No. 14-4476

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CARLTON BAPTISTE, a.k.a., CARLTON BAPTIST,
A030-338-600,

Petitioner,

v.

LORETTA E. LYNCH,
UNITED STATES ATTORNEY GENERAL,

Respondent.

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

BRIEF FOR RESPONDENT

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A030-338-600,

Petitioner,

v.

LORETTA E. LYNCH,
UNITED STATES ATTORNEY GENERAL,

Respondent.

STATEMENT OF JURISDICTION

Petitioner Carlton Baptiste seeks review of the October 15, 2014 final order of removal issued by the Board of Immigration Appeals ("Board"). Administrative Record ("A.R.") 3-6; Joint Appendix ("J.A.") 6-9. The Board upheld the immigration judge's determination that Baptiste's 2009 conviction for second-degree aggravated assault in violation of Section 2C:12-1b(1) of New Jersey General Statutes Annotated ("N.J.S.A.") constituted a crime of violence under 18 U.S.C. § 16(b), and, due to the five-year prison sentence imposed, an aggravated felony under Section 101(a)(43)(F) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(43)(F) (2012). A.R. 3-5; J.A. 6-8. The Board further

affirmed the immigration judge's determination that Baptiste's aggravated felony conviction rendered him removable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), ineligible for asylum, and ineligible for withholding of removal under the INA and the Convention Against Torture ("CAT"). A.R. 3-5; J.A. 6-8. The Board also upheld the immigration judge's determination that Baptiste's 2009 conviction combined with his 1978 conviction for atrocious assault and battery in violation of former N.J.S.A. § 2A:90-1 (West. 1978) rendered him removable under INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii), as an alien convicted of two separate crimes involving moral turpitude. A.R. 5-6; J.A. 8-9. Finally, the Board upheld the immigration judge's determination that Baptiste did not meet his burden of proof for deferral of removal under the CAT. A.R. 5; J.A. 8. The Board had jurisdiction to review the immigration judge's decision pursuant to 8 C.F.R. §§ 1003.1(b)(3) and 1240.15, which grant the Board appellate jurisdiction over the decisions of immigration judges in removal proceedings.

Section 242 of the INA, 8 U.S.C. § 1252, governs the judicial review of final orders of removal in the circuit courts of appeals. See INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (providing for "[j]udicial review of a final order of removal."). On November 14, 2014, Baptiste timely filed his petition for review. See INA § 242(b)(1), 8 U.S.C. § 1252(b)(1); J.A. 2-3. Venue is proper because the immigration judge completed the removal proceedings against Baptiste in Newark,

New Jersey, which lies within this judicial circuit. See INA § 242(b)(2), 8 U.S.C. § 1252(b)(2); A.R. 51-64: J.A. 11-23. However, as explained below, INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C), restricts this Court's jurisdiction over the petition for review because Baptiste is an alien who is removable by reason of having committed an enumerated criminal offense. The Court retains "jurisdiction to ascertain its jurisdiction, i.e., to determine '(1) whether the petitioner is an alien and (2) whether he has been convicted of one of the enumerated offenses.'" Rojas v. Atty Gen. of the U.S., 728 F.3d 203, 207 (3d Cir. 2013) (en banc), quoting Borrome v. Atty Gen. of the U.S., 687 F.3d 150, 154 (3d Cir. 2012). Furthermore, INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), provides this Court with jurisdiction to consider Baptiste's claim that the statutory definition of a crime of violence at 18 U.S.C. § 16(b) is unconstitutionally vague. Petitioner's Brief ("Pet. Br.") 36-45.

STATEMENT OF THE ISSUES

1. Whether second-degree aggravated assault under N.J.S.A. § 2C:12-1b(1) constitutes a crime of violence under 18 U.S.C. § 16(b) where it covers those who act with an awareness and conscious disregard of the probability of causing serious bodily injury, which naturally raises a substantial risk that the assailant or the victim will use intentional physical force during the commission of the injury.

2. Whether the statutory definition of a crime of violence at 18 U.S.C. § 16(b) violates the Constitution's guarantee of due process where this Court has applied the narrow definition of a crime of violence without any calls for review of whether the standard was unconstitutionally vague.

3. Whether the Board reasonably determined that second-degree aggravated assault under N.J.S.A. § 2C:12-1b(1) constitutes a crime involving moral turpitude where a conscious disregard of the probability that serious bodily injury will result from one's actions is a well-established reprehensible act with an appreciable level of consciousness or deliberation.

STATEMENT OF THE CASE

I. BAPTISTE'S IMMIGRATION HISTORY PRIOR TO JUNE 2013

Baptiste is a native and citizen of Trinidad and Tobago. A.R. 676. On April 13, 1972, Baptiste was admitted to the United States as a lawful permanent resident. Id. On August 4, 1975, Baptiste was apprehended trying to re-enter the United States at the Canadian border, placed in "exclusion proceedings," and charged with being inadmissible to the United States pursuant to former INA § 212(a)(31), 8 U.S.C. § 1182(a)(31) (1974), as an alien who "knowingly and for gain," encouraged, induced, assisted, abetted, or aided another alien to enter or try

to enter the United States.[1] A.R. 360, 536-37. On May 15, 1978, an immigration judge terminated the proceedings and ordered Baptiste's return to the United States as a returning resident. A.R. 360, 535-42.

On September 3, 1985, Baptiste was placed in deportation proceedings and charged with being deportable under former INA § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1984), as an alien convicted of a violation of law relating to a federally controlled substance. A.R. 360, 490-91. On December 17, 1987, an immigration judge sustained the deportability charge, but waived Baptiste's deportation pursuant to former INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996). A.R. 497. On January 12, 1998, Baptiste submitted an application for naturalization. A.R. 327. On May 22, 2001, the former Immigration and

[1] "Prior to 1996, the INA primarily distinguished individuals on the basis of 'entry' and not admission.'" Hing Sum v. Holder, 602 F.3d 1092, 1099 (3d Cir. 2010), citing INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994) (defining "entry" as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise"). "'Entry' dictated what type of enforcement proceeding applied to determine whether a non-citizen could be removed or barred from the country. Non-citizens who had effected an 'entry' into the United States were subject to deportation proceedings, while those who had not made an 'entry' [or were seeking entry] were subject to exclusion proceedings." Hing Sum, 602 F.3d at 1099-1100 (additional citation omitted). In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C, § 220, 110 Stat. 3009, Congress replaced "deportation and exclusion proceedings with a general 'removal' proceeding." Hing Sum, 602 F.3d at 1100. "Under the new regime, an alien's admission, under an amended definition at INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A), generally controls whether he or she is subject to grounds of deportability or inadmissibility within the context of a removal proceeding." Hing Sum, 602 F.3d at 1100.

Naturalization Service --- now the Department of Homeland Security ("DHS") --- administratively closed Baptiste's application due to his failure to appear for a scheduled interview. Id.

II. BAPTISTE'S ASSAULT CONVICTIONS

On December 15, 1978, Baptiste was convicted of atrocious assault and battery "by maiming or wounding another," a high misdemeanor violation of former N.J.S.A. § 2A:90-1 (West. 1978). A.R. 515-17, 521; J.A. 32. Baptiste was sentenced to a suspended twelve-month term of imprisonment and placed on probation for one year. A.R. 521; J.A. 32. On February 23, 2009, Baptiste was convicted of aggravated assault, a crime of the second degree, in violation of N.J.S.A. § 2C:12-1b(1) (West. 2009), and sentenced to five years imprisonment. A.R. 508-14, 521; J.A. 25-26.

III. THE REMOVAL PROCEEDINGS

On June 8, 2013, the DHS commenced removal proceedings against Baptiste through filing a Notice To Appear before an immigration judge in Newark, New Jersey. A.R. 735-36. The DHS alleged that Baptiste's aggravated assault conviction rendered him removable from the United States pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) as an alien convicted of an aggravated felony, defined under 8 U.S.C. § 1101(a)(43)(F) as "a crime of violence (as defined in [18 U.S.C. § 16], but not including a purely political offense) for which the term of imprisonment

[is] at least one year." 8 U.S.C. § 1101(a)(43)(F). A.R. 735. Under 18 U.S.C. § 16:

> The term "crime of violence" means--
>
> (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.

18 U.S.C. § 16. The DHS subsequently lodged an additional charge of removability against Baptiste pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii) on the basis that his aggravated assault conviction and his conviction for atrocious assault and battery constituted "two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial." A.R. 508, 733-34.

