No. 14-4476

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CARLTON BAPTISTE, a.k.a., CARLTON BAPTIST,

Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION ON REVIEW FROM AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER
AND
VOLUME 1 OF THE JOINT APPENDIX

Michael L. Foreman
Counsel of Record
PENNSYLVANIA STATE UNIVERSITY
DICKINSON SCHOOL OF LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
State College, PA 16803
(814) 865-3832
mlf25@psu.edu
PA Bar 30231

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rules of Appellant Procedure 26.1 and 29(c), and Third Circuit L.A.R. 26.1.1, counsel for the petitioner states that the Civil Rights Appellate Clinic is an educational component of The Pennsylvania State University, Dickinson School of Law which is not a publicly held corporation and has no parent corporation and no publicly traded stock.

In accordance with Federal Rules of Appellant Procedure 26.1(c) and Third Circuit L.A.R. 26.1.1, counsel for petitioner states that Carlton Baptiste is an individual and therefore is not a publicly held corporation, has no parent corporation and no publicly traded stock.

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STATEMENT OF JURISDICTION

Petitioner, Carlton Baptiste (Mr. Baptiste or petitioner), seeks review of the October 15, 2014 final order of removal issued by the Board of Immigration Appeals (BIA). Joint Appendix (JA) 0002. The BIA upheld the Immigration Judge's (I.J.) determination that petitioner's 2009 guilty plea to Section 2C:12-1b(1) of New Jersey Statutes Annotated constituted an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(F). JA0006, JA0009. The BIA also upheld the I.J.'s determination that petitioner's 2009 conviction and his 1978 conviction for assault and battery in violation of former N.J. Stat. Ann. § 2A:90-1 (West. 1978) rendered him removable under 8 U.S.C. § 1227(a)(2)(A)(ii), as an alien convicted of two separate crimes involving moral turpitude (CIMT). JA0008-0009.

Section 242 of the Immigration and Nationality Act (INA) governs the judicial review of final orders of removal in the circuit courts of appeals. *See* 8 U.S.C. § 1252(a)(1) (providing for "[j]udicial review of a final order of removal."). On November 14, 2014, Mr. Baptiste timely filed his petition for review. JA0002. Venue is proper because the I.J. conducted the removal proceedings against Mr.

Baptiste in Newark, New Jersey, which lies within this judicial circuit. *See* 8 U.S.C. § 1252(b)(2); JA00011, JA00024.

STANDARD AND SCOPE OF REVIEW

The petitioner agrees with the United States Department of Justice (DOJ) that this Court should exercise *de novo* review over the BIA's determination that his conviction under N.J. Stat. Ann. § 2C:12-1b(1) constitutes a crime of violence as defined in 8 U.S.C. § 1101(a)(43)(F). *See* United States Department of Justice (DOJ) Brief at 14. The Third Circuit has consistently noted that "we review *de novo* … the purely legal questions of whether a violation of particular federal criminal statutes is an 'aggravated felony'…" *Borrome v. Att'y Gen. of the United States*, 687 F.3d 150, 154 (3d. Cir. 2012).

Further, the Third Circuit has likewise recognized that "in determining what the elements are of a particular criminal statute deemed to implicate moral turpitude…our review of this issue is thus *de novo*." *Knapik v. Ashcroft*, 384 F.3d 84, 88 (3d. Cir. 2004). The Third Circuit should therefore review *de novo* whether the petitioner's conviction under N.J. Stat. Ann. § 2C:12-1b(1) constitutes a CIMT, because the BIA's determination that the petitioner's conviction under N.J. Stat.

Ann. § 2C:12-1b(1) constituted a CIMT was an interpretation of state law and not a factual determination.

Finally, following the recent decision of the Supreme Court in *Johnson v. United States*, -- U.S. --, 135 S.Ct. 2551 (2015), the Third Circuit should also consider whether 18 U.S.C. § 16(b)—a provision that 8 U.S.C. § 1101(a)(43)(F) incorporates by reference—is unconstitutionally void for vagueness.

STATEMENT OF THE ISSUES

There are three issues presented to this Court for review.

1. Whether the BIA erred in applying the least culpable conduct under the categorical approach, which case law demonstrates to be driving while intoxicated and injuring a third party, in upholding the I.J.'s decision that the petitioner's guilty plea under N.J. Stat. Ann. § 2C:12-1b(1) constituted a crime of violence under 18 U.S.C. § 16(b) and ultimately an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). JA0006-0009.

2. Whether the petitioner's guilty plea under N.J. Stat. Ann. § 2C:12-1b(1) constitutes a CIMT, requiring a requisite level of depravity and scienter-consciousness, thereby rendering him removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii). JA0008-0009.

3. Whether, in light of *Johnson v. U.S.*, -- U.S. --, 135 S.Ct. 2551 (2015), 18 U.S.C. § 16(b) is unconstitutionally void for vagueness, as the Ninth Circuit has held in *Dimaya v. Lynch*, -- F.3d --, 2015 WL 6123546 (9th Cir. 2015). This is a constitutional issue raised after *Johnson*, therefore the Court may review it.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court, and the petitioner is not aware of any completed, pending, or contemplated case or proceeding before any court related to this case, except for proceedings before the BIA and I.J. in this same case.

STATEMENT OF THE CASE

Mr. Baptiste is 76-years-old and in declining health. JA0011. Mr. Baptiste is a native of Trinidad and Tobago. JA0011. He has resided in the United States since 1965 and has been a lawful permanent resident since April 13, 1972. JA0011, JA0023. Mr. Baptiste's entire family resides in the United States. JA0023.

On December 15, 1978 Mr. Baptiste was convicted of assault and battery in violation of former N.J. Stat. Ann. § 2A:90-1. JA0012. On April 6, 2009, Mr.

Baptiste pled guilty to assault under N.J. Stat. Ann. § 2C:12-1b(1) and was sentenced to five years imprisonment. JA0011-0012.

In June 2013, the Department of Homeland Security (DHS) initiated removal proceedings against petitioner. JA0011-0012. DHS alleged that petitioner's 2009 guilty plea under N.J. Stat. Ann. § 2C:12-1b(1) rendered him removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), claiming he was an alien convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) as a "crime of violence," further defined in 18 U.S.C. § 16(b). JA0011.

The DHS also asserted petitioner had a conviction from December 1978 for assault and battery under former N.J. Stat. Ann. § 2A:90-1. JA00012. The DHS argued that the offense also qualified as a crime of violence under 18 U.S.C. § 16. JA0037-0038. The DHS then added charges against petitioner as being removable under 8 U.S.C. § 1227(a)(2)(ii), for having been convicted of two crimes involving moral turpitude not arising out of a single scheme of misconduct for his convictions in December 1978 and April 2009. JA0006.

The I.J. found that the 1978 conviction did not qualify as a crime of violence. JA0038. The I.J. further found that both convictions qualified as crimes involving moral turpitude under 8 U.S.C. § 1227(a)(2)(ii) because the least culpable conduct "is sufficient to constitute causing serious bodily injury in a

manner involving moral turpitude." JA0018. The I.J. then found that the April 2009 guilty plea qualified as a crime of violence under 18 U.S.C. § 16(b), because the least culpable conduct of recklessly causing serious bodily injury "under circumstances manifesting extreme indifference to the value of human life … necessarily create[d] a substantial risk that physical force" be intentionally used in the commission of the crime." JA0014.

Mr. Baptiste timely appealed to the BIA. JA0002. A one member panel of the BIA upheld the I.J.'s decision without revisiting the IJ's determination that the 1978 conviction did not qualify as a crime of violence. JA0006-0009. The BIA found that a violation of N.J. Stat. Ann. § 2C:12-1b(1) qualified as a crime of violence "even though it may be committed by means of reckless, as opposed to intentional, conduct" because an individual convicted under N.J. Stat. Ann. § 2C:12-1b(1) "necessarily disregards the substantial risk that in the course of committing that offense he will use physical force against another, either to effect the serious bodily injury that the statute requires or to overcome the victim's resistance." JA0007-0008. The BIA noted that petitioner did not contest the I.J.'s finding that his 1978 conviction qualified as a CIMT. JA0008. The BIA then found that petitioner's 2009 conviction qualified as a CIMT because "an individual cannot form the culpable mental state and commit the culpable acts required for

conviction … without acting in a base, vile or depraved manner and without consciously disregarding a substantial risk that he will kill another." JA0009. The finding that Bapsite had been convicted of an aggravated felony both made Baptiste removable and also ineligible for a discretionary waiver under 8 U.S.C. § 1182(h).

Mr. Baptiste timely appealed to the Third Circuit. JA0002.

