02-4019

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DAMAINE ANTONIO JOBSON,

Petitioner,

v.

JOHN ASHCROFT, Attorney General of the United States,

Respondent.

ON APPEAL FROM THE PETITION FOR REVIEW OF A DECISION BY THE BOARD OF IMMIGRATION APPEALS

BRIEF OF AMICUS CURIAE OF THE NEW YORK STATE DEFENDERS ASSOCIATION IN SUPPORT OF PETITIONER

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PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

In this case, a divided three-member panel of the Board of Immigration Appeals ("BIA" or "Board") held that a lawful permanent resident had committed a "crime of violence" as defined in 18 U.S.C. § 16(b). A "crime of violence" constitutes an "aggravated felony" under Section 101(a)(43)(F) of the Immigration and Nationality Act, and conviction of an "aggravated felony" renders any immigrant deportable. The BIA accordingly ordered petitioner removed from the United States.[1] But the BIA majority's summary two-page ruling, over a strong dissent, was in error – and squarely inconsistent with this Court's clear holdings – in two distinct respects.

1. The BIA was wrong to hold that the conviction at issue in this case – for reckless manslaughter, under New York's second degree manslaughter statute, N.Y. Penal Law § 125.15(1) – constitutes a "crime of violence" under 18 U.S.C. § 16(b) (hereinafter, "Section 16(b)"). Section 16(b) defines a "crime of violence" as a felony 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." As this Court held in *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001), and as the majority of circuits to have addressed this issue have

[1] *See* Joint Appendix ("J.A."), at 00002-00012.

held, an offense requiring a *mens rea* of mere recklessness does not fall within the scope of Section 16(b). That is because the statutory term "used" in Section 16(b) presupposes *deliberate* use of physical force.

Moreover, as this Court further noted in *Dalton*, the issue of whether a particular offense is a "crime of violence" must be judged not on the facts of the particular case, but instead, based on a categorical judgment about whether the minimum conduct to which the statutory offense may apply "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 *Dalton*, the Court held that the felony offense of driving while intoxicated (DWI) did not satisfy that standard, because there are contexts in which a person may be convicted of DWI even when there is no risk that force would intentionally be used. The same is true of the reckless manslaughter statute at issue in this case. As the case law applying that statute makes clear, that statute can be violated by mere reckless endangerment and by passive or inactive conduct that creates a risk of injury or death to another, even though this consequence was entirely unintended.

The decision in *Dalton* should have dictated the outcome in this case, as the dissenting panel member below emphasized at some length. The panel majority's sole contrary rationale was simply that any offense in which one person's conduct results in the death of another must inherently be "a crime of violence" under

Section 16(b), regardless of the non-deliberate nature of that offense. But that rationale is inconsistent with the text of Section 16(b), as construed in *Dalton*.

2. The BIA majority also allowed a critical procedural error by the Immigration Judge to stand uncorrected. Unable to hold that all offenses cognizable under the reckless manslaughter statute constitute a "crime of violence," the Immigration Judge chose to make that determination in this case based on the particular facts of petitioner's case, as described in the pre-sentence report ("PSR") prepared at the time of petitioner's sentencing. Based on the description of appellant's offense that appeared in that report, the Immigration Judge concluded that petitioner had committed a "crime of violence." However, this Court has expressly held that the "crime of violence" determination must be made on an offense-wide level, not based on the particular facts of the case. It has specifically disallowed the use of PSRs as a means of determining whether a "crime of violence" has been committed, *see Ming Lam Sui v. INS*, 250 F.3d 105 (2d Cir. 2001), and there are compelling policy justifications for that holding. The BIA majority failed even to comment on this error – despite the vociferous objections of the dissenting panel member – let alone, as would have been appropriate, to vacate the Immigration Judge's order based on this error. This represented a separate, independent error in the proceedings below.

The questions raised in this case are of critical importance to immigrants. An immigrant who commits an aggravated felony is "deportable" under the Immigration and Nationality Act. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (2000). Recent changes in immigration law have made deportation on this basis unchallengeable for particular classes of aliens. In 1996, Congress repealed Section 212(c) of the Immigration and Nationality Act, a provision that permitted lawful permanent residents to apply for discretionary relief from deportation. Under Section 212(c), an immigrant who was deportable based on a conviction for certain crimes could seek complete relief from deportation on the basis of factors such as his or her ties to the United States (including whether he or she had U.S. citizen family and children), length of time in this country, and the benefit to the community if relief were granted. This equitable relief was granted in the majority of cases and was predictably granted where certain favorable factors were present. *See INS v. St. Cyr*, 533 U.S.289, 296 & n. 5 (2001). The repeal of Section 212(c) makes those lawful permanent residents who are convicted of crimes determined to be aggravated felonies categorically ineligible for discretionary relief from deportation. *See* 8 U.S.C. § 1229(a)(3) (2000). It is therefore all the more important that Immigration Judges, the BIA and reviewing courts carefully and faithfully apply the definition of a "crime of violence" in measuring state-law offenses such as the one in this case.