Baptiste denied each charge of removability and moved the immigration judge to terminate the removal proceedings. A.R. 698-707, 716-24. On October 8, 2013, the immigration judge sustained the charges of removability. A.R. 113-15; J.A. 36-38. On November 5, 2013, Baptiste filed an application for deferral of removal under the CAT. A.R. 137, 311-23. Baptiste claimed that the husband or other family members of the victim from his 2009 conviction intended to torture

him in Trinidad and Tobago with the acquiescence of government officials. A.R. 316-20. On January 23, 2014, Baptiste moved the immigration judge to reopen his exclusion proceedings sua sponte and grant him relief under former 8 U.S.C. § 1182(c). A.R. 379-84. On March 11, 2014, the immigration judge denied Baptiste's motion to reopen. A.R. 360-63. On May 20, 2014, the immigration judge held a merits hearing on Baptiste's application for deferral of removal under the CAT. A.R. 205-23.

IV. THE IMMIGRATION JUDGE'S DECISION

At the conclusion of the merits hearing, the immigration judge issued an oral decision denying Baptiste's application for deferral of removal under the CAT. A.R. 51-63; J.A. 11-23. As an initial matter, the immigration judge explained why he previously found Baptiste removable and ineligible for asylum and withholding of removal. A.R. 52-56; J.A. 12-16. The immigration judge reasoned that second-degree aggravated assault in violation of N.J.S.A. § 2C:12-1b(1) categorically constituted a crime of violence under 18 U.S.C. § 16(b) because the minimum 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 may be intentionally used in the commission of the crime." A.R. 54; J.A. 14, citing Aguilar v. Atty. Gen. of the U.S., 663 F.3d 692, 698-99 (3d Cir. 2011). In contrast to crimes involving "pure recklessness,"

the immigration judge concluded that second-degree aggravated assault under the New Jersey statute required the perpetrator to act with "extreme indifference to the value of human life," and thus create a "probability of serious bodily injury," which signified a substantial risk that the perpetrator would use force in the commission of the offense. A.R. 55; J.A. 15.

In addition, the immigration judge also reasoned that Baptiste's two assault convictions constituted separate crimes involving moral turpitude that rendered him removable under 8 U.S.C. § 1227(a)(2)(A)(ii). A.R. 56-58; J.A. 16-18. The immigration judge concluded that causing serious bodily injury by acting with extreme indifference to the value of human life pursuant to the New Jersey aggravated assault statute and atrocious assault and battery under the former New Jersey law categorically constituted reprehensible conduct with a sufficient degree of scienter, and thus met the definition of a crime involving moral turpitude. A.R. 57-58; J.A. 17-18.

Having concluded that Baptiste was convicted of an aggravated felony for which he was sentenced to five years in prison, the immigration judge concluded that Baptiste was only eligible for deferral of removal under the CAT. A.R. 59-60; J.A. 19-20, citing INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (asylum); INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii) (withholding of removal). However, the immigration judge determined that Baptiste failed to demonstrate a

clear probability that anyone would torture him in Trinidad and Tobago or that a government official would turn a blind eye if he faced a clear probability of torture at the hands of his alleged enemies. A.R. 61-63; J.A. 21-23. Accordingly, the immigration judge denied Baptiste's application for deferral of removal under the CAT. A.R. 63; J.A. 23.

V. BAPTISTE'S APPEAL TO THE BOARD

On June 16, 2014, Baptiste filed an appeal with the Board challenging the immigration judge's removability findings. A.R. 12-29, 37-40. Baptiste argued that N.J.S.A. § 2C:12-1b(1) constituted an "indivisible statute" because New Jersey law did not require "jury unanimity with respect to any one of the three possible variations of *mens rea* in the statute." A.R. 21. Baptiste asserted that the Board could only apply "the formal categorical approach" and "focus on the minimum conduct that has a realistic probability of being prosecuted." A.R. 21. Baptiste designated "causing serious bodily injury as a result of driving with a high degree of recklessness" as the least minimum conduct proscribed under N.J.S.A. § 2C:12-1b(1). A.R. 21. Baptiste asserted that this conduct did not create a substantial risk that physical force against another person would be used in the course of committing the offense pursuant to the Supreme Court's decision in Leocal v. Ashcroft, 543 U.S. 1, 11, 125 S. Ct. 377 (2004), and its progeny, which held that a person does not risk having to use physical force in the course of

operating a vehicle while intoxicated and causing injury. A.R. 22-23, citing Oyebanji v. Gonzales, 418 F.3d 260 (3d Cir. 2005); Bejarano-Urrutia v. Gonzales, 413 F.3d 444, 446 (4th Cir. 2005); United States v. Torres-Villalobos, 487 F.3d 607, 616-17 (8th Cir. 2007). Because there was no "risk of confrontation" present in such circumstances, Baptiste asserted that his conviction for second-degree aggravated assault did not constitute a crime of violence. A.R. 24-28. As a final matter, Baptiste claimed that his aggravated assault conviction also did not constitute a crime involving moral turpitude. A.R. 28-29, citing Jean-Louis v. Atty. Gen. of the U.S., 582 F.3d 462, 469 (3d Cir. 2009).

VI. THE BOARD'S ORDER

On October 15, 2014, the Board dismissed Baptiste's appeal. A.R. 3-5; J.A. 6-9. The Board agreed with the immigration judge's determination that the full range of conduct proscribed under N.J.S.A. § 2C:12-1b(1) fell within the definition of a crime of violence under 18 U.S.C. § 16(b) because "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 the 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." A.R. 4-5; J.A. 7-8. Furthermore, the Board found that second-degree aggravated assault under

N.J.S.A. § 2C:12-1b(1) qualified as a crime involving moral turpitude because the proscribed conduct necessarily required the perpetrator to act in a "base, vile or depraved manner" and consciously disregard "a substantial risk that he will kill another." A.R. 5-6; J.A. 8-9 citing Matter of Franklin, 20 I. & N. Dec. 867, 869-70 (BIA 1994). With regard to Baptiste's claim for deferral of removal, the Board found no clear error in the immigration judge's determination that Baptiste failed to demonstrate a clear probability of torture inflicted by or with the acquiescence of a government official. A.R. 5; J.A. 8. The instant petition for review ensued. J.A. 2-3.

SUMMARY OF THE ARGUMENT

Baptiste's conviction for second-degree aggravated assault under N.J.S.A. § 2C:12-1b(1) categorically constitutes a crime of violence under 18 U.S.C. § 16(b). Over a decade ago, the Supreme Court explained in Leocal, 543 U.S. at 10, that the plain language of 18 U.S.C. § 16(b) "simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing the offense." The state of New Jersey categorizes second-degree aggravated assault as a violent crime and the most egregious form of aggravated assault. At a minimum, the state must prove that a defendant caused serious bodily injury to another with an awareness and conscious disregard of the known probability of serious bodily injury. If the substantial risk of force created

by an unlawful entry into a victim's home qualifies under 18 U.S.C. § 16(b), then the risk of force created when one's actions create a probability of serious bodily injury to the victim qualifies as well.

In addition, the statutory definition of a crime of violence at 18 U.S.C. § 16(b) does not violate the Constitution's guarantee of due process. Since the Supreme Court's decision in Leocal, this Court has routinely examined whether state or federal crimes constituted crimes of violence. Nevertheless, Baptiste asserts that 18 U.S.C. § 16(b) presents constitutional problems identical to those resolved by the Supreme Court in Johnson v. United States, --- U.S. ---, 135 S. Ct. 2551 (2015), which struck down the residual clause of the Armed Career Criminal Act's ("ACCA") definition of a "violent felony." Although the dissent in Johnson argued that the majority's opinion invalidated any statute requiring courts to use a categorical approach and estimate risk, such as 18 U.S.C. § 16(b), the Johnson majority expressly rejected that reading of its holding and reaffirmed the validity of the categorical approach and risk estimation to statutes, such as 18 U.S.C. § 16(b). Accordingly, 18 U.S.C. § 16(b) does not violate the Constitution's guarantee of due process.

As a final matter, the Board properly determined that Baptiste's aggravated assault conviction also constituted a crime involving moral turpitude. Consistent with its own case law and this Court's precedent, the Board rationally determined

that acting in conscious disregard of the probability of causing serious bodily injury to another and causing such injury is reprehensible conduct with an appreciable level of consciousness or deliberation.

STANDARD AND SCOPE OF REVIEW OF REVIEW

Baptiste's removability implicates 8 U.S.C. § 1252(a)(2)(C), which provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have 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) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

8 U.S.C. § 1252(a)(2)(C). The Court retains "jurisdiction to ascertain its jurisdiction, i.e., to determine '(1) whether the petitioner is an alien and (2) whether he has been convicted of one of the enumerated offenses.'" Rojas, 728 F.3d at 207, quoting Borrome, 687 F.3d at 154. The agency found Baptiste

removable under 8 U.S.C. § 1227(a)(2)(A)(iii) and 8 U.S.C. § 1227(a)(2)(A)(ii), which both suffice to trigger 8 U.S.C. § 1252(a)(2)(C).[2] A.R. 3-6.