SUMMARY OF THE ARGUMENT

The Third Circuit should find that Mr. Baptiste's 2009 conviction under N.J. Stat. Ann. § 2C:12-1b(1) does not constitute an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(F) as a "crime of violence," and that his 2009 conviction does not constitute a CIMT. Moreover, should the Third Circuit find that Mr. Baptiste's conviction under N.J. Stat. Ann. § 2C:12-1b(1) does constitute an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(F), it should then find 18 U.S.C. §16(b)'s definition of "crime of violence"—which is incorporated by reference in 8 U.S.C. § 1101(a)(43)(F) to be unconstitutionally void for vagueness, following the decision of the Ninth Circuit in *Dimaya v. Lynch*, -- F.3d --, 2015 WL 6123546 (9th Cir. 2015) applying the Supreme Court decision in *Johnson v U.S.*, -- U.S. --, 135 S.Ct. 2551 (2015)).

Applying its clearly defined precedent, the Third Circuit should analyze Mr. Baptiste's conviction under N.J. Stat. Ann. § 2C:12-1b(1) using the categorical approach. Because N.J. Stat. Ann. § 2C:12-1b(1) is not divisible, the modified categorical approach would not apply.

Under the categorical approach, the Court should first determine the "least culpable conduct" with a realistic probability of being prosecuted. *Moncrieffe v. Holder*, --- U.S. ---, 133 S. Ct. 1678, 1686 (2013). An examination of relevant New Jersey case law demonstrates that the least culpable conduct by which an individual may be convicted of violating N.J. Stat. Ann. § 2C:12-1b(1) is driving while intoxicated and injuring a third party. Further, because the Supreme Court has held that convictions for driving while intoxicated and causing injury are not crimes of violence, and because the Third Circuit has determined that vehicular manslaughter is not a crime of violence, it follows that a conviction under N.J. Stat. Ann. § 2C:12-1b(1) is similarly not a crime of violence. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004), *Oyebanji v. Gonzales*, 418 F.3d 260 (3d. Cir. 2005).

Moreover, applying the least culpable conduct standard, the Third Circuit should find that Mr. Baptiste's 2009 guilty plea under N.J. Stat. Ann. § 2C:12-1b(1) does not constitute a CIMT. CIMTs are crimes which involve conduct that is depraved, reprehensible, contrary to the accepted rules of morality and duties owed

to persons, and requires a degree of scienter-consciousness or deliberation. *See Jean-Louis v. Att'y Gen. of the United States*, 582 F.3d 462 (3d. Cir. 2009), *Knapik v. Ashcroft*, 384 F.3d 84 (3d. Cir. 2004). Where serious crimes committed recklessly meet these requirements the Third Circuit has found that they may constitute CIMTs where there are other aggravating factors not present here *See Partyka v. Attorney General of the U.S.*, 417 F.3d 408 (3d. Cir. 2005). As noted, the least culpable conduct to sustain a conviction under N.J. Stat. Ann. § 2C:12-1b(1) is that of driving while intoxicated and injuring a third party. Because the Third Circuit has noted that driving while intoxicated "almost certainly does not involve moral turpitude," and because the only difference between N.J. Stat. Ann. § 2C:12-1b(1) and driving while intoxicated is the inadvertent harm to a third party, a violation of N.J. Stat. Ann. § 2C:12-1b(1) cannot contain the requisite degree of depravity or scienter-consciousness to constitute a CIMT.

Finally, in light of *Johnson v. US*, -- U.S. --, 135 S.Ct. 2551 (2015) and following the reasoning of the Ninth Circuit in *Dimaya*, the Third Circuit should find 18 U.S.C. § 16(b) unconstitutionally void for vagueness and remand this case back to the BIA for proceedings consistent with this determination.

ARGUMENT

THE BOARD OF IMMIGRATION APPEALS ERRED IN FINDING THAT THE PETITIONER IS REMOVABLE, BECAUSE HIS GUILTY PLEA UNDER N.J. STAT. ANN. § 2C:12-1b(1) DOES NOT CONSTITUTE AN AGGRAVATED FELONY OR A CIMT.

I. INTRODUCTION

The INA precludes discretionary relief where a non-citizen has been convicted of a crime which constitutes an aggravated felony as defined in 8 U.S.C. § 1101(a)(43). Where a crime is determined to be an aggravated felony, a non-citizen is ineligible for asylum, they are subject to mandatory deportation, and there can be no consideration of equities which may demonstrate that removal is not a just result. The imposition of this harsh penalty requires the courts to be constrained and narrowly consider what crimes mandate this "'drastic measure.'" *Kawashima v. Holder*, 132 S. Ct. 1166, 1177 (2012) (Ginsburg, J. concurring) (citing *Fong Haw Tan v. Phelen*, 333 U.S. 6, 10 (1948). Because deportation is "the equivalent of banishment or exile," the Supreme Court requires that any doubts about the imposition of such a penalty be resolved in favor of the non-citizen. *Fong Haw Tan*, 333 U.S. at 10.

No doubt cognizant that deportation "is a particularly severe 'penalty,'" immigration laws have evolved to include procedures which may result in removal

but which also recognize that consideration of individual equities better enables a fair application of the law. *See Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (citing *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

In Mr. Baptiste's case, the imposition of this penalty would have a devastating impact. It would deport a 76-year-old grandfather from a country in which in which he has lived for the last 50 years, to a country where he has no ties and no way of supporting himself. Indeed, the I.J. noted the consequences of this penalty, finding Mr. Baptiste to be a "personally sympathetic person," but, basing her conclusions on the legally erroneous conclusion that his conviction constituted an aggravated felony, was unable to consider the equities present in Mr. Baptiste's case. JA0022-0023.

The DOJ's attempt to squeeze his conviction into the definition of aggravated felony undermines the long-established categorical approach, distorts the purpose of the automatic removal provisions, and strips the I.J.s from exercising their discretionary power, provided in the INA, to weigh the equities in support of and against the drastic remedy of removal.

II. SUPREME COURT AND A CONSISTENT LINE OF THIRD CIRCUIT PRECEDENT REQUIRE THE APPLICATION OF THE CATEGORICAL APPROACH TO DETERMINE THE LEAST CULPABLE CONDUCT NECESSARY TO SUSTAIN A CONVICTION UNDER A STATUTE THAT IS NOT DIVISIBLE.

A. This Court Should Apply the Categorical Approach

The "categorical approach has a long pedigree in our Nation's immigration law." *Moncrieffe*, 133 S. Ct. at 1686. In *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court articulated the categorical approach out of concern for the "potential unfairness of a factual approach," and concluded that a trial court should "look only to the fact of conviction and the statutory definition of the prior offense." *Id*. at 600-02. Despite the clear holding in *Taylor*, the DOJ's brief attempts to taint the record by presenting negative facts that fall outside of those which the court is to consider under the categorical approach. This Court has a long history of presumptively applying the categorical approach in order to determine whether a conviction constitutes an aggravated felony so as to render an alien removable. *See Rojas v. Att'y Gen. of the United States*, 728 F.3d 203 (3d Cir. 2013); *United States v. Blair*, 734 F.3d 218 (3d. Cir. 2013); *Evanson v. Att'y Gen. of the United States*, 550 F.3d 284, 291 (3d Cir. 2008); *Singh v. Ashcroft*, 383 F.3d 144 (3d Cir. 2004).

The categorical approach requires courts to "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime – i.e., the offense as commonly understood." *Descamps v. United States*, 133 S. Ct. 2276, 2282 (2013). A conviction categorically meets the generic definition of a crime "only if the statute's elements are the same as, or narrower than, those of the generic offense." *Id*. at 2282; *see also United States v. Brown*, 765 F.3d 185, 188 (3d Cir. 2014) (discussing the categorical approach in light of *Descamps*). Where the conviction statute has the same elements as the generic offense, the prior conviction can serve as a predicate. If the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as a predicate, even if the defendant actually committed the offense in its generic form" *Descamps*, 133 S. Ct. at 2284.

In the instant case, the DOJ, knowing that the categorical approach is to be presumptively applied, invites this Court to find that the statute at issue in this case is divisible. DOJ Brief at 16. This argument is without legal foundation and the Court should reject this invitation. The DOJ's reliance on Justice Alito's dissent in *Descamps*, "to support his call for a 'more practical' rule that a conviction 'should qualify' when the defendant 'necessarily admitted or the jury necessarily found' the elements of a generic offense" as an alternative means for committing an

offense demonstrates that the DOJ is well aware that their argument is an evisceration of the categorical approach. *Id*. at 2295; DOJ Brief at 19.

Courts may move away from the categorical approach to a "modified categorical approach," only as necessary to assist "the categorical analysis when a *divisible* statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Id*. at 2284 (emphasis added). "[T]he modified categorical approach permits sentencing courts to consult a limited class of documents . . . to determine which alternative formed the basis of the defendant's prior conviction." *Descamps*, 133 S. Ct. at 2282. However, here, there is no basis to move away from the presumptive categorical approach because the statute at issue in not divisible.