This Court's scrutiny is particularly important given the nature of deportation proceedings. The determination of whether an offense is an aggravated felony is made, in the first instance, at a deportation hearing conducted by an Immigration Judge, who is not imbued with the authority to adjudicate guilt or innocence and is not empowered to find facts regarding criminal offenses. Further, immigrants have no right to counsel at deportation hearings. These facts mean that the federal Courts of Appeals play a crucial role in ensuring that state criminal statutes are properly and consistently interpreted in the deportation context.[2] In the decisions below, the Immigration Judge and the BIA erred both in their mode of analysis and in the result they reached. These errors place petitioner and other similarly situated immigrants in danger of unwarranted deportation. And it is squarely within this Court's jurisdiction to review the question whether as a

[2] The importance of this Court's setting out clear guidelines in this area is exemplified by the fact that last spring, in a Buffalo, New York case, a different panel of the BIA ruled that a conviction under the identical reckless manslaughter statute does *not* constitute a "crime of violence." Accordingly, defendants within this Circuit convicted of the same crime are facing utterly different results based solely on the panel of the BIA to which the case happens to be assigned. Counsel for *amicus* has not yet been able to obtain a copy of the unpublished decision in the Buffalo case, *Matter of Jeanbeaucejour*, A25-452-154 (BIA Mar. 1, 2001). For a summary of the facts and holding, *see* Gerald Seipp, January 2002 Immigration Briefings, *The Aggravated Felony Concept in Immigration Law: Traps for the Unwary and Opportunities for the Knowledgeable*. It is counsel's understanding that the Attorney General has agreed to review the *Jeanbeaucejour* decision, at the request of the INS.

matter of law petitioner committed an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F), as defined by 18 U.S.C. § 16. *See Dalton*, 257 F.3d at 203.

STATEMENT OF INTEREST

The New York State Defenders Association ("NYSDA") is a not-for-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and other persons throughout the State of New York. Since 1981, under contract with the State of New York, NYSDA has operated the Public Defense Backup Center, which provides state public defender, legal aid society, and assigned counsel program lawyers with legal research and consultation, publications, and training. NYSDA also operates the Immigrant Defense Project, which provides the same services to public defense lawyers and others specifically on issues involving the interplay between criminal and immigration law.

Amicus has, over the years, counseled and represented numerous immigrants accused and convicted of crimes. As part of our practice, we advise immigrant defendants as to whether a guilty plea to, or conviction of, a particular criminal charge would result in an "aggravated felony" conviction within the definition of the Immigration and Nationality Act. In providing such advice, we necessarily rely on governing Second Circuit law regarding the framework and substance of the aggravated felony analysis, such as the decisions in *Dalton* and *Sui*.

The legal issues raised in the instant case directly affect all immigrants charged with crimes that might be considered aggravated felonies, and particularly affect lawful permanent resident immigrants, whose ability to seek discretionary relief from deportation has been dramatically curtailed by the recent legislation regarding aggravated felony convictions. New York State has the second largest number of lawful permanent residents in the country. It is important that the legal analysis governing what constitutes an aggravated felony be clarified so that we may counsel immigrants as to the likely immigration effects of their decisions in the criminal context. A decision like the one below, which fails to acknowledge, let alone follow, governing Second Circuit law, undermines the reliability of our members' legal advice.

ARGUMENT

POINT I

The BIA Majority Erred In Holding That Petitioner's Conviction Constituted A "Crime Of Violence" Under 18 U.S.C. § 16(b)

This Court has set out quite clearly the analytic process that an Immigration Judge, the BIA or a reviewing court is to use to determine whether a particular offense constitutes a "crime of violence" under 18 U.S.C. § 16(b). The BIA panel failed entirely to abide by this Court's teachings on that issue. Analyzed correctly, it is clear that the offense of reckless manslaughter does not constitute a "crime of violence" under that statute.