Any alien convicted of an aggravated felony after his or her admission to the United States is removable under 8 U.S.C. § 1227(a)(2)(A)(iii). The term aggravated felony is defined at 8 U.S.C. § 1101(a)(43)(F) as "a crime of violence (as defined in [18 U.S.C. § 16], but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). Baptiste does not dispute that second-degree aggravated assault under N.J.S.A. § 2C:12-1b(1) is a felony that carries a term of imprisonment of at least one year. However, Baptiste does dispute the Board's determination that his conviction constitutes a crime of violence under 18 U.S.C. § 16(b). Pet. Br. 20-28. Since the jurisdictional inquiry into Baptiste's removability only involves consideration of criminal provisions, New Jersey state law and 18 U.S.C. § 16(b), "'a task outside

[2] Removability under 8 U.S.C. § 1227(a)(2)(A)(ii) requires both predicate offenses to carry a possible sentence of one year or longer, as provided under INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i), to implicate 8 U.S.C. § 1252(a)(2)(C). Baptiste does not dispute that his assault convictions satisfy this threshold. See N.J.S.A. § 2A:90-1; N.J.S.A. § 2C:12-1b(1). Moreover, Baptiste does not dispute that his 1978 assault conviction under N.J.S.A. § 2A:90-1 constituted a crime involving moral turpitude. See Matter of P--, 7 I. & N. Dec. 376, 377 (BIA 1956) (atrocious assault and battery under New Jersey law constitutes a crime involving moral turpitude). Accordingly, the only potential issue with regards to Baptiste's removability under 8 U.S.C. § 1227(a)(2)(A)(ii) is whether second-degree aggravated assault under N.J.S.A. § 2C-12-1b(1) constitutes a crime involving moral turpitude. Pet. Br. 28-36.

the BIA's special competence and congressional delegation . . . [and] very much a part of this Court's competence,'" the Court should exercise de novo review of whether Baptiste's conviction for second-degree aggravated assault under New Jersey law constitutes a crime of violence. Aguilar, 663 F.3d at 695, quoting Tran v. Gonzales, 414 F.3d 464, 467 (3d Cir. 2005) (noting that de novo review is appropriate in the context of interpreting the criminal provisions of Title 18 of the United States Code). The Court has jurisdiction to Baptiste's constitutional challenge to 18 U.S.C. § 16(b) de novo. 8 U.S.C. § 1252(a)(2)(D); see Papageorgiou v. Gonzales, 413 F.3d 356, 357 (3d Cir.2005); Pet. Br. 36-45.

Should the Court determine that Baptiste is removable under 8 U.S.C. § 1227(a)(2)(A)(iii), it need not determine whether he is also removable under 8 U.S.C. § 1227(a)(2)(A)(ii), because this additional ground of removability would create no additional immigration consequence.[3] INS v. Bagamasbad, 429 U.S. 24,

[3] As the agency recognized, Baptiste's aggravated felony conviction not only rendered him removable, it disqualified him from asylum and withholding of removal. A.R. 59-60, citing 8 U.S.C. § 1158(b)(2)(A)(ii) (an aggravated felony constitutes a particularly serious crime rendering an alien ineligible for asylum); 8 U.S.C. § 1231(b)(3)(B)(ii) (an aggravated felony for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a disqualifying particularly serious crime for purposes of withholding of removal). Should the Court conclude that Baptiste is not removable under 8 U.S.C. § 1227(a)(2)(A)(iii), Baptiste's removability will depend on whether the Board properly found him removable under 8 U.S.C. § 1227(a)(2)(A)(ii). Even if the Court sustains this basis of removability, it should remand for the Board to reconsider whether Baptiste's conviction, though not an aggravated felony, still constitutes a "particularly serious crime" that renders him

25, 97 S. Ct. 200 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.") (citations omitted). Should the Court reach the issue, it reviews the Board's determination that certain conduct constitutes a crime involving moral turpitude de novo, subject to the principles of deference articulated in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778 (1984). Mehboob v. Atty Gen. of the U.S., 549 F.3d 272, 275 (3d Cir. 2008). The Court defers to the Board's definition of moral turpitude and to its "determination that a certain crime involves moral turpitude." Id. (quotation marks and citation omitted).

ARGUMENT

I. BAPTISTE IS AN ALIEN WHO IS REMOVABLE BY REASON OF HAVING COMMITTED A CRIME OF VIOLENCE AGGRAVATED FELONY

A. The Categorical Approach

"When the Government alleges that a state conviction qualifies as an 'aggravated felony' under the INA," courts "generally employ a 'categorical approach' to determine whether the state offense is comparable to an offense listed

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ineligible for asylum and withholding of removal. INS v. Ventura, 537 U.S. 12, 16, 123 S. Ct. 353 (2002) ("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."); see Denis v. Atty Gen. of the U.S., 633 F.3d 201, 213-17 (3d Cir. 2011) (detailing the discretionary analysis of whether a conviction constitutes a disqualifying particularly serious crime).

in the INA." Moncrieffe v. Holder, --- U.S. ---, 133 S. Ct. 1678, 1684 (2013) (citations omitted); Aguilar, 663 F.3d at 695. "[R]eading the applicable statute to ascertain the least culpable conduct necessary to sustain a conviction," Denis, 633 F.3d at 206, courts "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, --- U.S. ---, 133 S. Ct. 2276, 2281 (2013). Thus, courts "may 'look only to the statutory definitions'— i.e., the elements" of the prior offense, "and *not* 'to the particular facts underlying those convictions.'" Id. at 2283 (emphasis in original), quoting Taylor v. United States, 495 U.S. 575, 600, 110 S. Ct. 2143 (1990). A prior 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."[4] Descamps, 133 S. Ct. at 2281; see also United States v. Brown, 765 F.3d 185, 188 (3d Cir. 2014) (discussing the

[4] "The categorical approach will not always suffice." Aguilar, 663 F.3d at 695 n.6. For divisible statutes, courts may undertake a modified categorical approach, under which it "may look beyond the statutory elements to determine the particular part of the statute under which the defendant was actually convicted." Id; quoting Denis, 633 F.3d at 206 (citation omitted). Here, this Court need only undertake a categorical approach because, as is set forth in detail herein, N.J.S.A. § 2C:12-1b(1) criminalizes only behavior that qualifies as a crime of violence. Aguilar, 663 at 695 n.3. Moreover, the record of Baptiste's conviction does not offer any assistance to undertake a modified categorical approach. A.R. 521. Although not at issue, the New Jersey statute is divisible because it is phrased in the disjunctive "'describing [at least] three variations of the same offense.'" Brown, 765 F.3d at 192, citing Descamps, 133 S. Ct. at 2285; Pet. Br. 13-20.

categorical approach in light of Descamps); United States v. Marrero, 743 F.3d 389 (3d Cir. 2014).

B. Crimes Of Violence Under 18 U.S.C. § 16(b)

The categorical analysis in this case "begins with the plain language of § 16(b)," which requires that for aggravated assault under N.J.S.A. § 2C:12-1b(1) "to be a crime of violence it must be a felony and, by its nature, raise a substantial risk that physical force may be used during the commission of the offense." Aguilar, 663 F.3d at 700-01, citing 18 U.S.C. § 16(b).[5] "[C]rimes carrying a *mens rea* of recklessness may qualify as crimes of violence under § 16(b) if they raise a substantial risk that the perpetrator will resort to intentional physical force in the course of committing the crime." Aguilar, 663 F.3d at 692.

Since 1990, the definition of the term "aggravated felony" in the INA has included a conviction for a crime of violence under 18 U.S.C. § 16 (not including a

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[5] Under 18 U.S.C. § 16:

> The term "crime of violence" means--
>
> (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.

18 U.S.C. § 16.

purely political offense), for which the term of imprisonment is at least one year.[6] 8 U.S.C. § 1101(a)(43)(F); The Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048 (1990). The Supreme Court examined the crime of violence definition in Leocal, 543 U.S. at 4, 11, where a unanimous Supreme Court held that a Florida offense for driving under the influence did not constitute a crime of violence under 18 U.S.C. § 16(a) or 18 U.S.C. § 16(b).[7] With regard to 18

[6] Other grounds of deportability cross-reference the definition of a crime of violence. See INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i). Apart from the immigration laws, more than a dozen other federal criminal statutes incorporate 18 U.S.C. § 16(b) or similar language. See, e.g., 18 U.S.C. § 25 (use of minors in crimes of violence); 18 U.S.C. § 119 (protection of individuals performing certain official duties); 18 U.S.C. § 924(c)(3)(B) (using, carrying or possessing firearms in crimes of violence); 18 U.S.C. § 929 (enhanced penalties for offenses committed while possessing armor-piercing ammunition); 18 U.S.C. § 842(p)(2) (disseminating information regarding explosive or destructive devices or weapons of mass destruction with intent that it be used for or in furtherance of crimes of violence); 18 U.S.C. § 844(o) (transferring explosive materials to be used to commit crimes of violence); 18 U.S.C. § 931 (possession of body armor by someone convicted of a crime of violence); 18 U.S.C. § 1028(b)(3)(B) (enhanced penalties for offenses involving fraudulent identification documents committed in connection with crime of violence); 18 U.S.C. § 1952 (traveling or using mail or other facility in interstate or foreign commerce with intent to commit crime of violence); 18 U.S.C. § 1959 (attempting, conspiring, or threatening to commit crime of violence in connection with racketeering enterprise); 18 U.S.C. § 2261 (crime of violence against spouse or domestic partner); 18 U.S.C. § 3561 (mandating at least probation for a first conviction for crime of violence against a spouse or domestic partner); see also 18 U.S.C. § 3142(e-f) (addressing pre-trial release of person charged with or previously convicted of crime of violence); 18 U.S.C. § 3181 (generally authorizing extradition of persons who committed crimes of violence in foreign countries against United States nationals), 18 U.S.C. § 5032 (referral of certain juveniles who commit crimes of violence for proceedings in district court); 18 U.S.C. § 3559(c)(2)(F)(ii) (defining "serious violent felony" in recidivist sentencing statute using language similar to section 16(b)).

