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DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

IN THE MATTER OF:	)	
Michael G-,	)	**A xxx-xxx-xxx**
Respondent.	)	

RESPONDENT'S RESPONSE BRIEF

July 11, 2013

INTRODUCTION

Michael G- ("Mr. G-") is a lawful permanent resident of the United States and a citizen of Jamaica. He has lived continuously in the United States for almost thirty years. He knows no one in Jamaica, has no family there, and has not visited that country in over twenty years. Mr. G- is the father of four American-born children who are minors. He is devoted to his children. He provides for them financially, ensures that they have all that they need, and brings emotional stability to their lives which is crucial for their development.

Mr. G- has a criminal record. Many of his criminal offenses are old and minor. Two in Georgia are more recent and significant. The first is an interconnected pair of convictions in 2011 for the personal possession of a small quantity of drugs. The second is a conviction in 2007 for threatening Donae B- ("Ms. B-"), his girlfriend at the time and the mother of two of his children. Mr. G-, while intoxicated, got into a heated quarrel with Ms. B-. The two exchanged threats. Ms. B- threatened to take away Mr. G-'s children. In a state of distress, Mr. G- responded by leaving "reckless threats" on Ms. B-'s voicemail. The voicemail message ultimately formed the basis for his conviction of making terroristic threats.

Mr. G- served his sentence. He has completed Drug and Alcohol classes combined with Violence Intervention Prevention counseling. He has rehabilitated himself. He has demonstrated his worth to society by aiding in the prosecution of criminals, even though he jeopardized his lawful permanent status by doing so. He is a hard worker who has always supported his family, financially and emotionally.

The Immigration Judge ("IJ") found Mr. G- removable for his Georgia controlled substance conviction. He found that the Mr. G-'s Georgia conviction for making threats does not constitute an aggravated felony under the Immigration and Nationality Act ("INA" or "Act").

He ruled that Mr. G- is eligible for cancellation of removal because he has been a legal permanent resident of the United States for over five years, has lived here for over seven years, and has not been convicted of an aggravated felony. He granted Mr. G- cancellation in the exercise of discretion.

The Department of Homeland Security ("DHS") disagrees with the IJ's finding that Mr. G-'s conviction for making threats does not constitute an aggravated felony. It appealed this issue to the Board of Immigration Appeals ("Board" or "BIA"). It did not appeal the IJ's favorable exercise of discretion in the alternative.

Mr. G- responds with his brief on appeal. In it, he argues that the IJ was correct with the finding that Mr. G-'s Georgia conviction for making threats does not constitute an aggravated felony. Intervening Supreme Court decisions reveal that the IJ erred when applying the modified categorical approach to the underlying Georgia statute to reach this result.[1] The statute is not divisible. The IJ should have applied the pure categorical approach. Under this approach, Mr. G-'s conviction is not an aggravated felony because the minimum conduct criminalized falls outside of the federal definition of a crime of violence.

In the alternative, even if the IJ was correct in applying the modified categorical approach, Mr. G-'s Georgia conviction does not fall within the federal definition of an aggravated felony. The IJ correctly granted Mr. G- cancellation of removal as a matter of discretion based on his factual findings which include proof of rehabilitation, his close relationship with his family and children, the length of time he has lived in the United States, his

[1] *See Descamps v. United States*, 133 S. Ct. 2276 (2013); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

work history, and his cooperation with law enforcement, coupled with evidence of serious countervailing negative equities.

ISSUES PRESENTED

I. Whether the IJ erred when he applied the modified categorical approach to an indivisible statute.

II. In the alternative, whether the IJ correctly concluded that Mr. G-'s conviction is not an aggravated felony under the modified categorical approach when the Georgia statute criminalizes conduct that does not require or present a substantial risk of physical force.

III. Whether the IJ correctly granted Mr. G- discretionary relief based on his factual finding that the social and humane considerations outweighed his criminal record.