A. The Categorical Nature Of The "Crime Of Violence" Determination

Section 1227(a)(2)(A)(iii) of Title 8 of the United States Code states that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." The Immigration and Nationality Act provides a long list of alternative definitions for "aggravated felony." *See* 8 U.S.C. § 1101(a)(43)(A)-(U). The sole definition that the INS claims is applicable to the offense of conviction in this case – reckless manslaughter, under N.Y. Penal Law § 125.15(1) – is "a crime of violence (as defined in section 16 of Title 18 …) for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F).

A "crime of violence," in turn, is defined in 18 U.S.C. § 16 as:

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

The Immigration Judge determined, and the BIA majority affirmed, that petitioner's conviction constituted a "crime of violence" under Section 16(b). Neither asserted that petitioner's conviction would satisfy Section 16(a), and there could be no basis for making such claim.[3] Accordingly, the question presented

[3] That is because the "use … of physical force," *see* 18 U.S.C. § 16(a), is not an "element" of N.Y. Penal Law § 125.15(1).

here is purely whether the particular state criminal statute at issue falls within Section 16(b)'s definition of "crime of violence."

This Court has held that the language of 18 U.S.C. § 16(b) compels an analysis that is focused on whether the *nature* of the state crime, as elucidated by its generic elements, is such that its commission presents a substantial risk that physical force would be used, irrespective of the factual circumstances surrounding any particular violation. *Dalton*, 257 F.3d at 204. This approach is commonly referred to as the "categorical analysis." Under this approach, this Court has said that "the singular circumstances of an individual petitioner's crimes should not be considered," and that *any conduct* falling within the purview of the specific criminal statute must by its nature inherently satisfy the definition of a "crime of violence." *Id.* at 204-05 (internal quotations and citation omitted). This approach is consistent with that adopted by the BIA. *See, e.g., Matter of Sweetser*, Interim Decision 3390, at 9, 1999 WL 311950 (BIA May 19, 1999) ("[E]ither a crime is violent 'by its nature' or it is not.…It cannot be a crime of violence 'by its nature' in some cases, but not in others.").[4]

[4] Other Courts of Appeals have similarly adopted a categorical approach to evaluating whether a conviction under a particular criminal statute constitutes a "crime of violence." *See, e.g., United States v. Chapa-Garza*, 243 F.3d 921, 924 (5th Cir. 2001); *Tapia Garcia v. INS*, 237 F.3d 1216, 1221-22 (10th Cir. 2001); *Ramsey v. INS*, 55 F.3d 580, 583 (11th Cir. 1995) (per curiam); *United States v. Winter*, 22 F.3d 15, 19 (1st Cir. 1994); *United States v. Aragon*, 983 F.2d 1306,

Accordingly, the text of the statute of which the petitioner was convicted is the first place the Immigration Judge or BIA is to look. When it is clear from the face of the statute that a crime either is or is not a "crime of violence" within the meaning of 18 U.S.C. § 16(b), the inquiry stops with the statute. *See Dalton*, 257 F.3d at 205. Only when a criminal statutory provision is "divisible" into multiple categories of offense conduct – some but not all of which constitute "crimes of violence" under Section 16(b) – may a court go beyond the statute and refer to the "record of conviction," for the limited purpose of determining whether the immigrant's criminal conviction falls within a category that would justify removal. *See United States v. Palmer*, 68 F.3d 52, 55-56 (2d Cir. 1995) (because statute addresses harassment as well as intimidation and thus reaches both conduct that satisfies the "crime of violence" definition and conduct that does not, the record of conviction may be consulted); *see also Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 325 (BIA 1996) (when a statute encompasses multiple subsections of conduct, only some of which constitute firearms violations, the Immigration Judge may look to record of conviction to determine whether particular conviction involved a firearm). However, as the BIA has recently emphasized, in making such an inquiry it is not appropriate "to delve into the underlying facts that may have been

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1312 (4th Cir. 1993); *United States v. Dunne*, 946 F.2d 615, 620, 621 (9th Cir. 1991).

presented in the criminal proceeding," but rather the court must focus "on the elements of the offense that had to be proven to sustain a conviction." *Matter of Ramos*, 23 I&N Dec. 336, 340 (BIA 2002).

Applying this analysis to the state criminal statutory provision at issue here, N.Y. Penal Law §125.15(1), it is clear that this provision is not "divisible" into different offenses. The statute contains a singular offense: recklessly causing the death of another. It does not break this conduct down into different means or circumstances, some of which might constitute a "crime of violence" and others not. Accordingly, the analysis of whether a conviction under this provision constitutes a "crime of violence" under Section 16(b) must focus solely on the generic elements of the offense, and "'only the minimum criminal conduct necessary to sustain a conviction'" under the state statute is relevant to the determination whether a conviction thereunder falls within Section 16(b). *Dalton*, 257 F.3d at 204 (quoting *Michel v. INS*, 206 F.3d 253, 270 (2d Cir. 2000)).