B. New Jersey Statute Annotated § 2C:12-1b(1) is Not Divisible.

A statute is not divisible when it contains a "single, indivisible set of elements." *Descamps*, 133 S. Ct. at 2283 (internal quotation marks omitted). The Third Circuit has found, and the DOJ's brief concedes, "the proper approach for determining divisibility within the meaning of *Descamps* is a matter primarily of examining and interpreting the text of the criminal statute." DOJ's Brief at 25; *see also United States v. Brown*, 765 F.3d 185 (3d Cir. 2014). The statute at issue provides that a person is guilty of aggravated assault if he:

> Attempts to cause serious bodily injury to another, or causes such injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury . . . .

N.J. Stat. Ann. § 2C:12-1b(1). A cursory reading of the statute could lead to the erroneous conclusion that the statute is divisible. The New Jersey legislature's use of the word "or," combined with three separate and distinct forms of *mens rea*, may create the appearance of a divisible statute. The Third Circuit has held that Pennsylvania's simple assault statute is divisible because that statute "'list[s] potential offense elements in the alternative,'" i.e. 'different mental states – intent, knowledge, or recklessness.'" *United States v. Marrero*, 743 F.3d 389, 396 (3d Cir. 2014).

Petitioner agrees that Pennsylvania's simple assault statute is divisible, however, Petitioner does so for a different reason than stated in *Marrero*. Pennsylvania's simple assault statute, 18 Pa. Cons. Stat. § 2701(a), states:

> (a) a person is guilty of assault if he:
> (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;
> (2) negligently causes bodily injury to another with a deadly weapon;
> (3) attempts by physical menace to put another in fear of imminent serious bodily injury; or
> (4) conceals or attempts to conceal a hypodermic needle on his person and intentionally or knowingly penetrates a law enforcement officer or an officer or an employee of a correctional institution, county jail or prison, detention facility

> or mental hospital during the course of an arrest or any search of the person.

The statute is divisible *not* because it lists alternative forms of *mens rea*, but instead, because it provides four separate and distinct versions of what constitutes the crime of simple assault. *See Moncrieffe*, 133 S. Ct. at 1684 (defining a divisible statute as one "that contain[s] several different crimes, each described separately"); *Descamps*, 133 S. Ct. at 2284 (holding that a statute is divisible where it "comprises multiple, alternative versions of the crime."); *United States v. Abbott*, 748 F.3d 154, 159 (3d Cir. 2014) (upholding lower court finding that Pennsylvania's possession with intent to deliver statute was divisible because "[t]he punishment for violating depends on the type of controlled substance . . . [b]ecause [the statute] can be violated by the possession of and intent to distribute many different drugs, the types of which can increase the prescribing range of penalties, the statute includes several alternative elements and is therefore divisible"). For instance, 18 Pa. Cons. Stat. § 2701(a)(2) and (a)(4) are two separate and distinct ways that one can commit simple assault in Pennsylvania. Subsection (a)(2) requires an actor to negligently cause bodily injury with a deadly weapon, while (a)(4) could be charged where a person has a hypodermic needle in his or her pocket, which punctures a police officer's skin while that officer is

conducting a pat-down search. Therefore, subsections (a)(2) and (a)(4) provide a prosecutor the ability to charge simple assault for separate and distinct crimes.

Conversely, a statute is not divisible where it lists different mental states that allow for conviction regardless of whether the defendant committed the crime intentionally, knowingly, or recklessly. *See* 18 Pa. Cons. Stat. § 2701(a)(1); *Matter of Chairez*, 26 I&N Dec. 349, 354 (BIA 2014)[1] (explaining that the BIA would look to relevant state law to determine whether a statute treats such variations as alternative means by considering whether "jury unanimity regarding the mental state with which the accused" committed the offense was required).

The New Jersey statute at issue, much like the Utah statute in *Matter of Chairez*, does not require jury unanimity with respect to any single variation of *mens rea*. More importantly, it cannot be determined which aspect of the law Mr. Baptiste was charged with or to which he plead guilty. This is most notably shown by the New Jersey Criminal Model Jury Charge, which states:

> [T]he State must prove beyond a reasonable doubt each of the following elements: 1. That the defendant(s) caused serious bodily injury to another; and 2. That the defendant(s) acted purposely or knowingly or acted recklessly under circumstances manifesting extreme indifference to the value of human life.

[1] We recognize that the Attorney General recently stayed this decision. However, pending a final decision the analysis remains sound and properly applies the legal standard in such cases.

New Jersey Criminal Model Jury Charge, Aggravated Assault—Serious Bodily Injury, N.J. Stat. Ann. § 2C:12-1b(1).[2] The text of this charge shows that section 2C:12-1b(1) does not require jury unanimity on any *mens rea* element, or on any particular sub-section. Applying the jury instruction to Mr. Baptiste's case it cannot be determined whether he plead to and was convicted because he "acted purposely or knowingly or acted recklessly." This is exactly the point made in *Descamps*, 133 S. Ct. at 2283 (holding that a statute is not divisible when it contains a "single, indivisible set of elements").

N.J. Stat. Ann. 2C:12-1b(1) is not divisible for several reasons. First, the textual interpretation of the statute clearly provides that a defendant may be convicted if any or all of the "indivisible set of elements" is proven beyond a reasonable doubt. Second, the *mens rea* provision at issue here is similar to the *mens rea* provision in the Utah statute at issue in *Matter of Chairez* (which the Board found was not divisible). N.J. Stat. Ann. § 2C:12-1b(1) lists three *mens rea* variations, including recklessness, as alternative means, not alternative versions, of committing the crime.[3] Third, the model jury charge fails to require jury unanimity

[2] A copy of these jury instructions is available online at http://www.judiciary.state.nj.us/criminal/charges/assault2.pdf.

[3] Furthermore, because the I.J. and BIA viewed the statute under which Mr. Baptiste pleaded guilty as one that is not divisible and only considered whether

in determining the mental state with which the accused acted. Although not permitted to be used when applying the categorical approach, the indictment in this case confirms that the statute is not divisible. The indictment stated that the defendant, "did purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life cause or attempt to cause serious bodily injury . . . ." JA0029. The State's failure in specifying a single variation of *mens rea* is significant in deciding "divisibility." As the Supreme Court explained in *Descamps*, "[a] prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives." *Descamps*, at 2290. The fact that the prosecutor here did not do so suggests that section 2C:12-1b(1) is not divisible. For the reasons set forth, this Court should find that section 2C:12-1b(1) is not divisible and thereby apply the categorical approach.

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reckless assault constitutes a crime of violence, the DOJ's attempt to present a different theory is prohibited at this stage. *See S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[a] simple but fundamental rule of administrative law . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency").

III. THE LEAST CULPABLE CONDUCT IN VIOLATION OF N.J. STAT. ANN. § 2C:12-1b(1) DOES NOT CONSTITUTE AN AGGRAVATED FELONY AS DEFINED IN 8 U.S.C. § 1101(a)(43)(F).[4]

In accordance with the categorical approach, the court must determine whether the least culpable conduct under N.J. Stat. Ann. § 2C:12-1b(1) qualifies as an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(F). This provision defines an aggravated felony as 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 is at least one year." Under 18 U.S.C. § 16, a crime of violence is defined as:

> (a) an offense that has 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 of physical force against the person or property of another may be used in the course of committing the offense.

N.J. Stat. Ann. § 2C:12-1b(1) provides that a person is guilty of second-degree

[4] As explained in this section, it is an error as a matter of law to conclude that Mr. Baptiste's 2009 guilty plea is an aggravated felony and DOJ's argument should be rejected on that ground. Were the court to accept the DOJ's argument the court would be required to address Mr. Baptiste's due process argument set forth in Section V. It is a cardinal rule of statutory construction that when a "construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to the intent Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). DOJ's construction of the statute raises serious constitutional problems while Mr. Baptiste's interpretation is consistent with Congressional intent and Supreme Court interpretation of the statute.

aggravated assault if he or she "attempts to cause serious bodily injury to another, or . . . under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury." The least culpable conduct in violation of N.J. Stat. Ann. § 2C:12-1b(1) is driving while intoxicated and causing injuries to a passenger. *State v. Pigueiras*, 781 A.2d 1086 (N.J. Super. Ct. App. Div. 2001). In order to come within 18 U.S.C. § 16(b), the statute's least culpable conduct must "by its nature, involve a substantial risk of the use" of physical force in the course of committing the offense. *Aguilar v. Att'y Gen. of the United States*, 663 F.3d 692, 694 (3d Cir. 2011). The Third Circuit has noted that the language "use of force" under section 16(b) requires "specific intent to employ force, and not mere recklessness as to causing harm;" pure recklessness will not suffice. *Tran v. Gonzales*, 414 F.3d 464, 469-470 (3d Cir. 2005). "Pure recklessness . . . exists when the *mens rea* of a crime lack[s] an intent, desire or willingness to use force or cause harm at all . . . we . . . focused the inquiry on whether the crime itself involve[d] any risk of intentional harm or use of force." *Aguilar*, 663 F.3d at 697-698 (citations omitted).