PROCEDURAL HISTORY

Mr. G- is a lawful permanent resident of the United States. IJ Dec. 2. He was born in Jamaica. Tr. 11. He arrived in the United States in 1983 and obtained lawful permanent resident status at a young age. IJ Dec. 2. In 2007, he pled guilty to making terroristic threats, in violation of Ga. Code Ann. § 16-11-37(a), for which he was sentenced to five years, of which four were on probation. Exh. 2, Record of Sentence. Mr. G- served seven months before being released for "time served." Tr. 73. In 2011, Mr. G- was convicted of two controlled substance offenses for simple possession. Tr. 24.

On July 30th, 2012, DHS served Mr. G- with a notice to appear in which it alleged he was removable under INA § 237(a)(2)(B)(i) (controlled substance violation). *Id*. On December 19, 2012, it amended the notice to appear with the additional allegation that Mr. G- was removable under INA § 237(a)(2)(A)(iii) (for being convicted of an aggravated felony). The

specific aggravated felony which DHS alleges Mr. G- committed is a crime of violence as defined by 18 U.S.C. § 16 for which the term of imprisonment is at least one year. INA § 101(a)(43)(F). It is based on Mr. G-'s conviction of terroristic threats under Ga. Code Ann. § 16-11-37. *See* Exh. 9, Form I-261.

On March 11, 2013, Mr. G- had a merits hearing and the IJ found him credible. IJ Dec. 2. The IJ determined that the Mr. G-'s Georgia conviction for terroristic threats was not an aggravated felony. The IJ determined that Mr. G- was removable based on the controlled substance violation, but that he was eligible for cancellation of removal. IJ. Dec. 6. The IJ granted Mr. G- cancellation of removal as a matter of discretion because as a factual matter the positive factors in his case outweighed the negative factors. IJ Dec. 7. The government appealed. Exh. 10, DHS Memorandum.

STATEMENT OF FACTS

Mr. G- is a 36 year old lawful permanent resident of the United States. Tr. 11. He was born in Jamaica. Tr. 11. He entered the United States in 1983 and obtained lawful permanent resident status in the same year. Tr. 11-12. Most of Mr. G-'s family currently lives in the United States and his mother and stepfather are naturalized U.S. citizens. Tr. 8-9. None of his family lives in Jamaica. Tr. 26. Mr. G- was educated in the United States. Exh. 8, Prehearing Statement. He is a hard worker and has held numerous jobs in the construction and food service industry. Exh. 3, Form EOIR-42A. Mr. G- has four American-born children, ages sixteen, fourteen, twelve, and eleven, with whom he has a close relationship. Tr. 25. Mr. G- supports his children. Exh. 8, Prehearing Statement.

In 2007, Mr. G- pled guilty to making terroristic threats in violation of Ga. Code Ann. § 16-11-37(a). Exh. 2, Record of Sentence. This conviction was based on an isolated incident in 2006 when Mr. G- and his girlfriend, Ms. B-, got into an argument. *Id*. Ms. B- threatened to move back to Virginia with their children. Exh. 8, Prehearing Statement. The threatened loss of his children greatly distressed Mr. G-. He was intoxicated. *Id*. In the heat of the moment, Mr. G- recklessly made a threat against Ms. B- in a voicemail message. *Id*. He was convicted for the threat, and sentenced to five years with four on probation. Tr. 73. He served seven months, was credited for "time served", and released. *Id*. Mr. G- deeply regrets his actions and has completed a family violence intervention program and drug and alcohol classes. Tr. 55.