[7] The statute addressed in Leocal "ma[de] it a third degree felony for a person to operate a vehicle while under the influence and, 'by reason of such operation,

U.S.C. § 16(a), the Supreme Court held that the "'use . . . of physical force against the person or property of another'" requires "a higher degree of intent than negligent or merely accidental conduct." Leocal, 543 U.S. at 4, quoting 18 U.S.C. § 16(a). Similarly, the Supreme Court concluded that the state statute did not meet the definition of a crime of violence under 18 U.S.C. § 16(b) because "[i]n no 'ordinary or natural' sense can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury." Leocal, 543 U.S. at 11. The Court construed 18 U.S.C. § 16(b) as follows:

> Section 16(b) sweeps more broadly than § 16(a), defining a crime of violence as including '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.' But § 16(b) does not thereby encompass all negligent misconduct, such as the negligent operation of a vehicle. It simply 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 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.

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caus[e] . . . [s]erious bodily injury to another.'" 543 U.S. at 7, quoting Fla. Stat. § 316.193(3)(c)(2).

Leocal, 543 U.S. at 10 (emphasis added, footnote omitted). As construed in Leocal, 18 U.S.C. § 16(b) has two requirements: (1) an offense must be a felony; and (2) the offense that naturally involves a person acting in disregard of the risk that physical force might be used against the victim. See, e.g., Aguilar, 663 F.3d at 701; Tran, 414 F.3d at 471; Oyebanji, 418 F.3d at 264.

In the decade since Leocal, this Court has applied 18 U.S.C. § 16(b)'s narrow, "substantial risk" standard using a categorical approach comparing the statutory definition of a criminal statute with the definition under 18 U.S.C. § 16(b). See, e.g., Aguilar, 663 F.3d at 700-02; Tran, 414 F.3d at 471-72; Oyebanji, 418 F.3d at 264. For example, in Tran, 414 F.3d at 472, the Court concluded that the crime of reckless burning or exploding under Pennsylvania law did not constitute a crime of violence because "the risk that the fire started by the offender will spread and damage the property of another . . . cannot be said to involve the intentional use of force." Id. at 472. In Oyebanji, 418 F.3d at 264, the Court held that the crime of vehicular homicide under New Jersey law did not constitute a crime of violence under 18 U.S.C. § 16(b) because the type of reckless conduct required for vehicular homicide only raised a substantial risk that accidental, not intentional, force would be used. Id. Finally, in Aguilar, 663 F.3d at 701-03, this Court applied the principles derived from Leocal and its own precedent to conclude that sexual assault under Pennsylvania law constituted a crime of

violence under 18 U.S.C. § 16(b).[8] The Court concluded that "*Leocal* and *Tran* teach that crimes carrying a mens rea of recklessness may qualify as crimes of violence under 16(b) if they raise a substantial risk that the perpetrator will resort to intentional physical force in the course of committing the crime." Aguilar, 663 F.3d at 699. The Court reasoned:

> [j]ust as a burglary creates a substantial risk that the burglar will have to use physical force to overcome the desire of home occupants to protect themselves and their property, so too does a sexual assault under § 3124.1, by its nature, create a substantial risk that the assailant will use physical force to overcome a victim's desire to protect his or her body from non-consensual sexual penetration. If the risk of force created by an unlawful entry into a victim's home qualifies under § 16(b), then surely the risk of force when an offender is trying to enter a victim's body without consent must qualify as well.

Aguilar, 663 F.3d at 701.

C. Second-Degree Aggravated Assault Under N.J.S.A. § 2C:12-1b(1) Falls Within The Category Of Active, Violent Crimes

1. Aggravated Assault Under New Jersey Law

"There are many types of conduct which constitute aggravated assault in New Jersey." See 33 N.J. Prac., Criminal Law § 9.2 (4th ed. Aug. 2015); see N.J.S.A. § 2C:12-1b (aggravated assault). "The offense can be either a crime of the second, third or fourth degree." Id. "This grading reflects a number of factors:

[8] Section § 3124.1, a second degree felony under Pennsylvania law, makes it an offense to "engage[ ] in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent."

the degree of injury inflicted or attempted to be inflicted on the victim; the nature of the force, i.e., whether a firearm or other deadly weapon was used; and the mental state of the defendant." Id; citing State v. Sloane, 111 N.J. 293, 296, 544 A.2d 826, 827 (N.J. 1988); see also N.J.S.A. § 2C:44-1. The status of the victim may also elevate the offense. 33 N.J. Prac., Criminal Law § 9.2 (4th ed. Aug. 2015); see also N.J.S.A. § 2C:44-1.

2. Second-Degree Aggravated Assault Under N.J.S.A. § 2C:12-1b(1)

Aggravated assault under N.J.S.A. § 2C:12-1b(1) is a crime of the second degree, the highest degree of assault, which punishes any person who "[a]ttempts 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." Id; see Sloane, 111 N.J. at 303. In general, a person convicted of aggravated assault as a crime in the second degree may be sentenced "for a specific term of years which shall be fixed by the court and shall be between five years and 10 years." N.J.S.A. § 2C:43-6. Aggravated assault in the second degree falls within the New Jersey's designated list of "violent crimes" that require the defendant to serve 85% of the minimum sentence imposed before being eligible for parole. N.J.S.A. § 2C:43-7.2(a)-(d).

Focusing on the elements, as the categorical approach demands, the least culpable second-degree aggravated assault under N.J.S.A. § 2C:12-1b(1) has two

elements: (1) a reckless causing of serious bodily injury, that is a bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ, see N.J.S.A. § 2C:11-1b; and (2) circumstances manifesting extreme indifference to the value of human life. Understood together, the elements require a significantly higher degree of culpability than the statutory reckless standard. See State v. Pigueiras, 344 N.J. Super. 297, 308-13, 781 A.2d 1086 (N.J. Ct. App. 2001); State v. Curtis, 195 N.J. Super. 354, 363-64, 479 A.2d 425 (N.J. Ct. App.) cert. denied, 99 N.J. 212 (1984); State v. Jenkins, 178 N.J. 347, 361-63, 840 A.2d 242 (N.J. 2004).

As an initial matter, even reckless conduct under New Jersey law involves a substantial amount of deliberateness and intent. N.J.S.A. § 2C:2-2b(3).[9] A person

[9] Pursuant to N.J.S.A. § 2C:2-2b(3):

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. 'Recklessness,' 'with recklessness' or equivalent terms have the same meaning.

N.J.S.A. § 2C:2-2b(3).

acts recklessly when he or she "consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." Id. New Jersey courts have explained that to act recklessly the person must act with a "conscious disregard of the" the *possibility* that a result will occur from his or her actions. Jenkins, 178 N.J. at 363; Curtis, 195 N.J. Super. at 364. Moreover, the disregard of the risk "must be of such a nature and degree that, considering the nature and *purpose* of the actor's conduct and the circumstances *known* to him." N.J.S.A. § 2C:2-2b(3) (emphasis added). Further, it must involve "a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation." Id. In short, reckless culpability has a volitional and active component. Cf. Bejarano-Urrutia, 413 F.3d at 449-50 (Niemeyer, C.J., *dissenting*) ("Unlike a person who accidentally injures another person, a person who acts recklessly in bringing about harm to another is aware of the nature of his conduct and thus can be said to be 'actively employ[ing]' the physical force that results in injury 'against another.'") (alteration in original), quoting Leocal, 543 U.S. at 9.