A. To Constitute a Crime of Violence the Least Culpable Conduct Must Create a Substantial Risk of Intentional Physical Force Due to a Confrontation.

In determining whether the statute's least culpable conduct constitutes a crime of violence, the court must assess "whether the crime, by its nature, raises 'a substantial risk' of 'the use of force.'" *Aguilar*, 663 F.3d at 697. The Third Circuit has explained that a crime whose *mens rea* is "pure" recklessness is not a crime of violence for immigration purposes. *Tran*, 414 F.3d at 469. The crime must raise a substantial risk that the perpetrator will *intentionally* use force in furtherance of the offense to constitute a crime of violence under 18 U.S.C. § 16(b). *See Aguilar*, 663 F.3d at 694. In *Aguilar*, the court held since "[t]he confrontation inherent in engaging in non-consensual sexual or deviant intercourse" creates a substantial risk that physical force be necessary in the course of committing the offense, sexual assault, as defined by § 3124.1, is a crime of violence under 18 U.S.C. § 16(b). *Id.* Referencing Black's Law Dictionary and Oxford English Dictionary to define "use," the Third Circuit stated, "These definitions show an obvious commonality: the 'use' of force means more than the mere occurrence of force; it requires the intentional employment of that force, generally to obtain some end." *Tran*, 414 F.3d at 470. "Use of physical force is an intentional act, and therefore the first prong of [§ 16] requires specific intent to use force." *Tran*, 414 F.3d at 469 citing

United States v. Parson, 955 F.2d 858, 866 (3d Cir. 1992). A specific intent to obtain some end is necessary to satisfy the definition of "use."

Although neither the Supreme Court nor the Third Circuit addressed the specific statute at issue here, they have addressed offenses with similar elements. In *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), the Court held a DUI offense causing serious bodily injury was not a crime of violence under 18 U.S.C. § 16(b) as a higher degree of intent than negligence was required; the act itself must be purposeful. Similarly, this Court has reasoned that vehicular homicide is not a crime of violence as the crime raised a substantial risk of harm but lacked a risk of confrontation or use of intentional and directed force. *Oyebanji v. Gonzales*, 418 F.3d 260, 263-264 (3d Cir. 2005). "[T]he 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct…." *Tran*, 414 F.3d at 472 (quoting *Leocal*, 543 U.S at n.7). The Third Circuit in *Tran* held "the 'use of force' in 18 U.S.C. § 16(b) requires a willing intent to use force." *Id*. at 472.

The nature of the statute's least culpable conduct must create a substantial risk of the intentional use of force rather than a substantial risk of harm. As to 18 U.S.C. § 16(b), "a defendant's commission of a crime that, by its nature, is likely to require force similarly suggests a willingness to risk having to commit a crime of specific intent." *Id*. at 471 (citing *Parson*, 955 F.2d at 866). This willingness to

risk using physical force is necessary to satisfy 18 U.S.C. § 16(b). For example, "a burglar of a dwelling risks having to use force if the occupants are home and hear the burglar. In such a case, the burglar has a *mens rea* legally nearly as bad as a specific intent to use force, for he or she recklessly risks having to commit a specific intent crime." *Id*. It is well-settled that crimes of recklessness alone cannot constitute a crime of violence as the conduct lack the *mens rea* necessary for such qualification.

B. There is a Wide Range of Conduct Within N.J. Stat. Ann. § 2C:12-1b(1) Found to Categorically Fall Outside the INA's Definition of an Aggravated Felony as Defined in 8 U.S.C. § 1101(a)(43)(F).

The least culpable conduct under N.J. Stat. Ann. § 2C:12-1b(1), driving while intoxicated and causing bodily harm to a third party, is similar to the conduct in *Leocal* and crimes involving pure recklessness, and therefore cannot constitute a crime of violence. In *State v. Gregg*, 650 A.2d 835 (N.J. Super. Ct. App. Div. 1994), the defendant was highly intoxicated when he collided with another vehicle, killing one person and injuring two others. The defendant was convicted by a jury of aggravated assault, in violation of N.J. Stat. Ann. § 2C:12-1b(1) and other offenses.[5] *Gregg*, 650 A.2d at 836. In *State v. Kromphold*, 744 A.2d 640 (N.J.

[5] On appeal, the court acknowledged that there was more than enough evidence to support the conviction, but reversed due to prosecutorial misconduct.

2000), a defendant was convicted under N.J. Stat. Ann. § 2C:12-1b(1) based on his having caused a head-on collision while driving under the influence of alcohol. Similarly, in *State v. Pigueiras*, 781 A.2d 1086, the Superior Court, Appellate Division affirmed a conviction under N.J. Stat. Ann. § 2C:12-1b(1) where the defendant drove drunk, lost control of his car, and caused an accident resulting in severe injuries to his girlfriend. All of the foregoing conduct falls within the scope of N.J. Stat. Ann. § 2C:12-1b(1), and as such, driving while intoxicated causing unintentional injury constitutes the least culpable conduct for the purposes of comparison under the categorical approach.

The BIA upheld the I.J.'s determination that a guilty plea under N.J. Stat. Ann. § 2C:12-1b(1) entails "such a willingness to use force or cause harm that inherent in the conduct there is a probability . . . of serious bodily injury." JA0015 (citations omitted). However, *Pigueiras*, *Gregg*, and *Kromphold* indicate that purely reckless conduct not involving a willingness to use force falls within the scope of N.J. Stat. Ann. § 2C:12-1b(1). Accordingly, the BIA did not apply the least culpable conduct consistent with prior New Jersey case law, as *Leocal* states, "in no ordinary and natural sense could driving under the influence raise a substantial risk of having to use physical force against another person." *Leocal*, 543 U.S. at 11.

C. Causing Serious Bodily Injury by Driving While Intoxicated is Not a Crime of Violence Pursuant to 18 U.S.C. § 16(b).

A crime of violence pursuant to 18 U.S.C. § 16(b) "requires a substantial risk that physical force will be used against the person. The substantial risk is not synonymous with recklessness, but rather a risk of the *use of force*, not a risk of injury to persons." *Tran*, 414 F.3d at 465. The court in *Tran* held that reckless burning or exploding under 18 Pa. Cons. Stat. § 3301 does not constitute a crime of violence. *Tran*, 414 F.3d 464 (3d. Cir. 2005). In *Leocal*, the Court held a DUI offense causing serious bodily injury was not a crime of violence under 18 U.S.C. § 16(b). *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Following the rationale of *Leocal*, the Third Circuit found that vehicular homicide "is a form of reckless driving that causes death" but held that vehicular homicide is not a crime of violence under U.S.C. § 16(b). *Oyebanji*, 418 F.3d at 263-264. *Leocal*, *Oyebanji*, and *Tran* demonstrate that a DUI offense resulting in serious bodily harm and other reckless crimes require a higher degree of intent to constitute a crime of violence.

As "we look to the elements of the statutory state offense, not to the specific facts [of the case], reading the applicable statute to ascertain the least culpable conduct necessary to sustain conviction under the statute," *Denis v. Att'y Gen. of*

the United States, 633 F.3d 201, 206 (3d Cir. 2011) (internal citations omitted), the minimum culpable conduct test demonstrates that a violation of N.J. Stat. Ann. § 2C:12-1b(1) is not an aggravated felony. Driving while intoxicated does not present the "risk of confrontation," nor intentional use of force that makes sexual assault or burglary a section 16(b) offense. Objectively, the act must be purposefully committed and have a substantial risk of intentional physical force due to a foreseeable confrontation.

A guilty plea under N.J. Stat. Ann. § 2C:12-1b(1) cannot constitute a crime of violence. The statute covers accidental actions, mistakes, heat of the moment reactions and other reckless or negligent actions but not ones that the INA, Supreme Court and Third Circuit case law define as violent crimes. The least culpable conduct under the N.J. statute, bodily harm resulting from driving while intoxicated, although a serious lapse in judgment, would constitute an accident punishable under N.J. law. Simply put, there are a host of crimes that can be and are prosecuted under this N.J. statute but do not reach the INA's definition of violent crimes. Accordingly, those convicted under the N.J. statute should not face the harshest deportation consequences reserved for those that satisfy the crime of violence and aggravated felony standard – immediate removal with no consideration of the equities.

IV. THE PETITIONER'S CONVICTION UNDER N.J. STAT. ANN. § 2C:12-1b(1) DOES NOT CONSTITUTE A CRIME INVOLVING MORAL TURPITUDE.

The Third Circuit has consistently and repeatedly reinforced that to constitute morally turpitudinous behavior, an act must be reprehensible and must involve some form of either scienter consciousness or deliberation. See *Jean-Louis* 582 F.3d 462 (3d Cir. 2009); *Partyka v. Att'y Gen.*, 417 F.3d 408, 414 (3d Cir. 2005). Conduct which is morally turpitudinous is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Knapik v. Ashcroft*, 384 F.3d 84, 89 (3d. Cir. 2004) (citing *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994)). Moral turpitude "contains an honesty component ... which includes conduct that is contrary to justice, honesty, or morality." *Smriko v. Ashcroft*, 387 F.3d 279, 283 (3d Cir. 2004).