In 2010, two armed men broke into Mr. G-'s home with the intent of committing an armed robbery. They shot Mr. G-, damaging the nerves in one of his legs and permanently affecting his ability to walk. Exh. 8, Prehearing Statement. Mr. G- reported the crime even though he knew doing so could put his lawful status in jeopardy because there were illegal narcotics in his house. *Id*. A portion of the drugs belonged to Mr. G-'s live in girlfriend, which she swore to in an affidavit. Nevertheless, Mr. G- pled guilty to the shared possession of one pill of MDMA and less than a half of a gram of cocaine. *Id*. Because of Mr. G-'s cooperation with the local police department, both suspects who broke into Mr. G-'s home were apprehended and convicted. *Id*. The Assistant District Attorney valued Mr. G-'s help so much that she wrote Mr. G- a letter in support of his cancellation of removal based on her belief that he has made significant changes in his life. Exh. 11, Letter from ADA Lynne G. Voelker.

DHS served Mr. G- with a notice to appear on July 30, 2012, alleging that he was removable under INA § 237(a)(2)(B)(i) (controlled substances). Exh. 1, Notice to Appear. On December 19, 2012, DHS added an additional charge, alleging that Mr. G- was removable under

INA § 237(a)(2)(A)(iii) (aggravated felony). The specific aggravated felony which DHS alleges Mr. G- committed is a crime of violence as defined by 18 U.S.C. § 16 for which the term of imprisonment is at least one year. INA § 101(a)(43)(F). It is based on Mr. G-'s conviction of terroristic threats under Ga. Code Ann. § 16-11-37. Exh. 9, Form I-261.

Immigration Judge's Decision

On March 11, 2013, the IJ issued a decision finding that Mr. G-'s conviction for terroristic threats was not an aggravated felony. IJ Dec. 6. The IJ found that Mr. G- was removable for committing a controlled substance offense, but that he remained eligible for cancellation of removal despite the controlled substance conviction. IJ Dec. 2, 7. The IJ also held that Mr. G- was entitled to cancellation of removal as a matter of discretion.

The IJ opined that the Georgia statute under which Mr. G- was convicted for threatening Ms. B- was divisible because it states that "a person commits the offense of a terroristic threat when he or she threatens to commit any crime of violence". He opined this language contemplates some acts that would amount to a crime of violence and other acts that do not. IJ Dec. 4-5. More specifically, the IJ noted that the statute criminalizes conduct with a "mens rea of reckless disregard" which does not amount to a crime of violence as defined under 18 U.S.C § 16. IJ Dec. 5. Because the IJ deemed the statute divisible, he applied the modified categorical approach. *Id*. The IJ concluded that the conviction was not an aggravated felony because the statute Mr. G- was convicted under does not have as an element "the use, attempted use, or threatened use of physical force against the person or property of another" as required by 18 U.S.C. § 16(a). *Id*. The IJ stated that the Georgia statute punishes a threat to commit a crime of violence, but does not define a crime of violence. As a result, it cannot be said that a crime of violence within the meaning of the Georgia code necessarily equates to violent force as required

by 18 U.S.C. § 16. *Id*. Additionally, the IJ found that Mr. G-'s conviction fell outside of 18 U.S.C. § 16(b), because there was no substantial risk that physical force would be used during the commission of the offense. *Id*. Additionally, the IJ stated that 18 U.S.C. § 16(b) did not relate to the effect of a person's conduct, but to the use of force. IJ Dec. 6.

The IJ determined that Mr. G- should be granted cancellation as a matter of discretion, because Mr. G-'s criminal record was outweighed by the positive factors. The IJ noted that Mr. G-'s past criminal convictions were unremarkable, except for the 2011 conviction based on controlled substance offenses and his 2007 conviction for having made terroristic threats. *Id*. The IJ placed importance on how long ago the unremarkable minor convictions occurred and the fact that the criminal court only sentenced Mr. G- to probation despite his prior criminal record. The IJ found as a matter of fact that "[Mr. G-] has been rehabilitated from his criminal conduct and that similar incidents are not likely to recur." *Id*.