The degree of culpability is "significantly higher" for actions that occur under "circumstances manifesting extreme indifference to human life." See Pigueiras, 344 N.J. Super. at 1096. "'[E]xtreme indifference to human life [is] conduct that indicates that life does not matter . . . a pronounced or unusual or violent failure to accord any importance or value to human life.'" State v. Farrell,

250 N.J. Super. 386, 390-91, 594 A.2d 1338 (N.J. Ct. App. 1991), quoting Model Jury Charges (Title 2C), N.J.S.A. § 2C:12-1. Unlike a conscious disregard for the *possibility* of a result from reckless conduct, a person acting under circumstances manifesting extreme indifference to the value of human life must have awareness and consciously disregard the *probability* of a result from his volitional, active conduct. Jenkins, 178 N.J. at 363; Curtis, 195 N.J. Super. At 364; Pigueiras, 344 N.J. Super. at 1096. Thus, in the context of second-degree aggravated assault, the defendant must cause serious bodily injury with an awareness and conscious disregard of the known probability of serious bodily injury. See Jenkins, 178 N.J. at 363 ("In aggravated manslaughter . . . the defendant must have caused death with an awareness and conscious disregard of the *probability* of death. If, instead, the defendant disregarded only a possibility of death, the result is reckless manslaughter.") (additional citation and internal quotations omitted); Curtis, 195 N.J. Super. at 363-64, 366 (a person acting "under circumstances manifesting extreme indifference to the value of human life" is not just acting recklessly, that is creating a possibility of serious bodily injury to another person, the person's actions must satisfy a "significantly greater . . . degree of recklessness" such that the person create a "probability" of causing "serious bodily injury" to the victim). Accordingly, the least culpable conduct necessary for a second-degree aggravated assault-serious bodily injury conviction involves an awareness and conscious

disregard of a known probability that serious bodily injury will result from one's volitional, active conduct. Id.

Contrary to Baptiste's claim, the least culpable conduct for purposes of a crime of violence categorical analysis is not the least egregious possible fact pattern necessary for a conviction, which Baptiste contends is "driving while intoxicated and causing injuries to a passenger." Pet. Br. 21, 24-25. The categorical approach focuses on the elements of the offense, and not the particular facts of any conviction. Descamps, 133 S. Ct. at 2281-82; Aguilar, 663 F.3d at 695. Moreover, the categorical approach in the crime of violence context under 18 U.S.C. § 16(b) looks at the natural, substantial risk of physical force of the statutory offense in the ordinary case, and not fact patterns where the substantial risk of physical force thankfully does not come to fruition. See Aguilar, 663 F.3d at 702 n.19 ("although it is true that intentional force may not, in all cases, be used during the commission [of an offense], that is not the proper inquiry. Again, the relevant question under § 16(b) is whether there is a 'substantial risk' that [force] will be used.") see also Ng v. Atty Gen., 436 F.3d 392, 397 (3d Cir. 2006) (holding that some violations would not result in physical force, but "the natural consequence of using interstate commerce facilities in the commission of murder-for-hire is that physical force will be used upon another.") (additional citations

omitted). Accordingly, Baptiste's focus on a unique factual pattern misapprehends the proper categorical inquiry here. Pet. Br. 21, 24-25.

Moreover, the factual scenario of "driving intoxicated and causing injuries" would not suffice to sustain a conviction for second-degree aggravated assault. See Pigueiras, 344 N.J. at 317-18; State v. Oriole, 243 N.J. Super. 688, 581 A.2d 142 (N.J. Ct. App. 1990) ("drunken driving and reckless conduct are not synonymous.") (citation omitted). The scenario Baptiste describes would be punishable, at most, as a fourth-degree aggravated assault for assault by auto. See N.J.S.A. § 2C:12-1c ("A person is guilty of assault by auto or vessel when the person drives a vehicle or vessel recklessly and causes either serious bodily injury or bodily injury to another."). To meet to the significantly higher standard of a second-degree aggravated assault, a defendant's "predriving conduct, such as drinking, and conduct associated with the driving [must be] so extraordinary and extreme . . . to satisfy" the standard for "circumstances manifesting extreme indifference to the value of human life." Pigueiras, 344 N.J. at 317-18 (citation and internal quotations omitted); State v. Kromphold, 162 N.J. 345, 349-50, 744 A.2d 640 (N.J. 2000) (noting the defendant's blood alcohol was more than triple the legal limit intoxicated and acted under "extreme indifference to the value of human life"); accord State v. Mara, 253 N.J. Super. 204, 213, 601 A.2d 718 (N.J. Ct. App. 1992); State v. Gregg, 278 N.J. Super 182, 650 A.2d 835 (N.J. Ct. App.

1984). Again, the standard is "significantly higher" than driving while intoxicated and reckless conduct. Pigueiras, 344 N.J. at 314; Pet. Br. 21, 24-28. In sum, the least culpable conduct necessary for a conviction for second-degree aggravated assault under N.J.S.A. § 2C:12-1b(1) is an awareness and conscious disregard of the probability of causing serious bodily injury.

3. Acting With An Awareness And Conscious Disregard Of The Probability Of Causing Serious Bodily Injury Naturally Raises A Substantial Risk That The Actor Or The Victim Will Use Intentional Physical Force

Aggravated assault under N.J.S.A. § 2C:12-1b(1) constitutes a crime of violence under 18 U.S.C. § 16(b). "The quintessential violent crimes--murder, assault, battery, rape, etc.--involve the intentional use of actual or threatened force against another's person . . . ." Oyebanji, 418 F.3d at 264, citing *Black's Law Dictionary 16* (8th ed.1999). Aggravated assault under N.J.S.A. § 2C:12-1b(1), is a crime of the second degree, the most severe degree of assault. N.J.S.A. § 2C:12-1b(1). Sloane, 111 N.J. at 303. Acting with an awareness and conscious disregard of the probability of causing serious bodily injury naturally raises a substantial risk that the actor or the victim will use intentional physical force during the resultant infliction of injury.[10] Leocal, 543 U.S. at 10 (18 U.S.C. § 16(b) "simply covers

[10] Baptiste has never disputed that attempting to cause serious bodily injury to another or causing such injury purposely or knowingly falls within the definition of a crime of violence under 18 U.S.C. § 16(b).

offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. . . ."); see Briolo v. Atty Gen., 515 Fed. Appx. 126, 129, 2013 WL 1010634 (3d Cir. 2013) (recklessly causing injury "under circumstances manifesting extreme indifference to the value of human life" is "conduct [that] necessarily creates a risk, at the very least, that the victim will resist and that the perpetrator will respond will physical force.") (unpublished).

In Briolo, 515 Fed. Appx. at 128-29, this Court held that third-degree aggravated assault under N.J.S.A. § 2C:12-1b(7) "clearly" constituted a crime of violence under 8 U.S.C. § 16(b). Third-degree aggravated assault and second-degree assault share the same language, except for the injury involved; third-degree aggravated assault results where the victim sustained a "significant bodily injury" whereas second-degree aggravated assault results where the victim sustained a "serious bodily injury;" second-degree aggravates assault requires a more egregious injury, which is punished more severely than third-degree aggravated assault. Compare N.J.S.A. §§ 2C:12-1b(1), b(7).[11] Nevertheless, each degree of assault aggravated requires, at a minimum, the perpetrator to act "under circumstances manifesting extreme indifference to the value of human life." Id.

[11] "'Significant bodily injury' means bodily injury which creates a temporary loss of the function of any bodily member or organ or temporary loss of any one of the five senses." N.J.S.A. § 2C:11-1d.

"Like the conduct at issue in *Aguilar*," aggravated-assault under New Jersey law "necessarily creates a risk, at the very least, that the victim will resist and that the perpetrator will respond with physical force." Briolo, 515 Fed. Appx. at 129. "Thus," there is no doubt that [a] conviction for aggravated assault under this statute categorically constitutes a 'crime of violence' aggravated felony." Briolo, 515 Fed. Appx. at 129 (emphasis added).