Recently, the Third Circuit upheld BIA findings of moral turpitude involving a "serious crime committed recklessly," but did so on an extremely narrow basis—only where the statute "requires the actor to 'consciously disregard' the 'grave risk of death to another person.'" *Partyka*, 417 F.3d at 414 (citing *Knapik*, 384 F.3d at 89-90) (violation of N.Y. Penal Law § 120.25, where the Third Circuit noted that "the elements of depravity, recklessness and grave risk of death, *when considered*

together, implicate accepted rules of morality and the duties owed to society" [emphasis added]). Importantly, although the Court in *Partyka* recognized a narrow band of reckless behavior which could constitute a CIMT, it reaffirmed that the "hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation." *Partyka*, 417 F.3d at 414.

A determination as to whether a conviction constitutes a CIMT requires that the statute be analyzed using the categorical approach. *See Jean-Louis*, 582 F.3d at 471. Accordingly, under Third Circuit precedent, this court must examine "the elements of the statutory offense to ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute."[6] *Mahn v. Att'y Gen. of the United States*, 767 F.3d 170, 174 (3d. Cir. 2014) (citing *Partyka v. Atty Gen. of the U.S.*, 417 F.3d 408 (3d. Cir. 2005)).

[6] *Jean-Louis* rejected the reasoning of the Board of Immigration Appeals (BIA) in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (BIA 2008) which established a "realistic probability" test, and required adjudicators to inquire as to the criminal statute's actual scope and application and examine whether there was a case in which the criminal statute was applied to conduct that did not involve moral turpitude. *Matter of Silva-Trevino* was vacated on April 10, 2015, but the Third Circuit correctly recognized the appropriate test six years previously. *Matter of Silva-Trevino*, 26 I&N Dec. 550 (A.G. 2015). Under *either* the realistic probability test or the hypothetical conduct test, the conduct to be analyzed is that of driving while intoxicated and injuring a third party, which does not constitute a CIMT.

An examination of the least culpable conduct demonstrates that Mr. Baptiste's conviction under N.J. Stat. Ann. § 2C:12-1b(1) does not constitute a CIMT, because although reckless conduct is sufficient to violate N.J. Stat. Ann. § 2C:12-1b(1), that conduct is neither depraved nor sufficiently serious. Because of this, the Third Circuit should find that Mr. Baptiste's conviction under N.J. Stat. Ann. § 2C:12-1b(1) is not a CIMT.

A. Third Circuit Precedent Demonstrates that N.J. Stat. Ann. § 2C:12-1b(1) does not Constitute a CIMT.

The Third Circuit has considered the issue of morally turpitudinous conduct several times before and has repeatedly found that CIMTs require "a reprehensible act committed with an appreciable level of consciousness or deliberation." *Partyka*, 417 F.3d at 414. Because the least culpable conduct under N.J. Stat. Ann. § 2C:12-1b(1) requires only that an act be committed recklessly without conscious disregard of a grave risk of death to another person, its *mens rea* requirements do not meet the levels that the Third Circuit has previously held sufficient to constitute a CIMT.

1. The Third Circuit has Previously Considered N.J. Stat. Ann. 2C:12 and has Found that it does not Include Morally Turpitudinous Behavior.

The Third Circuit has previously considered N.J. Stat. Ann. § 2C:12-1b(1)[7], although it did so in a non-precedential opinion and only determined that attempting to cause serious bodily injury constituted a CIMT. *See Andres v. Atty General of the United States*, 263 Fed. Appx. 212 (3d. Cir. 2008). Importantly, although it did not reach a conclusion as to whether reckless conduct would constitute a CIMT, the court cited to the BIA opinion which did reach such a conclusion. The BIA opinion notes that it was *only* because Andres committed the assault against his wife that reckless conduct constituted a CIMT. *Andres*, 263 Fed. Appx. at 215 ("we note the fact that according to the indictment, the victim was the respondent's wife means his conviction would involve moral turpitude even if it only required a reckless state of mind."). It was the presence of this aggravating factor—knowledge that the victim was his wife—that the BIA emphasized in its conclusion that reckless conduct here would constitute a CIMT.

The Third Circuit has also previously examined a different section of N.J. Stat. Ann. § 2C:12, and determined that a conviction for aggravated assault under

[7] At the time, the statute was N.J. Stat. Ann. § 2C:12-1(b)(7); but the language is identical to that of current N.J. Stat. Ann. § 2C:12-1b(1).

N.J. Stat. § 2C:12-1b(5)(a)[8] (assault on police officer) did not constitute a CIMT. *Partyka*, 417 F.3d 480, 410. Importantly, the court noted that courts have generally found an assault on a police officer to be a more serious offense than an assault on a private person. *Partyka*, 417 F.3d at 414-16. Because of this distinction, courts in other circuits have found that reckless infliction of injury is sufficient to find moral turpitude where the assault is on a police officer; however, the Third Circuit did not adopt this view. *Partyka*, 417 F.3d at 415-16. Accordingly, because an assault on a police officer is a more serious offense and a lower *mens rea* is sufficient to find morally turpitudinous conduct, the reverse logically follows: where a private person is the individual who is assaulted, moral turpitude inheres only with a higher *mens rea* present.

Because, as previously discussed, Mr. Baptiste's conviction must be analyzed using the least culpable conduct, his reckless conduct alone is insufficient to constitute a CIMT, and, unlike *Andres*, there are no aggravating factors present. Lacking an aggravating factor, Mr. Baptiste's conviction is more properly analyzed under the logic in *Partyka*, and therefore does not constitute a CIMT.

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[8] N.J. Stat. § 2C:12-1b(5)(a) provides that a person is guilty of aggravated assault for committing a "simple assault as defined in subsection a. (1), (2), or (3) upon: (a) Any law enforcement officer acting in the performance of his duties while in uniform or exhibiting evidence of his authority or because of his status as a law enforcement officer." N.J. Stat. Ann. § 2C:12-1b(5)(a).

B. Mr. Baptiste's Conviction under N.J. Stat. Ann. § 2C:12-1b(1) does not Constitute a CIMT Because the Least Culpable Conduct by Which a Person Can be Convicted does not Constitute a CIMT.

Following Third Circuit precedent, morally turpitudinous conduct exists where conduct is depraved, base, or vile. *See Hernandez-Cruz v. Att'y Gen. of the United States*, 764 F.3d 281, 284-85 (3d. Cir. 2014). Moral turpitude for reckless conduct may also exist where certain aggravating factors are present, as "the elements of depravity, recklessness and grave risk of death, when considered together, implicate accepted rules of morality and the duties owed to society." *Knapik*, 384 F.3d at 90.

Mr. Baptiste was pled guilty to second degree aggravated assault under N.J. Stat. Ann. § 2C:12-1b(1). *See* JA0025; *see also generally* Section IV, *supra*. As previously discussed in Section IV, *supra*, under New Jersey law, the least culpable conduct for which a person has been convicted of violating N.J. Stat. Ann. § 2C:12-1b(1) is that of drunken driving resulting in injury, a crime which does not constitute a CIMT. *See Knapik*, 384 F.3d at 90 ("drunk driving…almost certainly does not involve moral turpitude.")

Neither the Supreme Court nor the Third Circuit has expressly considered whether driving while intoxicated and causing injury to another constitutes a CIMT. Without clear precedent, the standards set forth by the Third Circuit to

generally define morally turpitudinous conduct provide guidance in determining that drunken driving resulting in injury does not constitute a CIMT. Accordingly, drunken driving which causes injury to another must be analyzed to determine whether it is categorically reprehensible, depraved, or base, or whether it contravenes any of the accepted duties of morality or honesty owed to society.

Under New Jersey case law, section 2C:12-1b(1) aggravated assault charges have been sustained where an intoxicated individual drove the wrong way down a road and collided with another individual. *See State v. Kromphold*, 744 A.2d 640 (N.J. 2000). Although the injuries sustained by the victims were severe, the record indicates that this was the first time the actor had been involved in a collision resulting from his intoxication, despite the fact that he regularly drove under the influence of alcohol. *Id*. at 642. Moreover, had the actor not collided with another vehicle, it is likely that the only charges he would have faced are those associated with driving under the influence, charges that the Third Circuit has found insufficient to sustain a CIMT determination. Given that an actor who misjudges his or her tolerance for alcohol, gets behind the wheel of a car, and drives home without incident cannot be charged with an aggravated assault, the only factor which separates this situation from one similar to that of *Kromphold* is the collision

and subsequent injuries to other persons. The question is whether this factor is sufficient to sustain a CIMT charge.