B. A Conviction Under N.Y. Penal Law § 125.15(1) Does Not Constitute A "Crime Of Violence" Because A *Mens Rea* Of Recklessness Is Insufficient To Satisfy 18 U.S.C. § 16(b).

A person who violates New York Penal Law § 125.15(1) does so with a *mens rea* of recklessness. *See* N.Y. Penal Law §125.15(1) ("A person is guilty of manslaughter in the second degree when: 1. He recklessly causes the death of another.") There is no contrary claim in this case. With reference to *mens rea*, the

Immigration Judge below stated that "the Court does not believe that [petitioner] intentionally caused the death of the child, would have wanted the child to be injured in any way." The Immigration Judge concluded nonetheless that petitioner's conviction for reckless manslaughter was a "crime of violence" because, he said, "the definition of crime of violence under 18 USC Sec. 16 encompasses behavior that would be defined as negligent or reckless, including the behavior of the [petitioner] here." J.A. at 000029.

In *Dalton*, this Court carefully analyzed the level of *mens rea* required for a "crime of violence" within the meaning of Section 16(b). It concluded that the language of Section 16(b) – "a substantial risk that physical force against the person or property of another may be used" – encompasses only those crimes with a certain level of *mens rea*, namely, a substantial likelihood of the employment of *intentional* force in the course of committing the offense. 257 F.3d at 207-08. This Court looked to the plain meaning of the word "use" in Section 16(b), and interpreted "use" to "contemplate[] only *intentional* conduct" and "refer[] only to those offenses in which there is a substantial likelihood that the perpetrator will *intentionally employ* physical force[,] . . . not [to] an accidental, unintended event." *Dalton*, 257 F.3d at 208 (quoting *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001)) (emphasis added). In so holding, this Court relied on the reasoning in *United States v. Rutherford*, 54 F.3d 370, 372-73 (7th Cir. 1995), that

"[i]n ordinary English, the word 'use' implies intentional availment" and not reckless or random occurrences. *Dalton*, 257 F.3d at 206. This analysis led the Court to conclude that a felony DWI conviction under New York state law was not a "crime of violence" because drunk driving does not involve the intentional "use of physical force," but rather "the risk of an ensuing accident." *Id*. at 206-07.

The Supreme Court's analysis of the plain meaning of the word "use" strongly reinforces this Court's interpretation in *Dalton*. In *Bailey v. United States*, the Supreme Court resolved a Circuit split on the meaning of "use" in 18 U.S.C. § 924(c)(1), a statutory provision which imposes certain penalties if a defendant "uses or carries a firearm" in the course of committing certain crimes. 516 U.S. 137, 137 (1995). The Court reviewed the possible meanings of "use" and concluded that it necessarily indicates "active employment" by the defendant. *Id.* at 143, 145. The Supreme Court's holding in *Bailey* leaves little room for doubt that "use" in Section 16(b) is rightly construed to require the active, intentional use of force, and nothing less.

The majority of the Courts of Appeals to consider the question similarly have concluded that a conviction requiring only a reckless *mens rea* is not sufficient to qualify as a "crime of violence" within 18 U.S.C. § 16(b). *See Bazan-Reyes v. INS,* 256 F. 3d 600, 612 (7th Cir. 2001) (Section 16(b) is limited to crimes in which there is a substantial risk that *intentional* physical force will be used in the

course of committing the offense); *Chapa-Garza*, 243 F.3d at 925, 927 (holding that Section 16(b) requires a substantial likelihood that the offender will *intentionally* employ physical force in the course of committing the offense); *see also United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992) (suggesting, in dicta, that driving while intoxicated is not a "crime of violence" because Section 16(b) requires a willingness to risk having to commit a crime of *specific intent*). *But see Park v. INS*, 252 F.3d 1018, 1024 (9th Cir. 2001) (holding that a reckless *mens rea* is sufficient to constitute a "crime of violence" under Section 16(a) and (b)); *Tapia Garcia v. INS*, 237 F.3d 1216, 1222-23 (10th Cir. 2001) (relying on Sentencing Guidelines cases interpreting the term "crime of violence" to uphold the BIA's determinations that Section 16(b) does not require intentional conduct and that drunk driving is a "crime of violence" under Section 16(b)). *See also Matter of Ramos*, 23 I&N Dec. 336 (holding that although Section 16(b) does not require specific intent to do violence, an offense must have been committed *at least* recklessly to qualify as a "crime of violence" under this provision).

