of removal, adjustment of status, and waiver of inadmissibility. *See Yu v. U.S. Att'y Gen.*, 568 F.3d 1328, 1330 n.1 (11th Cir. 2009); *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005).

II. STANDARD OF REVIEW

"We review the decision of the Board and the decision of the Immigration Judge to the extent that the Board expressly adopted the opinion of the Immigration Judge." *Ayala v. U.S. Att'y Gen.*, 605 F.3d 941, 947–48 (11th Cir. 2010). We review *de novo* whether a petitioner's conviction qualifies as an "aggravated felony." *Accardo v. U.S. Atty. Gen.*, 634 F.3d 1333, 1335 (11th Cir. 2011). We also review *de novo* the legal conclusions of the immigration judge and the Board. *Perez-Guerrero v. U.S. Atty. Gen.*, 717 F.3d 1224, 1230 (11th Cir. 2013).

III. DISCUSSION

Villalobos argues that he is eligible for cancellation of removal because, in the light of *Dimaya*, his conviction for aggravated child abuse does not qualify as

an aggravated felony and that he is entitled to reconsideration of his application for deferral of removal because the agency failed to give "proper weight" or "reasoned consideration" to his evidence that he would be tortured upon returning to El Salvador. The Attorney General responds that we lack jurisdiction to review Villalobos's challenge to the denial of his application for deferral of removal and that we should remand for the Board to consider whether Villalobos's conviction qualifies as an aggravated felony under the elements clause of the definition of crime of violence, 8 U.S.C. § 16(a), and, if not, to consider "whether he otherwise meets the requirements for cancellation of removal and asylum[.]"

Because *Dimaya* declared void for vagueness the statutory provision used to classify Villalobos's conviction as an aggravated felony, we grant the part of Villalobos's petition that challenges the denial of his application for cancellation of removal. We also vacate in part and remand for the Board to address how to classify Villalobos's conviction and whether he is eligible for asylum and for cancellation of removal. But we deny Villalobos's petition to the extent that he challenges the denial of his application for deferral of removal.

A. In the Light of Dimaya*, We Remand for the Board to Address Whether Villalobos is Eligible for Asylum or Cancellation of Removal.*

Villalobos is a lawful permanent resident of the United States, but he is deportable, among other reasons, if he "is convicted of an aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). A conviction qualifies as an aggravated felony if it is

"a crime of violence (as defined in section 16 of Title 18 . . .) for which the term of imprisonment [is] at least one year." *Id.* § 1101(a)(43)(F). To constitute a "crime of violence" a conviction can involve either "an offense that has an element the use, attempted use, or threatened use of physical force against the person" or an "offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person may be used in the course of committing the offense." 18 U.S.C. § 16.

While Villalobos's petition was pending, the Supreme Court held that the residual clause of the definition of crime of violence, *id.* § 16(b), is void for vagueness. *Dimaya*, 138 S. Ct. at 1210. In *Dimaya*, the Supreme Court concluded that, like the residual clause that defined the term "violent felony" in the Armed Career Criminal Act, *see Johnson v. United States*, 135 S. Ct. 2551 (2015), section 16(b) was impermissibly vague because it "call[ed] for a [sentencing] court to identify a crime's 'ordinary case' in order to measure [its] risk" and the provision created "uncertainty about the level of risk that makes a crime 'violent.'" *Dimaya*, 138 S. Ct at 1215. Because the Supreme Court invalidated section 16(b), that provision cannot serve as the basis for classifying Villalobos's conviction as a crime of violence and as an aggravated felony that makes him ineligible for asylum and for cancellation of removal.

We grant that part of Villalobos's petition that challenges the denial of his application for cancellation of removal, vacate the order classifying his conviction as an aggravated felony based on the residual clause of the definition of a crime of violence, and remand to the Board. "Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *Accardo*, 634 F.3d at 1339 (quoting *I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16 (2002)). The Board should be given the first opportunity to decide how to classify Villalobos's conviction for aggravated child abuse and whether he is eligible for cancellation of removal and asylum.

The invalidation of the residual clause of the definition of crime of violence does not, as Villalobos argues, necessarily mean that he cannot be classified as an aggravated felon. *Dimaya* did not affect the elements clause in the definition of a crime of violence, 18 U.S.C. § 16(a). The immigration judge ruled that Villalobos's conviction constituted a "crime of violence [as] defined at 18 U.S.C. Section 16(b)." Villalobos appealed that ruling to the Board, and the Attorney General defended the ruling. Because the orders of the immigration judge and the Board do not reflect that they considered whether Villalobos's conviction qualified as a crime of violence as an "offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," *id.*

§ 16(a), we remand that issue to the Board to address and decide in the first instance.