An actor who engages in drunken driving cannot be sufficiently differentiated from an actor who engages in drunken driving with the unfortunate by-product of causing injury to others to sustain a CIMT charge. An actor who drives while under the influence does so while engaging in a gross deviation from conduct which is socially expected from a reasonable person. A person who drives while under the influence but, unfortunately, collides with another car causing injuries, has also engaged in a gross deviation from conduct that a reasonable person would undertake, but this person merely suffers from far worse luck than the first actor. Surely, luck should not be a predicate to determine the sufficiency of a CIMT charge.

Drunk driving fails to rise to the level of baseness, depravity, or reprehensibility required to sustain a CIMT charge. *See Knapik*, 384 F.3d at 90. It has not been found to contravene socially accepted duties of honesty and morality. *Id*. As an aggravated assault charge under N.J. Stat. Ann. § 2C:12-1b(1) can be sustained where an actor drives under the influence, collides with another vehicle, and causes injury to other persons, the difference between this charge and drunk driving are simply too minor to sustain a CIMT charge. Given the statutes under

which the Third Circuit has found morally turpitudinous conduct to exist, standards that the Third Circuit uses to analyze CIMTs, and the least culpable conduct by which a conviction under N.J. Stat. Ann. § 2C:12-1b(1) can be sustained, a conviction under N.J. Stat. Ann. § 2C:12-1b(1) does not constitute a CIMT.

V. 18 U.S.C. § 16(b), INCORPORATED INTO 8 U.S.C. § 1101(a)(43)(F)'S DEFINITION OF "CRIME OF VIOLENCE," VIOLATES DUE PROCESS BECAUSE IT IS UNCONSTITUTIONALLY VAGUE

"[T]he [void for] vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at it meaning and differ as to its application." *United States* v. *Lanier*, 520 U.S.259, 266 (1997) *quoting Connally* v. *Gen. Constr, Co*. 269 U.S. 385, 391 (1926). This description perfectly captures the meaning of 18 U.S.C. § 16(b) as the DOJ interprets the statute—individuals and judges cannot tell what it actually encompasses. The language of 18 U.S.C. § 16(b) suffers from the precise flaws which prompted the Supreme Court to find the Armed Career Criminal Act's (ACCA) "residual clause" to be void for vagueness. *Johnson v. U.S.*, -- U.S. --, 135 S.Ct. 2551 (2015).

Under the doctrine of constitutional avoidance this Court must address this constitutional challenge only if the Court adopts the DOJ's interpretation of the statute and finds that Mr. Baptiste's conviction under N.J. Stat. Ann. § 2C:12-1b(1)

is an aggravated felony. Under the doctrine of constitutional avoidance courts will not "anticipate a question of constitutional law in advance of the necessity of deciding it." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-347 (U.S. 1936) (Brandeis, J., concurring) *citing Liverpool, N. Y.& P. S. S. Co.* v. *Emigration Commissioners,* 113 U.S. 33, 39 (1855) (citations omitted). "The Court will not pass upon a constitutional question … if there is also present some other ground upon which the case may be disposed of." *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring). Therefore, the due process violation must only be evaluated if the court finds the language in 18 U.S.C § 16(b), incorporated into 8 U.S.C. § 1101(a)(43)(F), to encompass the conviction under N.J. Stat. Ann. § 2C:12-1b(1).

A. The Due Process Clause of the Fifth Amendment Applies to Deportation Proceedings.

The Fifth Amendment's Due Process Clause "requires that a penal statute define that criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). While here we are dealing with violations of the INA, it "is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Demore v. Kim*, 538 U.S. 510, 523 (2003) (internal

quotation marks omitted); *See Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951) (acknowledging the grave nature of deportation and necessity of certainty in such context). The Fifth Amendment and its prohibition of vague statutes applies to 8 U.S.C § 1101(a)(34)(F).

B. 18 U.S.C. § 16(b) Suffers From the Same Flaws that led the Supreme Court to Strike Down the ACCA Residual Clause.

The Supreme Court found that the ACCA's "residual clause" – which permits an enhanced sentence for a prior offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another" – violated due process as unconstitutionally vague. *Johnson*, 135 S.Ct. at 2557. The risk-based statute at issue here, 18 U.S.C. § 16(b), which covers an offense 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" suffers from the same flaws that led the Supreme Court in *Johnson* to strike down the risk-based residual clause of the ACCA.

The Supreme Court found the ACCA residual clause suffered from two features that "conspire[d] to make it unconstitutionally vague." *Johnson*, 135 S.Ct. at 2557. First, the Court found no practical methodology for determining the inherent risk posed by any given statute, explaining there was "no reliable way to

choose between…competing accounts of what constitutes an *ordinary* case." *Id*. at 2558 (emphasis added). *Johnson* noted the "nature of the inquiry," including vast disagreements regarding what constitutes the ordinary case, rather than the matter of degree of risk or enumerated offenses rendered the statute void for vagueness. *Id*. at 2560; (*Compare, e.g. United States v. Whitson*, 597 F. 3d 1218, 1222 (11th Cir. 2010) (per curiam) (concluding that deciding whether conspiracy is a violent felony requires evaluating only the dangers posed by the "simple act of agreeing [to commit a crime]," *with United States v. White*, 571 F. 3d 365, 370–371 (4th Cir. 2009) (considering the probability that the conspiracy will actually be carried out in determining whether it qualifies as a violent felony). Courts have been provided no guidance or basis to determine what the "ordinary" violation of the statute entails – an imagined, judicial construct, not based on real facts or statutory elements. While the Court questioned the residual clause in part because it contained "a confusing list of examples," the Court made it clear that this confusing list of examples was not the basis for the decision. *Johnson*, 135 S.Ct. at 2561. The Court explained, "*[m]ore importantly*," the residual clause required courts to apply a risk-based standard "to an idealized *ordinary* case of the crime." *Id*. (emphasis added).

Second, even if the Court could discern the ordinary case for a given statute, the residual clause "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony" – i.e., the statute lacks a meaningful gauge for determining when the ordinary case of a particular statute reaches the ACCA threshold of posing a "serious potential risk of physical injury." *Id*. The Court held ACCA's residual clause to be unconstitutionally vague as the clause combined an "indeterminacy about how to measure the risk posed by a [particular] crime" in the ordinary case with an "indeterminacy about how much risk it takes for the crime to qualify as a violent felony." *Id*. at 2558.

18 U.S.C. § 16(b) is almost a mirror image of the clause of the ACCA stricken as void for vagueness.[9] It contains precisely the same flaws. The Court has

[9] This Circuit has observed, a "crime of violence under § 16(b) requires a different analysis than a crime of violence under the ACCA. Under the ACCA, a violent felony must create a serious potential risk of physical injury to another. Under § 16(b), the inquiry is whether the crime creates a substantial risk of the use of force while committing the offense, not a risk of injury." *Aguilar*, 663 F.3d at 700. However, without binding authority the Third Circuit has also expressed the comparable nature of the statutes. "The inquiry under § 16(b) and under the ACCA are analogous—if there is no serious potential risk of physical injury, there is not likely to be a serious risk that physical force will be used." *Addo v. Att'y Gen. of the United States*, 355 Fed. Appx. 672, 677 (3d Cir. 2009) (internal citations omitted). Prior to *Johnson*, the Supreme Court frequently cited its decision in *Leocal*, 543 U.S. 1, when discussing the ACCA residual clause. *See James*, 550 U.S. at 216, 219, 224 (pointing to *Leocal* three times as an example of a crime subject to the risk-based analysis); *Begay v. United States*, 553 U.S. 137, 143, 145 (2008) (citing *Leocal* three times in a discussion of risk-based analysis).

noted that the residual clause considers whether conduct encompassed by the "elements of the offense, in the *ordinary* case, presents a serious potential risk of injury to another" while 18 U.S.C. § 16(b) similarly requires courts to consider not the petitioner's own conduct, but whether the nature of the crime, "as evidenced by the generic elements of the offense – must be such that its commission *ordinarily* would present a risk that physical force would be used." *James v. United States*, 550 U.S. 192, 208 (2007) (emphasis added); *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994) (reaching the same conclusion prior to *James*).

Section 16(b) and the residual clause are subject to the same mode of analysis – the categorical approach – which demands that courts "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime.'" *Leocal*, 543 U.S. at 7. Both 18 U.S.C. § 16(b) and the residual clause apply a risk-based standard to "an idealized ordinary case of the crime" – an "abstract inquiry" that "offers significantly less predictability." *Id.* at 2561. In *Johnson*, the Supreme Court condemned the residual clause as it essentially asked judges "to imagine how the idealized ordinary case of the crime

subsequently plays out," while 18 U.S.C § 16(b) asks courts to make the same predictions with idealized ordinary cases.[10] *Id*. at 2557-58.

Second, like the residual clause, 18 U.S.C. § 16(b) lacks the same meaningful gauge for determining when an "ordinary case" has met the equally-nebulous standard of a "substantial risk" that force will be used. *See* 18 U.S.C. § 16(b). Thus, the defects that rendered the residual clause void for vagueness are equally present in 18 U.S.C. § 16(b) and mandate the same result. Further, if the residual clause which provided guiding examples of the necessary risk is too ambiguous to pass constitutional scrutiny, a similar statute that provides no such examples can only be *more* ambiguous. Ultimately, both are subject to the same constitutional defects and *Johnson* dictates that § 16(b) be held void for vagueness – "indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a crime of violence." *Id*. at 2558.