The analysis in *Dalton* dictates the result in this case. Looking to the generic elements of the crime, it is clear that the offense of reckless manslaughter under New York state law, like the felony DWI offense considered in *Dalton*, does not, by its nature, involve a likelihood of the offender *intentionally* employing physical force to effectuate commission of the offense. As interpreted by state case law, to

establish reckless manslaughter under Section 125.15(1), there only must be evidence when a defendant acts that "he is aware of and consciously disregards a substantial and unjustifiable risk" that death will occur. *People v. Hiraldo*, 177 Misc. 2d 33, 35, 676 N.Y.S.2d 775, 776 (Sup. Ct. 1998).

Thus, an offender convicted under this statutory provision may lack any intent, desire, or willingness to cause harm at all. For example, a parent may fail to provide his child with proper nutrition, leading to the death of the child, but such conduct does not involve a likelihood of intentionally using force against another person or property, though it suffices to sustain a reckless manslaughter conviction. *See People v. Stubbs*, 122 A.D.2d 91, 504 N.Y.S.2d 235 (2d Dep't 1986). Again, like driving while intoxicated, the conduct required for a manslaughter conviction presents a serious risk of injury, but does not necessarily present a substantial likelihood that force will be *intentionally* employed. *See Matter of Sweetser*, Interim Decision 3390, at 9 (holding that "the use of physical force" is an act committed by a criminal defendant, while the "risk of physical injury" is a consequence of the defendant's acts"). Thus, the minimum intent level necessary for a conviction of second degree manslaughter under Section 125.15(1) of the New York Penal Law does not satisfy the intent necessary to constitute a "crime of violence" under 18 U.S.C. § 16(b).

Accordingly, as a matter of law, petitioner's offense was not a "crime of violence" under 18 U.S.C. § 16, and his removal proceeding should be terminated. *See Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996) (dismissing deportation proceedings due to INS's failure to establish by clear, unequivocal, and convincing evidence that conviction under a divisible firearm statute constitutes a firearms violation as defined in the Act).

C. The Conduct Which N.Y. Penal Law § 125.15(1) Encompasses Does Not Necessarily Present A Substantial Risk of Physical Force Being Used.

Apart from the fact that a person may violate N.Y. Penal Law § 125.15(1) without having engaged in intentional conduct, the conviction at issue here is not properly considered a "crime of violence" under 18 U.S.C. § 16(b) for a second, independent, reason: The statute encompasses a substantial amount of conduct that does not involve a risk of physical force being used. In reviewing the Immigration Judge's opinion in the instant case, the BIA held that because "the death of a person results from the reckless act of the offender," "[t]he nature of this crime is such that there is a substantial risk that force may be used in the course of committing the offense." J.A. at 000003. But, as the dissenting Board member pointed out (J.A. at 000006-000009), the majority's reasoning in the decision below is flawed: it presumes that because all offenses under N.Y. Penal Law § 125.15(1) necessarily involve the most serious consequence – death – therefore, all

offenses inherently involve a substantial risk that force will be used.[5] This reasoning is inconsistent with this Court's analysis in *Dalton*.

In *Dalton*, this Court carefully examined the range of conduct that fits within the felony DWI statute, in order to determine whether the minimum conduct required for conviction under the statute constituted a "crime of violence." 257 F.3d at 205-06. The Court noted that the New York case law made clear that a person can be convicted of DWI even when there is no risk that force may be used (*e.g.*, a defendant can be found guilty of driving while intoxicated even if she is asleep at the wheel of a car whose engine is not running and evidence shows the vehicle never moved). *Id.* at 205. Accordingly, the Court concluded that it was "at a loss to see how this minimum threshold … satisfies the statutory definitions of an

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[5] The two cases cited by the BIA in support of its conclusion that second degree manslaughter must be a "crime of violence" because of its serious consequence are inapposite, as the dissenting Board member pointed out, because neither case addressed the precise issue raised here: whether reckless manslaughter involves a substantial risk of physical force pursuant to § 16(b). *See* J.A. at 000008, n. 2. The majority cited *United States v. Aponte*, 235 F.3d 802 (2d Cir. 2000) and *Johnson v. Vomacka*, No. 97 Civ. 5687, 2000 WL 1349251 (S.D.N.Y. Sept. 20, 2000). *Aponte* was a Sentencing Guidelines case, in which this Court noted that manslaughter is one of the crimes that is listed in U.S.S.G. § 4B1.2 as presenting a serious risk of *injury* to another. *Aponte* thus concluded without further discussion that manslaughter must constitute a "crime of violence" within U.S.S.G. § 4B1.1. 235 F.3d at 803. In *Johnson*, the District Court concluded that second degree manslaughter was a "crime of violence" without any analysis whatsoever, indeed without even identifying whether it was a "crime of violence" pursuant to 18 U.S.C. § 16(a) or § 16(b). 2000 WL 1349251, at *4.