Even if the Board were to determine that Villalobos's conviction is not a crime of violence, that ruling would not dictate, as Villalobos argues, that his "deportation order cannot stand." Villalobos conceded that he is removable as having been convicted of a crime of child abuse, *see* 8 U.S.C. § 1227(a)(2)(E)(i), which can affect a permanent resident's eligibility for cancellation of removal, *id.* § 1229b(b). *See Pierre v. U.S. Att'y Gen.*, 879 F.3d 1241, 1251–52 (11th Cir. 2018). The Board must determine in the first instance, what, if any, effect Villalobos's concession has on his eligibility for immigration relief.

B. The Board and the Immigration Judge Gave Reasoned Explanations for Denying Villalobos's Application for Deferral of Removal.

In our review of the denial of Villalobos's application for deferral of removal under the Convention, our jurisdiction is limited to reviewing the legal conclusions of the Board and the immigration judge. *See Perez-Guerrero*, 717 F.3d at 1230. "[N]o court . . . ha[s] jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) [of Title 8]," 8 U.S.C. § 1252(a)(2)(C), which includes the commission of a "crime involving moral turpitude," *id.* § 1182(a)(2)(A)(i)(I). Villalobos does not challenge the finding that his conviction for aggravated child abuse constitutes a crime of moral turpitude. Because

Villalobos committed a crime of moral turpitude, we lack "jurisdiction to review the factual findings that [he] is unlikely to endure severe pain or suffering in [El Salvador] and [whether] officials [in its government] are unlikely to inflict, instigate, or consent to any pain or suffering that [he] might endure." *See Perez-Guerrero*, 717 F.3d at 1231.

We have jurisdiction to review, as a "question of law," 8 U.S.C. § 1252(a)(2)(D), Villalobos's argument that the immigration judge and the Board failed to give reasoned consideration to the evidence he presented regarding the possibility he would be tortured upon returning to El Salvador, *see Perez-Guerrero*, 717 F.3d at 1232 (quoting 8 C.F.R. § 208.16(c)(3)). To determine if Villalobos's application received reasoned consideration, "we inquire only whether the [immigration judge and the] Board considered the issues raised and announced [their] decision[s] in terms . . . [that establish they] heard and thought and not merely reacted" to Villalobos's evidence. *Id.* at 1232 (quoting *Cole v. U.S. Att'y Gen.*, 712 F.3d 517, 534 (11th Cir. 2013)) (alterations adopted). If the immigration judge and the Board gave his application for relief under the Convention reasoned consideration, then Villalobos's petition fails.

To obtain relief under the Convention, an alien must prove that he will, more likely than not, be tortured if removed to his country of origin. 8 C.F.R. § 208.16(c)(2). Torture is confined to acts involving "severe pain and suffering,

whether physical or mental" committed by, at the direction of, or with the acquiescence of "a public official or other person acting in an official capacity." *Id.* § 208.18(a)(1). "Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." *Id.* § 208.18(a)(7).

The immigration judge and the Board gave reasoned consideration to the evidence relevant to Villalobos's application for deferral of removal under the Convention. The immigration judge considered that Villalobos had never been tortured in El Salvador and the testimony that Villalobos might be arrested in El Salvador, he might be mistreated by gang members in jail who perceived him as a child abuser or a homosexual, and he might be extorted by gangs who might assume that he is wealthy. And the immigration judge also considered Dr. Kirkland's testimony that Villalobos would not be arrested unless he committed an offense in El Salvador and that its government was eradicating gang violence in the country. Villalobos argues that "the [Board] did not . . . address this issue at all in its decision," but the Board "affirm[ed] the Immigration Judge's decision" only after considering Villalobos's "assert[ion] that he may be harmed by authorities in El Salvador or gang members," the "variety of reasons that [he and his expert offered for why] th[o]se two groups may want to harm him," and the possibility

"that the government of El Salvador would acquiesce in his torture" taking into consideration "the record of evidence."

Villalobos identifies no evidence that the immigration judge and Board failed to consider. Villalobos argues that the immigration judge and the Board "failed to give proper weight to his evidence," but we lack jurisdiction to consider that argument. *See Perez-Guerrero*, 717 F.3d at 1233. We deny the part of Villalobos's petition that challenges the denial of his application for deferral of removal under the Convention.

IV. CONCLUSION

We **GRANT IN PART** and **DENY IN PART** Villalobos's petition. We **GRANT** the part of Villalobos's petition that challenges the denial of his application for cancellation of removal, **VACATE** that part of the order that classified his conviction as an aggravated felony based on the residual clause of the definition of a crime of violence, 18 U.S.C. § 16(b), and **REMAND** to the Board for further consideration. We **DENY** the part of Villalobos's petition that challenges the denial of his application for a deferral of removal under the Convention.