[10] If anything, the risk-based standard of 18 U.S.C. § 16(b), speculation as to an individual's willingness to use physical force, as opposed to the risk-based standard of the ACCA's residual clause, presenting "a serious potential risk of physical injury to another," entails a heightened degree of conjecture. Surely speculating in an ordinary case one's willingness to intentionally use physical force rather than flee is more uncertain than a potential risk of harm.

Indeed, the Brief of the Solicitor General for the United States in *Johnson* stated that 18 U.S.C. § 16(b) "requires a court to identify the ordinary case of the commission of the offense," which makes it "*equally susceptible to petitioner's central objection to the residual clause*." Brief for the United States of America, *Johnson* v. *United States*, 2015 WL 1284964, 22-23 (2015) (emphasis added). The Government admits the same flaw at issue in the residual clause exists in 18 U.S.C § 16(b).

C. The Third Circuit Should Follow the Ninth Circuit's Recent Decision That *Johnson*'s Fundamental Holding Rendered 18 U.S.C. § 16(b) Unconstitutionally Vague.

The Ninth Circuit recently found 18 U.S.C. § 16(b) "suffers from the same indeterminacy as ACCA's residual clause" and held 18 U.S.C § 16(b) unconstitutional as a due process violation. *See Dimaya v. Lynch*, -- F.3d --, 2015 WL 6123546, at *1 (9th Cir. 2015). In a thorough analysis the Ninth Circuit began by acknowledging, "importantly, both the provision at issue here [Section 16(b)] and ACCA's residual clause are subject to the same mode of analysis. Both are subject to the categorical approach." *Dimaya*, 2015 WL 6123546, at *10. This analysis in turn hinges on the particular judge's conjecture of whether the crime involved a "substantial risk of force" in the "ordinary case," rather than focusing on real-world facts or elements of the crime. *Id*. at *11. *Johnson's* "reasoning

applies with equal force to the similar statutory language and identical mode of analysis used to define a crime of violence for purposes of the INA." *Id*. at *12.

The court found 18 U.S.C. § 16(b) suffers the same indeterminacy regarding, "how much risk it takes for the crime to qualify as 'a crime of violence.'" *Id*. at *15 *citing Johnson*, 135 S. Ct. at 3558. Section 16(b) provides "judges no more guidance than does the ACCA provision as to what constitutes a substantial enough risk of force to satisfy the statute. Accordingly, *Johnson's* holding with respect to the imprecision of the serious potential risk standard is also clearly applicable to § 16(b)." *Id*. at *15.

Ultimately, the Ninth Circuit found 18 U.S.C. § 16(b) and ACCA both combine "indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a crime of violence;'" Therefore, 18 U.S.C § 16(b) is "subject to identical unpredictability and arbitrariness as ACCA's residual clause.'" *Id*. at *12, 21 (citing 135 S. Ct. at 2558). The Ninth Circuit elaborated that 18 U.S.C. § 16(b) "requires courts to 1) measure the risk by an indeterminate standard of a judicially imagined ordinary case, not by real world facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial." *Id*. at *21 (citations omitted). After thoroughly considering the issue, the Ninth Circuit held 18 U.S.C.

§ 16(b) is "subject to the same constitutional defects and that *Johnson* dictates that § 16(b) be held void for vagueness." *Id*. at *12. We ask this Court to come to the same conclusion if the Court is required to reach this constitutional issue.

VI. CONCLUSION

A final order finding his 2009 guilty plea to be a crime of violence mandating removal from the United States and exiling him is a serious consequence to impose on a 76-year-old grandfather who has lived much of his life in the United States. It forecloses the possibility that an immigration judge may consider the equities against and in favor of allowing Mr. Baptiste to remain in this country, and mandates penalties on top of the sentence which Mr. Baptiste has already served.

This court should analyze Mr. Baptiste's conviction under N.J. Stat. Ann. § 2C:12-1b(1) using the categorical approach and find that the least culpable conduct by which a person may be convicted of violating N.J. Stat. Ann. § 2C:12-1b(1) does not constitute an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(F), and that it further does not constitute a CIMT. Alternatively, this court should find 18 U.S.C. § 16(b) unconstitutionally void for vagueness.

VII. PRAYER FOR RELIEF

For the above reasons, Petitioners respectfully ask this court to find that Mr. Baptiste was not convicted of a crime which constitutes a crime of violence as defined by 8 U.S.C. § 1101(a)(43)(F), and that Mr. Baptiste was not convicted of a crime which constitutes a CIMT. Petitioners respectfully ask that this court remand this case back to the BIA with instructions to immediately release Mr. Baptiste from custody.

/s Michael L. Foreman

Michael L. Foreman
Counsel of Record
PENNSYLVANIA STATE UNIVERSITY
DICKINSON SCHOOL OF LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
State College, PA 16803
(814) 865-3832
mlf25@psu.edu
PA Bar 30231
Dated: November 30, 2015

CERTIFICATION OF BAR ADMISSION

I certify that I, Michael L. Foreman am admitted to practice before the United States Court of Appeals for the Third Circuit.

/s Michael L. Foreman

Michael L. Foreman
Counsel of Record
PENNSYLVANIA STATE UNIVERSITY
DICKINSON SCHOOL OF LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
State College, PA 16803
(814) 865-3832
mlf25@psu.edu
PA Bar 30231
Dated: November 30, 2015

CERTIFICATION OF COMPLIANCE WITH FEDERAL RULE 32(a)

I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains less than 14,000 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface and type style requirements of Rules 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman Font.

/s Michael L. Foreman

Michael L. Foreman
Counsel of Record
PENNSYLVANIA STATE UNIVERSITY
DICKINSON SCHOOL OF LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
State College, PA 16803
(814) 865-3832
mlf25@psu.edu
PA Bar 30231
Dated: November 30, 2015

CERTIFICATION OF COMPLIANCE WITH 3d. CIR. L.A.R. 31.1(c)

In accordance with the Third Circuit Rule 31.1(c), I certify that (1) the electronic brief being filed is identical to the paper copies being submitted, and (2) that a virus protection program Symantec has been run on the file and no virus was detected.

/s Michael L. Foreman

Michael L. Foreman
Counsel of Record
PENNSYLVANIA STATE UNIVERSITY
DICKINSON SCHOOL OF LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
State College, PA 16803
(814) 865-3832
mlf25@psu.edu
PA Bar 30231
Dated: November 30, 2015

CERTIFICATION OF SERVICE

I certify that the original and nine copies of this brief, as well as the original and nine copies of the record appendix, are being sent to the Clerk- of the Court today, November 30, 2015, by United Parcel Service (UPS) Next Day Delivery. I further certify that one copy of the brief, as well as one copy of the record appendix, are being served today, November 30, 2015, on the respondent, the Department of Justice, by United Parcel Service (UPS) Next Day Delivery.

I certify under penalty of perjury that the foregoing statements by me are true.

/s Michael L. Foreman

Michael L. Foreman
Counsel of Record
PENNSYLVANIA STATE UNIVERSITY
DICKINSON SCHOOL OF LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
State College, PA 16803
(814) 865-3832
mlf25@psu.edu
PA Bar 30231
Dated: November 30, 2015

NO. 14-4476

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CARLTON BAPTISTE, a.k.a., CARLTON BAPTIST,

Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION ON REVIEW FROM AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

VOLUME 1, APPENDED TO THE BRIEF (JA0001 to JA0009)

Michael L. Foreman
Counsel of Record
PENNSYLVANIA STATE UNIVERSITY
DICKINSON SCHOOL OF LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
State College, PA 16803
(814) 865-3832
mlf25@psu.edu
PA Bar #30231

JOINT APPENDIX – TABLE OF CONTENTS

(Volume 1 Appended to Brief)

14-4476 tyw

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Carlton Baptiste,
Petitioner

v.

ERIC HOLDER
United States Attorney General
Respondent

Immigration File No. A 030338600

PETITION FOR REVIEW

PETITION FOR REVIEW

The above-named Petitioner hereby petitions for review by this Court of the final order of removal entered by the Board of Immigration Appeals on 10/15/2014.

This Petition is timely filed pursuant to 8 U.S.C. §1252(b)(1) as it is filed with 30 days of the decision by the BIA.

The above-named Petitioner is filing *pro se*.