'aggravated felony' or a 'crime of violence.'" *Id.* at 205-06. This Court emphasized that "[s]ubsection 16(b) defines a 'crime of violence' in terms of real, substantial risks and cannot support deportation based upon hypothetical harms." *Id.* at 206. This Court also stressed the difference between a "risk of injury" and the statutory requirement of a risk of the "use of physical force," pointing out that there are many crimes that involve the former but not the latter, for example, "[c]rimes of gross negligence or reckless endangerment, such as leaving an infant alone near a pool." *Id.* at 207 (pointing also to statutes "criminalizing the use, possession and/or distribution of dangerous drugs" as "underscor[ing] the fact that some criminal conduct may involve a substantial risk of injury or harm without at the same time involving the use of physical force"). *See also Matter of Alcantar*, 20 I&N Dec. 801, 809 (BIA 1994) (analysis must focus on a crime's inherent potential for risk of physical force as opposed to the actual harm caused).

Thus, as this Court held in *Dalton*, the "clear and ordinary language" of Section 16(b) requires that the minimum conduct needed to establish "a crime of violence must involve the application of force." 257 F.3d at 207. New York reckless manslaughter, like New York felony DWI, embraces conduct which, although antisocial and generally warranting significant punishment, does not involve the defendant having applied any force to the victim, which is the operative issue under Section 16(b). For example, neglecting one's child by failing

to feed him for a prolonged period of time is conduct sufficient to sustain a reckless manslaughter conviction if that failure leads to the child's death. *See People v. Stubbs,* 122 A.D.2d 91, 504 N.Y.S.2d 235 (2d Dep't 1986). Similarly, when one has a duty of care to a child, failing to obtain medical care for that child, when the child is being beaten to death by someone else, constitutes reckless manslaughter under New York law. *See People v. Salley*, 153 A.D.2d 704, 544 N.Y.S.2d 680 (2d Dep't 1989). One may be convicted of reckless manslaughter if he gives a gun and ammunition to a person whom he knows to be depressed and suicidal and that person uses the gun to commit suicide. *See People v. Duffy*, 185 A.D.2d 371, 586 N.Y.S.2d 150 (3d Dep't 1992). So, too, disregarding the risk posed by examining a loaded gun in close proximity to other people will sustain a reckless manslaughter conviction. *See People v. Tallarine*, 223 A.D.2d 738, 637 N.Y.S.2d 461 (2d Dep't 1996). Injecting heroin into someone who is importuning you to do so, when that person is already "completely bombed out" is conduct sufficient for New York reckless manslaughter. *See People v. Cruciani,* 36 N.Y.2d 304, 327 N.E.2d 803, 367 N.Y.S.2d 758 (1975). Or, a reckless manslaughter conviction may be sustained where a defendant, after consuming at least a half-liter of alcohol, places his five-year old son in front of him on an all-terrain vehicle and drives down the highway. *See People v. Hart*, 266 A.D.2d 698, 698 N.Y.S.2d 357 (3d Dep't 1999).

These offenses, which clearly constitute reckless manslaughter under New York law, do not involve the application of force. Such offenses are similar in nature to that in *Matter of Sweetser*, where the Board found that the respondent's conviction for child abuse, resulting in the death of a child, did not constitute a "crime of violence." There, the respondent left his son unattended in a bathtub and his son drowned; the Board found that such conduct did not involve a "substantial risk that force" would be used, as required by 18 U.S.C. § 16(b). *Matter of Sweetser*, Interim Dec. 3390, at 8.

To sweep reckless manslaughter within Section 16(b)'s purview would result in a broad expansion of Section 16(b), far beyond its plain language, to reach convictions under a statute that encompasses passive conduct. It would make defendants convicted based on their failures to carry out their duties of care into aggravated felons, despite the fact that, under the New York sentencing scheme, manslaughter in the second degree is not identified as a violent felony offense. *See* N.Y. Penal Law § 70.02(1) (listing the violent felony offenses). Because not all convictions under N.Y. Penal Law § 125.15(1) necessarily involve a substantial risk that physical force will be used in the course of committing the offense, the statutory provision clearly encompasses offenses that are not "crimes of violence" under 18 U.S.C. § 16(b) for purposes of defining an "aggravated felony" under 8

U.S.C. § 1101(a)(43)(F). For this reason as well, the removal proceeding should be terminated.