Although this Court's internal operating procedures provide that non precedential opinions do not bind panels in later cases, see Chehazeh v. Atty Gen., 666 F.3d 118, 127 n.12 (3d Cir. 2012), citing Internal Operating Procedures 5.7 (3d Cir. 2010),[12] this Court should adhere to its reasoning in Briolo. Acting with an awareness and conscious disregard of the probability of causing serious bodily injury naturally creates a substantial risk that the assailant will accomplish the resultant injury by overcoming the resistance put up by the victim or the outright use of force against the victim. Briolo, 515 Fed. Appx. at 129. The common case of second-degree aggravated assault has the following characteristics: (1) close proximity to the victim; (2) active, deliberate action; and (3) violence. See, e.g., State v. Villar, 150 N.J. 503, 507-08, 518, 696 A.2d 674 (N.J. 1997) (holding that the evidence could support a conviction for second-degree aggravated assault

[12] Internal Operating Procedures 5.7 provides that "[t]he court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing."

where the intoxicated defendant, acting under circumstances manifesting extreme indifference to the value of human life, punched the victim in the face with a beer stein that split her lip "down to the muscle, broke a tooth, and left her covered in blood."); State v. Graham, 223 N.J. Super 571, 539 A.2d 322 (N.J. Ct. App. 1988) (the defendant acted recklessly, but not under circumstances manifesting extreme indifference to the value of human life "when he fired a loaded handgun he was pointing in [his wife's direction], because he "was intoxicated at the time" and not "capable of any manifestation."); State v. Day, 216 N.J. Super. 33, 37, 522 A.2d 1019 (N.J. Ct. App. 1987) ("As to the aggravated assaults, the testimony and physical evidence of his beating the victim so fiercely about the head and face that her tongue was nearly torn from her mouth, shows either an actual 'serious bodily injury' or at least an attempt to cause the same."); see also Commonwealth v. Cassidy, 447 Pa. Super. 192, 196, 668 A.2d 1143 (Pa. Sup. Ct. 1995) (Defendant's act of picking up victim and throwing her across room with such force that she bounced off doorjamb, struck another door frame, and finally fell to ground manifested "extreme indifference to value of human life" within meaning of Pennsylvania's aggravated assault statute). Just as burglary creates a substantial risk that the burglar will have to use physical force to overcome the desire of home occupants to protect themselves and their property, second-degree aggravated assault under N.J.S.A. § 2C:12-1b(1), by its nature, also creates a substantial risk

that the assailant will use physical force to overcome a victim's desire to protect his or her body from the probability of suffering serious bodily injury. See Aguilar, 663 F.3d at 696. If the risk of force created by an unlawful entry into a victim's home qualifies under 18 U.S.C. § 16(b), then surely the risk of force when an offender's actions toward another create a probability of serious bodily injury qualifies as well. Aguilar, 663 F.3d at 696; Briolo, 515 Fed. Appx. at 129.

This conclusion is entirely consistent with the Supreme Court's decision in Leocal, 543 U.S. at 10-11, and this Court's decision in Oyebanji, 418 F.3d at 264. The Leocal and Oyebanji decisions teach that vehicle offenses, even those resulting in death, do not constitute crimes of violence under 18 U.S.C. § 16(b) where there exists a risk of accidental force only. Leocal, 543 U.S. at 10-11; Oyebanji, 418 at 264. Second-degree aggravated assault under N.J.S.A. § 2C:12-1b(1) is neither a vehicle offense, nor do its elements raise only the risk of accidental force in the common case. See State v. Parker, 198 N.J. Super. 272, 281-82, 486 A.2d 1275 (N.J. Ct. App. 1984) ("because of the egregious level of misconduct required for a conviction under N.J.S.A. 2C:12-1(b)(1) it is doubtful that many indictments arising from motor vehicle accidents will ever be returned under that section."). Rather, second-degree aggravated assault naturally falls within the category of active, violent crimes that raise a substantial risk that the defendant, victim, or both will use intentional force during the commission of the

offense. Briolo, 515 Fed. Appx. at 129; Oyebanji, 418 F.3d at 264 (identifying assault crimes as one the "quintessential" violent crimes). Thus, while it is possible to convict an individual for second-degree aggravated assault if he or she drives while "incredibly" intoxicated and under "extreme indifference to the value of human life" recklessly causing serious bodily injury, "that is not the proper inquiry." Aguilar, 663 F.3d at 702 n.19. The question is whether second-degree aggravated assault under N.J.S.A. § 2C:12-1b(1), by its nature, raises a substantial risk of intentional force during the commission of the offense. Id; see, e.g., Ng, 436 F.3d at 397 (holding that some violations would not result in physical force, but "the natural consequence of using interstate commerce facilities in the commission of murder-for-hire is that physical force will be used upon another.") (additional citations omitted). Even where the defendant's intoxication is at issue, the culpability of consciously disregarding the probability of causing serious bodily injury to another raises a substantial risk of intentional, violent force will be used. Accordingly, consideration of the common case of second-degree aggravated assault under N.J.S.A. § 2C:12-1b(1) demonstrates that it is a crime of violence under 18 U.S.C. § 16(b).[13]

[13] Baptiste has waived any challenge to the agency's decision to deny him deferral of removal under the CAT. See Kost v. Kozakiewicz, 1 F.3d 176, 182 (3d Cir.1993) (appellants are required to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief). In any event, the Court would lack jurisdiction to review the agency's dispositive factual finding

II. A CRIME OF VIOLENCE AT 18 U.S.C. § 16(b) COMPORTS WITH THE CONSTITUTION'S GUARANTEE OF DUE PROCESS

A. Due Process

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. "The Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Johnson v. U.S., --- U.S. ---, 135 S. Ct. at 2556, citing Kolender v. Lawson, 461 U.S. 352, 357-358, 103 S. Ct. 1855 (1983); see United States v. Williams, 553 U.S. 285, 304, 128 S. Ct. 1830 (2008). However, there is a "strong presumptive validity that attaches to an Act of Congress." United States v. National Dairy Products Corp., 372 U.S. 29, 32, 83 S. Ct. 594 (1992). Moreover, a statute is unconstitutionally vague only if it cannot be construed in a way that eliminates the vagueness problem. See Skilling v. United States, 561 U.S. 358, 403-04, 130 S. Ct. 2896 (2010); United States v. Lanier, 520 U.S. 259, 266, 117 S.

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that Baptiste failed to establish a clear probability of torture by or with the acquiescence of a public official or a person acting in an official capacity. See Pieschacon-Villegas v. Atty Gen. of the U.S., 671 F.3d 303, 309 (3d Cir. 2011) (the court lacks jurisdiction to review criminal alien's disagreement with BIA's determination that his evidence is insufficient to demonstrate eligibility for CAT relief).

Ct. 1219 (1997) ("[C]larity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute. . . .").

B. The Supreme Court's Decision In Johnson

The Supreme Court recently held that part of the definition for a "violent felony" in the ACCA was facially vague and violated due process. Johnson, 135 S. Ct. at 2563. By way of background:

> Federal law forbids certain people--such as convicted felons, persons committed to mental institutions, and drug users--to ship, possess, and receive firearms. § 922(g). In general, the law punishes violation of this ban by up to 10 years' imprisonment. § 924(a)(2). But if the violator has three or more earlier convictions for a 'serious drug offense' or a 'violent felony,' the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life. § 924(e)(1); Johnson v. United States, 559 U.S. 133, 136, 130 S. Ct. 1265, 176 L.Ed.2d 1 (2010).

Johnson, 135 S. Ct. 2555. The ACCA defined "violent felony" as follows:

> any crime punishable by imprisonment for a term exceeding one year . . . that--
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.

18 U.S.C. § 924(e)(2)(B) (emphasis added). "The closing words of this definition, italicized above, have come to be known as the Act's residual clause." Johnson,

135 S. Ct. 2556. Prior to Johnson, the Supreme Court estimated whether a state or federal crime presented "a serious potential risk of physical injury to another" by utilizing the categorical approach to picture the kind of conduct that the crime involved in "the ordinary case" and judging whether that abstraction presented a serious potential risk of physical injury. See James v. United States, 550 U.S. 192, 208, 127 S. Ct. 1586 (2007).

The Supreme Court concluded in Johnson that "[t]wo features of the residual clause conspire[d] to make it unconstitutionally vague:" (1) "uncertainty about how to estimate the risk [of injury] posed by a crime;" and (2) "uncertainty about how much risk it takes for a crime to qualify as a violent felony." Johnson, 135 S. Ct. at 2557 (alteration added). The Johnson majority emphasized that courts not only had to assess the risk of a crime based on a "judicially imagined 'ordinary case' of [that] crime," but also had to "imagin[e] how the idealized ordinary case of the crime subsequently play[ed] out" to assess the risk of physical injury posed by the crime. Id. at 2557-58. The majority held that the residual clause provided "no reliable way to choose between . . . competing accounts" of what risks of physical injury the ordinary case of a crime would involve, noting that a judicially imagined attempted burglary could just as easily involve a risk of physical injury--where, for example, a burglar encounters police, security or a homeowner--or none at all--where a homeowner yells and the burglar runs away. Id. As to the

uncertainty about how much risk of injury it takes for a crime to qualify as a violent felony, the Johnson majority emphasized that courts estimated this risk based on a judicially imagined set of facts and in light of the residual clause's enumerated offenses--burglary, arson, extortion, and crimes involving explosives--which were "far from clear in respect to the degree of risk [of injury] each poses." Id. at 2558, quoting Begay v. United States, 553 U.S. 137, 143, 128 S. Ct. 1581 (2008). Accordingly, the Supreme Court ruled that the residual clause produced "more unpredictability and arbitrariness than the Due Process Clause tolerates." Id. at 2558.