Respectfully submitted,

X Carlton Baptiste

Dated: 11/13/14

PROOF OF SERVICE

I, Carlton Baptiste, (A 030-338-600) hereby declare:
I am over the eighteen (18) years of age. My address is:

Essex County Correctional Facility
354 Doremus Avenue
Newark, NJ 07105

On 11/13/14, I caused the enclosed documents described as follows:

1. Petition for Review
2. BIA Decision dated 10/15/2014
3. In Forma Pauperis Affidavit
4. Proof of Service

to be served by regular mail to the following parties in said action by placing them in an envelope and mailing said envelope to the address set forth below:

Honorable Eric Holder, Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Thomas W. Hussey, Director
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
1331 Pennsylvania Avenue, NW
Washington, D.C. 20004

Field Office Director, DHS/ICE
Newark District Field Office
614 Frelinghuysen Avenue, 3rd Floor
Newark, New Jersey 07112

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE United States that the foregoing is true and correct.

Executed on 11/13/14.

X Carlton Baptiste

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

Whitney Wallace Elliott, Esquire
Law Offices of Whitney Elliott, LLC
45 Academy Street, Suite 409
Newark, NJ 07102

DHS/ICE Office of Chief Counsel - NEW
P.O. Box 1898
Newark, NJ 07101

Name: BAPTISTE, CARLTON

A 030-338-600

Date of this notice: 10/15/2014

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:
Pauley, Roger

Issued:
Userteam: Docket

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

BAPTISTE, CARLTON
A030-338-600
DHS/ESSEX COUNTY JAIL
354 DOREMUS AVENUE
NEWARK, NJ 07105

DHS/ICE Office of Chief Counsel - NEW
P.O. Box 1898
Newark, NJ 07101

Name: BAPTISTE, CARLTON

A 030-338-600

Date of this notice: 10/15/2014

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

lucasd
Userteam: Docket

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: A030 338 600 – Newark, NJ Date: OCT 15 2014

In re: CARLTON BAPTISTE a.k.a. Carlton Baptist

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Whitney Wallace Elliott, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony under section 101(a)(43)(F) of the Act

Lodged: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - *Convicted of two or more crimes* involving moral turpitude

APPLICATION: Termination; asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Trinidad and Tobago, has timely filed an appeal of an Immigration Judge's decision dated May 20, 2014. The Immigration Judge found the respondent removable as charged under both charges of removability, denied his applications for asylum and withholding of removal pursuant to sections 208 and 241(b)(3) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §§ 1158 and 1231(b)(3), respectively, and withholding of removal under the Convention Against Torture pursuant to 8 C.F.R. § 1208.16(c)(2), due to statutory ineligibility, denied his application for deferral of removal under the Convention Against Torture pursuant to 8 C.F.R. § 1208.17, and ordered the respondent removed. On appeal, the respondent contests both the Immigration Judge's removability finding and the denial of all forms of relief. The appeal will be dismissed.

The record reflects that on December 15, 1978, the respondent was convicted in the Superior Court of New Jersey, County of Essex, for the offense of atrocious assault and battery, in violation of N.J. Stat. § 2A:90-1, for which he received a suspended sentence of 12 months' imprisonment (I.J. at 2; Exh. 2). In addition, on April 6, 2009, the respondent was convicted pursuant to a guilty plea in the Superior Court of New Jersey, County of Essex, for the offense of aggravated assault, in violation of New Jersey Stat. Ann. § 2C:12-1b(1), for which he received a 5-year sentence of imprisonment (I.J. at 2; Exh. 2). On the basis of these convictions, the DHS initiated the present removal proceedings, charging the respondent with deportability under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), 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 under section 101(a)(43)(F) of the Act, as well as deportability as an alien convicted of two or more crimes involving moral turpitude under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii). The Immigration Judge sustained both charges. We agree with her resolution.

The term "crime of violence" is defined at 18 U.S.C. § 16 as follows:

> (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.

In determining whether a particular offense is a "crime of violence" under this definition, we have held that either the elements of the offense must be such that physical force is an element of the crime, or that the nature of the crime -- as evidenced by the generic elements of the offense -- must be such that its commission ordinarily would present a risk that physical force would be used against the person or property of another, irrespective of whether the risk develops or harm actually occurs. *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994).

New Jersey Statutes Annotated § 2C:12-1b(1) provides that "A person is guilty of aggravated assault if he attempts to cause serious bodily injury to another, or causes such injury purposely or knowingly or under circumstances manifesting extreme indifference to human life recklessly causes such injury." We agree with the Immigration Judge that this offense qualifies as a crime of violence under 18 U.S.C. § 16(b), even though it may be committed by means of reckless, as opposed to intentional, conduct. In the context of 18 U.S.C. § 16(b), the relevant question is not whether the offense of conviction may itself be committed by means of intentional or reckless conduct; rather, the question is whether the offense (whatever its *mens rea* may be) is one that inherently involves a person acting in conscious disregard of the risk that, in the course of its commission, he may "use" physical force against the person of another. In *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004), the Supreme Court explained that 18 U.S.C. § 16(b)

> covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. The reckless disregard in § 16(b) relates *not* to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime. The classic example is burglary. A burglary would be covered under § 16(b) *not* because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.

125 S. Ct., at 383 (emphasis in original). Like the burglar who, upon entering a building, necessarily disregards the substantial risk that he will be required to intentionally use physical force against the building's lawful occupants, an individual who undertakes to cause serious bodily injury to another under circumstances manifesting extreme indifference to human life necessarily disregards the substantial risk that in the course of committing that offense he will use physical force against another, either to effect the serious bodily injury that the statute

requires or to overcome the victim's resistance or both. *See Aguilar v. Attorney General of U.S.*, 663 F.3d 692 (3d Cir. 2011). Furthermore, because it is the abstract "nature" of the offense that is relevant and not the specific facts underlying the conviction, it is no defense that the substantial risk of the use of force did not in fact materialize in the respondent's particular case, just as it would be no defense for a burglar to argue that his particular burglary was of an unoccupied dwelling.

Thus, we agree with the Immigration Judge that the crime for which the respondent was convicted and sentenced to more than 1 year of imprisonment constitutes a crime of violence, and is an aggravated felony. As such, this offense constitutes a particularly serious crime, thus rendering the respondent ineligible for asylum, pursuant to section 208(b)(2)(A)(ii) of the Act. In addition, because the respondent was sentenced to imprisonment for at least 5 years for this aggravated felony, it is also a particularly serious crime for the purpose of precluding withholding of removal under section 241(b)(3) of the Act (pursuant to section 241(b)(3)(B)(ii) of the Act), and withholding of removal under the Convention Against Torture (pursuant to 8 C.F.R. § 1208.16(d)(2)).

While the particularly serious crime bar does not preclude deferral of removal under the Convention Against Torture pursuant to 8 C.F.R. § 1208.17, we find no clear error in the Immigration Judge's finding that the respondent did not establish that it is more likely than not that, if returned to Trinidad and Tobago, he will experience treatment that would rise to the level of torture that is "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," and we affirm her determination on this issue for the reasons she provided in her decision (I.J. at 10-13). *See* 8 C.F.R. §§ 1208.16(c), 1208.18(a)(1)-(5); *Kaplun v. Att'y Gen. of the U.S.*, 602 F.3d 260 (3d Cir. 2010) (indicating that the question of what is likely to happen to an alien if removed is a factual question).

In addition, while we need not address the issue of the respondent's removability under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii), in order to resolve the respondent's appeal, we note our agreement with the Immigration Judge's resolution of this issue as well. The respondent does not contest the Immigration Judge's finding that his December 15, 1978, conviction for atrocious assault and battery, in violation of N.J. Stat. § 2A:90-1, constitutes a crime involving moral turpitude. However, he does contest her determination that his April 6, 2009, aggravated assault conviction under N.J. Stat. Ann. § 2C:12-1b(1), was for a morally turpitudinous offense.

As indicated above, in order to sustain a conviction for aggravated assault, a New Jersey prosecutor must, at a minimum, establish that the offender "under circumstances manifesting extreme indifference to human life recklessly causes" serious bodily injury to another. N.J. Stat. Ann. § 2C:12-1b(1). The New Jersey courts hold that an individual acts under circumstances manifesting an extreme indifference to the value of human life if he acts with conscious awareness of the fact that his conduct bears a substantial risk that he will kill another and he conducts himself with no regard to that risk. *See State v. Colon*, 689 A.2d 1359, 1364 (N.J. Super. Ct. App. Div. 1997). Based upon this examination of the statutory elements of the New Jersey offense of aggravated assault, we are persuaded that it is a crime in which moral turpitude

necessarily inheres. Specifically, an individual cannot form the culpable mental state and commit the culpable acts required for conviction under section 2C:12-1b(1) without acting in a base, vile or depraved manner and without consciously disregarding a substantial risk that he will kill another. *See, e.g., Matter of Franklin*, 20 I&N Dec. 867, 869-70 (BIA 1994) (finding moral turpitude where the offender's conduct necessarily involved the conscious disregard of a known risk, where that disregard constituted a gross deviation from a reasonable standard of care). Accordingly, we agree with the Immigration Judge's resolution of this ground of removability as well.

Accordingly, the following order will be issued.

ORDER: The appeal is dismissed.

FOR THE BOARD