POINT II

It Is Improper To Rely On A Presentence Report To Determine Whether A Conviction Constitutes A "Crime of Violence"

The Immigration Judge in this case relied in part on the description of petitioner's conduct in a contested PSR in determining that petitioner's prior conviction was a "crime of violence." *See* J.A. at 000029, 000061-000069. As discussed above, under the categorical analysis endorsed by this Court in *Dalton*, it is not permissible to look beyond the generic elements of the offense (or the elements of a subset of a divisible offense) to determine whether an immigrant's conviction was for a "crime of violence." Moreover, as this Court has held, even where there is a "divisible" offense and it is necessary to determine which subset of that offense supplied the basis for conviction in the particular case, the Immigration Judge or the BIA may not properly consult a PSR in making that determination. *See Sui v. INS*, 250 F.3d 105. The Immigration Judge in this case relied on the PSR in making his determination that petitioner's offense was a "crime of violence." And the BIA panel brushed this issue aside, despite the emphatic objections by the dissenting Board member that this process was inconsistent with Second Circuit law. *See* J.A. at 000009-000011. This was error.

A PSR sets out the results of the probation department's investigation into the factual circumstances of the crime and the defendant's personal history. It does not analyze the statute under which the defendant was convicted or the elements of that conviction. *See* N.Y.C.P.L.R. § 390.30 (2001). The PSR therefore does not have any bearing upon the categorical, elements-based determination that *Dalton* teaches is required. Both this Court and the BIA have, in fact, consistently held that even when a divisible offense is at issue and it is therefore unclear whether the particular petitioner's offense constituted an aggravated felony, the Immigration Judge is not to probe the facts of the case at bar in making a determination regarding the nature of a prior conviction. Rather, the Immigration Judge is to consider only the "record of conviction," with a focus on the *elements* of the criminal conviction, not the *facts* of a particular conviction. *See, e.g., Kuhali v. Reno*, 266 F.3d 93, 106 (2d Cir. 2001) ("[A] court may refer to the record of conviction, particularly the judgment of conviction, to determine whether the alien's criminal conviction falls within a category that would justify removal."). Under the precedent of the BIA, the record of conviction includes the indictment, plea, verdict, and sentence, *Matter of Short*, 20 I&N Dec. 136, 137-38 (BIA 1989), as well as an information, *Matter of Rodriguez-Cortes*, 20 I&N Dec. 587, 588 (BIA 1992), and a transcript of arraignment in which the respondent pled guilty, *Matter of Mena*, 17 I&N Dec. 38 (BIA 1979). It does not include a PSR.

In *Sui*, the INS sought to show that the BIA's decision that petitioner had been convicted of an attempt to commit an offense that involves fraud or deceit in which the loss to victims exceeded $10,000 (one of the statutorily defined aggravated felonies) was correct, by looking behind the statutory description of the offense and the charging document to facts set out in the PSR. 250 F.3d at 109-10. In that case, the Immigration Judge and BIA apparently had not consulted the PSR, but the INS sought to rely on it before this Court. This Court held that it would be improper to rely on the PSR, because to do so would be to "go behind the offense as it was charged to reach our own determination as to whether the underlying facts amount to one of the enumerated crimes." *Id.* at 117-18 (quoting *Lewis v. INS*, 194 F.3d 539, 543 (4th Cir. 1999)). This Court's decision in *Sui* was based in large part on the language and legislative history of the statutory provision that renders immigrants convicted of aggravated felonies deportable, 8 U.S.C. § 1227(a)(2)(A)(iii). That statute speaks in terms of "convictions," not of crimes "committed," which suggests the focus should be on the statute of conviction rather than on the defendant's actions. *See Sui*, 250 F.3d at 117. In addition, the legislative history of that statute does not suggest that Congress contemplated a factfinding role in ascertaining whether an immigrant had committed an aggravated felony. *Id.* This Court's refusal to consider a PSR in the context of the attempt analysis is directly applicable in the context of analyzing a "crime of

violence" – in both instances, the governing principle is that the statute should be the focus of the aggravated felony analysis, and not the underlying facts of the particular offense.