The government pointed to 18 U.S.C. § 16(b) and an appendix of other statutes to caution that they contained language similar to the ACCA's residual clause and would be placed in constitutional doubt should the Court strike down the residual clause. Supp. Brief for Respondent at 22, App. A, Johnson, 2015 WL 1284964, at *22, *1A. Citing the government's appendix in dissent, Justice Alito stated that "[i]f all these laws are unconstitutionally vague, [the majority's] decision is not a blast from a sawed-off shotgun; it is a nuclear explosion." Johnson, 135 S. Ct. at 2577 (Alito, J. *dissenting*). Justice Scalia, writing for the majority, dismissed these concerns, stating:

> The Government and the dissent next point out that dozens of federal and state criminal laws use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk,' suggesting that to hold the residual clause

> unconstitutional is to place these provisions in constitutional doubt. See post, at 2558-2559. Not at all. Almost none of the cited laws links a phrase such as 'substantial risk' to a confusing list of examples. "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red' assuredly does so." James, 550 U.S., at 230, n. 7, 127 S. Ct. 1586, (Scalia, J., *dissenting*). More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct; "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree," Nash v. United States, 229 U.S. 373, 377, 33 S. Ct. 780, 57 L.Ed. 1232 (1913).

Johnson, 135 S. Ct. at 2561. Accordingly, the Supreme Court distinguished the residual clause from statutes such as 18 U.S.C. § 16(b). Id. at 2561-63.

C. The Ninth Circuit's Decision In Dimaya And The Seventh Circuit's Decision In Vivas-Ceja

Despite the Supreme Court's warning, a divided panel of the Ninth Circuit recently declared that 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." Dimaya v. Lynch, 803 F.3d 1110, 1115 (9th Cir. 2015) (pet. for reh'g en banc filed). The Seventh Circuit has also reached this conclusion. United States v. Vivas-Ceja, --- F.3d ---, 2015 9301373 at *1 (7th Cir. Dec. 22, 2015). The Ninth Circuit's panel majority found that that "courts

considering both § 16(b) and the residual clause must decide what a 'usual or ordinary' violation of the statute entails and then determine how great a risk of injury that 'ordinary case' presents." Dimaya, 803 F.3d at 1115, Rodriguez-Castellon v. Holder, 733 F.3d 847, 854 (9th Cir. 2013) (additional citation and internal quotations omitted). The panel majority saw no textual difference between the ACCA's residual clause and 18 U.S.C. § 16(b), stating that both statutes "require[] courts to inquire whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a substantial risk of force." Dimaya, 803 F.3d at 1116. According to the panel majority, the particular connection of the residual clause with the enumerated offenses was of no consequence because "Johnson . . . made plain that the residual clause was void for vagueness in and of itself for the reasons stated in reaching its decision, and not because of the clause's relation to the four listed offenses." Dimaya, 803 F.3d at 1118. In addition, the panel majority "doubt[ed]" that the residual clause's focus on the risk of injury after the completion of the offense and 18 U.S.C. § 16(b)'s focus on the risk of physical force during the commission of the offense "create[d] a distinction between the two clauses." Dimaya, 803 F.3d at 1118. Nevertheless, the panel majority concluded that the reasoning of Johnson applied "whether the inquiry considers the risk of violence posed by the commission and the aftereffects of a crime, or whether it is limited to consideration of the risk of violence posed by acts

necessary to satisfy the elements of the offense." Dimaya, 803 F.3d at 1118-19. Finally, the Court rejected the government's assertion that the lack of widespread confusion in applying the definition of a crime of violence under 18 U.S.C. § 16(b) demonstrated that it did not suffer from the same indeterminacy of the residual clause. Dimaya, 803 F.3d at 1119. In Vivas-Ceja, 2015 WL at *2-4, the Seventh Circuit reached the same conclusion for the same reasons.

In Dimaya, Judge Callahan concluded in dissent that (1) 18 U.S.C. § 16(b) did not have either of the residual clause's "shortcomings;" and (2) the majority panel "ignore[d] the Court's statement that it was not calling other statutes into question." Dimaya, 803 F.3d at 1120 (Callahan, C.J., *dissenting*). After carefully describing the purpose of the 18 U.S.C. § 16, describing how courts have applied its distinct definitions, and summarizing the Supreme Court's decision in Johnson, Dimaya, 803 F.3d at 1121-27 (Callahan, C.J., *dissenting*), Judge Callahan recognized that "the [Supreme] Court faulted the residual clause for requiring potential risk to be determined in light of 'four enumerated crimes-burglary, arson, extortion, and crimes involving the use of explosives . . . [which] are far from clear in respect to the degree of risk each poses.'" Id. at 1127, quoting Johnson, 135 S. Ct. at 2558 (internal citation omitted). Judge Callahan also identified that the Supreme Court "did not prohibit all use of the 'ordinary case.' It only prohibit[ed] uses that leave uncertain both how to estimate the risk and amount of risk

necessary to qualify as a violent crime." Dimaya, 803 F.3d at 1127 (Callahan, C.J., *dissenting*). In conclusion, Judge Callahan made the following observations:

> The Supreme Court will be surprised to learn that its opinion in Johnson rendered § 16(b) unconstitutionally vague, particularly as its opinion did not even mention *Leocal* and specifically concluded with the statement limiting its potential scope. I fear that we have again ventured where no court has gone before and that the Supreme Court will have to intervene to return us to our proper orbit.

Dimaya, 803 F.3d at 1129 (Callahan, C.J., *dissenting*).

D. Under Johnson, There Is No Reason To Doubt The Constitutionality Of 18 U.S.C. § 16(b)

This Court should uphold the constitutionality of 18 U.S.C. § 16(b). As Judge Callahan recognized in her persuasive dissenting opinion in Dimaya, the Supreme Court did not doubt the constitutionality of statutes, like 18 U.S.C. § 16(b). Dimaya, 803 F.3d at 1127 (Callahan, C.J., *dissenting*); see United States v. Doe, --- F.Supp. 3d ---, 2015 WL 7422618 at *10 (E.D.N.Y Oct. 29, 2015) (holding that 18 U.S.C. § 16(b) was not unconstitutionally vague as applied to the charge of conspiracy to provide material support to a foreign terrorist organization). A faithful reading of the Supreme Court's Johnson decision undercuts Baptiste's vagueness challenge to 18 U.S.C. § 16(b), which is premised on the Ninth Circuit's decision in Dimaya. Pet. Br. 36-45. The Johnson majority expressly rejected Baptiste's position, forewarned by Justice Alito, that its opinion

invalidated statutes, like 18 U.S.C. § 16(b). Johnson, 135 S. Ct. at 2561-62; id. at 135 S. Ct. at 2577 (Alito, J. *dissenting*). The Johnson majority provided two specific reasons why statutes like 18 U.S.C. § 16(b) differed from the ACCA's residual clause: (1) "[a]lmost none of the cited laws links a phrase such as 'substantial risk' to a confusing list of examples" like the residual clause; and (2) "[m]ore importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion" unlike the residual clause that gauges the riskiness of an injury after the conduct in question. Johnson, 135 S. Ct. at 2561-62. Thus, the Johnson majority emphasized the significance of the textual distinctions between valid statutes, like 18 U.S.C. § 16(b) and unconstitutional statutes, like the residual clause. Id.

The majority panel of the Ninth Circuit and the Seventh Circuit overlooked the textual distinctions between 18 U.S.C. § 16(b) and the residual clause. Dimaya, 803 F.3d at 115-16; Vivas-Ceja, 2015 WL at *2-4. First, the risk estimation required to assess whether an offense presents a substantial risk that physical force may be used during its commission "falls short of the wide-ranging thought experiment previously required by the ACCA." See Doe, 2015 WL 7422618 at *10. Unlike the residual clause that focuses on the likely effects of one's conduct, 18 U.S.C. § 16(b) narrowly focuses on felony offenses that pose a substantial risk that physical force will be used in the course of committing the

offense. Compare 18 U.S.C. § 16(b) (requiring a "substantial risk that physical force against the person or property of another may be used"); 18 U.S.C. § 924(e)(2)(B)(ii) (requiring a "serious potential risk of physical injury to another"). "This is a critical distinction that the Supreme Court," this Court, and other courts have recognized. Doe, 2015 WL 7422618 at *10, citing Leocal, 543 U.S. at 10 n.7 (comparing § 16(b) with language identical to § 924(e)(2)(B)(ii) found in the sentencing guidelines, and noting that § 16(b) "plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct," because "[t]he 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct"); accord Aguilar, 663 F.3d at 700 n.16 ("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.") (additional citations omitted). "The risk of serious physical injury," such as provided in the residual clause "concerns the likely effect of the defendant's conduct, but the risk in section 16(b) concerns the defendant's likely use of violent force as a means to an end." Jobson v. Ashcroft, 326 F.3d 367, 373 (2d Cir. 2003) (additional citation). The appreciable difference between gauging a risk of physical injury that results from criminal conduct and

the more narrow estimation of the risk of physical force during the commission of an offense reveals why the Supreme Court did not doubt the constitutionality of statutes, like 18 U.S.C. § 16(b). Johnson, 135 S. Ct. at 2561.

Second, as the Supreme Court also highlighted, unlike the list of exemplar crimes preceding the residual clause, almost all other statutes that rely on an estimation of risk, like 18 U.S.C. § 16(b), do not rely a unique list of enumerated crimes to complicate the assessment of risk. Compare 18 U.S.C. § 924(e)(2)(B)(ii) & 18 U.S.C. § 16(b); Johnson, 135 S. Ct. at 2561 The difficulties the enumerated crimes -- burglary, arson, extortion, and crimes involving the use of explosives -- posed to the analysis of the residual clause largely contributed the Johnson majority's analysis. See Johnson, 135 S. Ct. at 2557-58, 2561. The Johnson majority reasoned that the listing of burglary and extortion forced courts to "go[] beyond evaluating the chances that the physical acts that make up the crime will injure someone." 135 S. Ct. at 2557. The Johnson majority concluded that the assessment of risk "in light of four enumerated crimes" left the residual clause with "uncertainty about how much risk it takes for a crime to qualify as a violent felony." Id. at 2558. Thus, contrary to the conclusion of the Seventh and Ninth Circuit's, Dimaya, 803 F.3d at 1117, Vivas-Ceja, 2015 WL at *2-4, the Johnson majority did not rely on the exemplar crimes only "in responding to the government's argument that the Court's holding would cast doubt on the many

criminal statutes that include language similar to the indeterminate term 'serious potential risk.'" Dimaya, 803 F.3d at 1117, quoting Johnson, 135 S. Ct. at 2561. Rather, the Johnson majority's response to Justice Alito and the government affirmed its position about the impact the list of exemplar crimes had on its holding. Johnson, 135 S. Ct. at 2561. The Johnson majority concluded that the dozens of federal and state criminal laws using terms like "substantial risk," "grave risk," and "unreasonable risk" would "[n]ot at all" be placed in "constitutional doubt" because "[a]lmost none of the cited laws links a phrase such as 'substantial risk' to a confusing list of examples." See Johnson 135 S. Ct. at 2561 ("The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red' assuredly does so."), quoting James, 550 U.S. at 230, n.7 (Scalia, J., *dissenting*) (internal quotations omitted). In sum, 18 U.S.C. § 16(b) "is not the ACCA's residual clause; nor has its standard proven to be unworkably vague." Dimaya, 803 F.3d at 1129 (Callahan, C.J., *dissenting*). Since the Supreme Court's decision in Leocal, this Court has applied this standard without any calls for review of whether the standard was unconstitutionally vague. Accordingly, this Court should uphold the constitutionality of 18 U.S.C. § 16(b).

III. THE BOARD PROPERLY CONCLUDED THAT SECOND-DEGREE AGGRAVATED ASSAULT UNDER N.J.S.A. § 2C:12-1b(1) CONSTITUTES A CRIME INVOLVING MORAL TURPITUDE

The Board properly concluded that second-degree aggravated assault under N.J.S.A. § 2C:12-1b(1) constitutes a crime involving moral turpitude. A.R. 5-6; J.A. 8-9. The Court has explained that "'the hallmark of moral turpitude is a reprehensible act with an appreciable level of consciousness or deliberation.'" Totimeh v. Atty Gen. of the U.S., 666 F.3d 109, 114 (3d Cir. 2012), quoting Partyka v. Atty Gen. of the U.S., 417 F.3d 408, 414 (3d Cir. 2005). "[I]n addition to intentional crimes, serious crimes committed recklessly -- that is, with a conscious disregard of a substantial and unjustifiable risk that *serious bodily injury* or death would follow -- can be found to involve moral turpitude." Mehboob, 549 F.3d at 276 (emphasis added); Knapik v. Ashcroft, 384 F.3d 84, 89-90 (3d Cir. 2004); accord Matter of Franklin, 20 I. & N. Dec. at 869-70; Matter of Medina, 15 I. & N. Dec. 611, 613-14 (BIA 1976); see also Matter of Leal, 26 I. & N. Dec. 20, 23 (BIA 2012). Thus, to the extent that Baptiste contends that a crime committed recklessly must always involve a conscious disregard of "a grave risk of death to another person" to constitute a crime involving moral turpitude, his claim lacks merit. Id; Pet. Br. 30.

Awareness and a conscious disregard of the probability that serious bodily injury will result from one's actions, the least culpable conduct under N.J.S.A. §

2C:12-1b(1), meets "the hallmark" definition of a crime involving moral turpitude because it "is a reprehensible act with an appreciable level of consciousness or deliberation."[14] Totimeh, 666 F.3d at 114. As explained supra, the level of culpability required under N.J.S.A. § 2C:12-1b(1) is significantly higher than reckless behavior; the assailant must be aware and consciously disregard the probability serious bodily injury will result from his or her conduct.[15] Jenkins, 178 N.J. at 363; Curtis, 195 N.J. Super. at 363-64. This level of deliberate action satisfies the "scienter" requirement to constitute a crime involving moral turpitude. Mehboob, 549 F.3d at 276.

Moreover, second-degree aggravated assault is a reprehensible act. An assailant must cause serious bodily injury to the victim, which is defined as "a bodily injury which creates a substantial risk of death or which causes serious,

[14] The Court applies the categorical approach to determine whether a state law conviction constitutes a crime involving moral turpitude. Jean-Louis, 582 F.3d at 465-66.

[15] As discussed previously, Baptiste's claim that the least culpable conduct for second-degree aggravated assault is "driving while intoxicated and causing injuries to a passenger" lacks merit. Pet. Br. 21, 24-25, 33-36. Every conviction for second degree aggravated assault under N.J.S.A. § 2C:12-1b(1) requires, at a minimum, proof beyond a reasonable doubt that the defendant caused serious bodily injury with an awareness and conscious disregard of the known probability serious bodily injury would result from his or her conduct. See Jenkins, 178 N.J. at 363; Curtis, 195 N.J. Super. at 363-64, 366. Baptiste's suggested conduct does not constitute second-degree aggravated assault under N.J.S.A. § 2C:12-1b(1) and side-steps the focus on the elements that a categorical approach demands. Jean-Louis, 582 F.3d at 465-66.

permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." See N.J.S.A. § 2C:11-1b. The level of harm inflicted on a victim of a second-degree aggravated assault under N.J.S.A. § 2C:12-1b(1) is far more serious than a simple assault and even far beyond conduct this Court has previously found reprehensible. See Knapik, 384 F.3d at 89-90 (concluding that "New York's first degree reckless endangerment statute is a crime involving moral turpitude" where it "creates a grave risk of death" without the requirement of injury). If "recklessly engag[ing] in conduct which creates a grave risk of death to another person" constitutes a crime involving moral turpitude without an actual injury, Knapik, 384 F.3d at 89-90, then acting with a higher degree of culpability and causing serious bodily injury to the victim does as well. See Knapik, 384 F.3d at 89-90; Matter of Medina, 15 I. & N. Dec. at 613-14 (reckless aggravated assault under Illinois law constitutes a crime involving moral turpitude); Mehboob, 549 F.3d at 274 ("indecent assault under Pennsylvania law is a crime involving moral turpitude" because "the offense combines a reprehensible act with deliberate conduct."); accord Matter of Franklin, 20 I. & N. Dec. at 869-70 (recklessly causing the death of another person in violation of Missouri law constituted a crime involving moral turpitude); Matter of Wojtkow, 18 I & N Dec. 111, 112 (BIA 1981) (recklessly causing the death of another in violation of New York law constituted a crime involving moral turpitude); cf. Partyka, 417 F.3d at 414-16

(negligent aggravated assault on a police officer under New Jersey law does not constitute a crime involving moral turpitude); N.J.S.A. § 2C:12-1b(1). Contrary to Baptiste's claim, the Board rationally decided that second-degree aggravated assault N.J.S.A. § 2C:12-1b(1) constituted a crime involving moral turpitude. A.R. 5-6; J.A. 8-9; Pet Br. 33.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

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December 29, 2015

CERTIFICATE OF COMPLIANCE WITH RULE 32 OF THE FEDERALRULES OF APPELLATE PROCEDURE

Pursuant to Fed. R. App. P. 32(a)(7)(c), the attached answering brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief is proportionately spaced using Times New Roman 14-point typeface and contains13,185 words.

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CERTIFICATION OF COMPLIANCE WITH RULE 28 OF THE FEDERALRULES OF APPELLATE PROCEDURE

Pursuant to Fed. R. App. P. 28, I certify that the text of the E-Brief and Hard Copies of Respondent's Brief are identical. Furthermore, I certify that Respondent's Brief was scanned with Microsoft Forefront Client Security version1.5.1972.0 and no viruses were detected.

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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Third Circuit Rule 28.3(d), I hereby certify that as counsel for the United States Attorney General, membership in the bar of the United States Court of Appeals for the Third Circuit is waived.

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CERTIFICATE OF SERVICE

On December 29, 2015, I electronically filed the foregoing Brief for Respondent with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I also mailed 10 hard copies of the electronically filed brief to the Clerk's Office.

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