There is not a single published BIA decision in which the Board has approved the use of PSRs. To the contrary, the BIA has stated that the documents listed in 8 C.F.R. § 3.41 constitute the entire universe of documents an Immigration Judge may consider in determining whether an immigrant's criminal conviction falls within a category that would justify removal. *See Matter of Teixeira*, 21 I&N Dec. at 320 (documents listed in 8 C.F.R. § 3.41 are the documents an Immigration Judge is to look to in determining whether a conviction is a firearms violation). PSRs are not listed among those documents. *See* 8 C.F.R. § 3.41 (listing the documents an Immigration Judge may consider as evidence of a criminal conviction).[6]

There are important policy reasons for forbidding reliance on a PSR in this context. Presentence reports, unlike the documents listed in 8 C.F.R. § 3.41, are simply not consistently reliable reporters of the facts at issue. Prosecutors are

[6] Among the list of permissible categories of documents is a catch-all provision, Section 3.41(a)(6), which reads: "[a]ny document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction." PSRs do not come within this provision, because a PSR, written prior to sentencing and thus prior to the final entry of the conviction, is not a "document that indicates the existence of a conviction."

often the sources of the facts in a PSR, and the representations in a PSR may go well beyond the facts presented in court, particularly where the offense is one to which the defendant pled guilty. There is no right to counsel before a Probation Department, nor any reliability limits on the "evidence" that it may include in such a report. Even where (as in federal criminal cases) there is a process in court for challenging the factual representations in a PSR, a criminal defendant may have little or no incentive to litigate the accuracy of facts alleged in a PSR, because, in many cases, it is clear that the resolution of those disputes would have no bearing on his sentence. For many defendants, it also may not be worth incurring additional legal fees to litigate the accuracy of various statements in a PSR. Finally, criminal defense counsel may not be fully aware of the immigration consequences that could flow from particular allegations in a PSR, and would not necessarily know that – for immigration reasons – it is imperative to litigate the accuracy of particular such allegations.[7]

[7] In addition, it is not at all clear whether under New York law a PSR is properly admitted into the Administrative Record of such a proceeding, or indeed properly considered by an Immigration Court. New York Criminal Procedure Law § 390.50(1) states that a presentence report is "confidential" and "may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the [sentencing] court." *Amicus* is aware of no statutory provision permitting the use of a PSR in a collateral immigration proceeding, nor, to *amicus*'s knowledge, was there an order by the sentencing court in this case authorizing the release of petitioner's PSR to the INS.

Indeed, the BIA has expressly rejected the use of documents similar to PSRs in this context. In *Matter of Texeira*, the Board reversed an Immigration Judge's determination that a particular conviction was an aggravated felony based on information contained in a police report. The BIA held that "general evidence related to what a respondent has done – as opposed to specific evidence of what he was actually convicted of doing – is not relevant to the issue of deportability under section 241(a)(2)(C) of the Act, because neither an Immigration Judge nor this Board can try or retry the criminal case (*i.e.*, deportation proceedings cannot result in a "conviction")." 21 I&N Dec. at 320.

Were Immigration Judges permitted to rely on PSRs at deportation hearings, such judges would almost inevitably be drawn into resolving disputed factual issues regarding the criminal offense. In petitioner's case, for instance, he appears to have contested the portions of the presentence report upon which the Immigration Judge relied. *See* BIA Dissenting Opinion, J.A. at 000011 & n. 4. For the Immigration Judge to rely on such information is dangerously close to the Immigration Judge taking on a factfinding role with respect to the prior criminal offense. *See Matter of Pichardo-Sufren*, 21 I&N Dec. 330, 335 (BIA 1996) ("If we were to allow evidence that is not part of the record of conviction as proof of whether an alien falls within the reach of section 241(a)(2)(C) of the Act, we essentially would be inviting the parties to present any and all evidence bearing on

an alien's conduct leading to the conviction, including possibly the arresting officer's testimony or even the testimony of eyewitnesses who may have been at the scene of the crime. Such an endeavor is inconsistent both with the streamlined adjudication that a deportation hearing is intended to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence.").

Consistent with *Sui*, the language of Section 1227(a)(2)(A)(iii), its legislative history, and these policy reasons as elucidated by the BIA, we respectfully submit that this Court should reiterate that it is inappropriate for an Immigration Judge or a reviewing court to consult a presentence report in determining whether a prior conviction constitutes a "crime of violence" in the deportation context. *Amicus* believes that such a statement is particularly important because there appear to be an increasing number of cases in which Immigration Judges and panels of the BIA have been consulting PSRs for the purpose of determining whether immigrants' convictions constituted "aggravated felonies." *See, e.g*., *Dickson v. Ashcroft*, No. 02-4102 (appeal filed April 5, 2002).

CONCLUSION

For the foregoing reasons, this Court should vacate the removal order of the BIA.

Dated: April 24, 2002

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