The IJ focused on and made numerous findings of fact of positive factors which support Mr. G-'s application for cancellation. The IJ noted that Mr. G- had already been in the United States for over 30 years and had established strong ties to the community and his family. IJ Dec. 6. The IJ stated that the Mr. G- had always worked and provided financial support for his children. *Id*. The IJ found that Mr. G- showed remarkably good behavior when assisting law enforcement officials in the prosecution of two felons. IJ Dec. 7. The IJ also noted that the Assistant District Attorney wrote a letter commending Mr. G-'s cooperation in assisting the prosecution of two criminals of an armed robbery where Mr. G- was a victim. IJ Dec. 6-7; Exh. 11, Letter from ADA Lynne G. Voelker.

ARGUMENT

I. Mr. G-'s Conviction Is Not an Aggravated Felony Under the Formal Categorical Approach and He Is Otherwise Eligible for Cancellation of Removal.

Issue: Whether the IJ erred when he applied the modified categorical approach to an indivisible statute.

A lawful permanent resident is eligible to apply for cancellation of removal if he has been lawfully admitted for permanent residence in the United States for at least five years, has lived in the United States continuously seven years in any lawful status, and has not been convicted of an aggravated felony. INA § 240(A)(a). It is undisputed that Mr. G- has had legal permanent residence status for more than five years and has lived in the United States lawfully and continuously for more than seven years. The only issue is whether Mr. G-'s 2007 Georgia conviction for terroristic threats constitutes an aggravated felony which renders him ineligible for cancellation of removal. *See* INA § 240(A)(a)(3).

DHS alleges that Mr. G-'s conviction for making terroristic threats constitutes a crime of violence as defined by 18 U.S.C. § 16 for which the term of imprisonment is at least one year, and is thus an aggravated felony. INA § 101(a)(43)(F). Section 16 defines a crime of violence as either: "an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16.

In order to determine if a state conviction qualifies as an aggravated felony, a court must apply a categorical approach, looking at the statutory language of the conviction and not the facts of the underlying offense. *See Taylor v. U.S.*, 495 U.S. 575, 600 (1990). In the case of divisible statutes, those that set out one or more elements of the crime in the alternative, there is a limited

exception. This modified approach allows judges to look to the record of conviction only for the purpose of determining which statutory phrase was the basis of the conviction. *See Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013).

Mr. G- was convicted of violating Ga. Code Ann § 16-11-37. This statute is not divisible and therefore the categorical approach is the proper analysis. Under the pure categorical approach, convictions under this Georgia statute are not categorically crimes of violence as defined by 18 U.S.C. § 16, and therefore they are not aggravated felonies within the meaning of the Act. Mr. G- is eligible for cancellation of removal. Although the IJ found Mr. G- eligible for relief, the IJ incorrectly deemed the statute divisible and applied the modified categorical approach. *See* IJ Dec. 5. Nevertheless, even under the modified categorical approach Mr. G-'s conviction is not categorically an aggravated felony and he remains eligible for cancellation.

A. The Pure Categorical Approach Applies to Indivisible Statutes.

The Supreme Court has repeatedly emphasized that a categorical approach applies when determining whether convictions constitute aggravated felonies under the Act. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) ("When the government alleges that a state conviction qualifies as an aggravated felony under the INA we generally employ a categorical approach to determine whether the state offense is comparable to an offense listed in the INA."); *Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012) ("To determine whether the Kawashimas' offenses 'involv[e] fraud or deceit' within the meaning of [the INA aggravated felony statute], we employ a categorical approach."); *Nijhawan v. Holder*, 557 U.S. 29 (2009). Under the categorical approach judges may only look to the facts of the conviction not the facts underlying the offense. *See Taylor v. U.S.*, 495 U.S. 575, 600 (1990).

There is a limited exception in the case of divisible statutes, those that set out one or more elements of the crime in the alternative, which allows judges to look to the record of conviction for the sole purpose of determining which statutory phrase was the basis of the conviction. *See Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013). This is referred to as the "modified categorical approach." *Id.*

Some courts have applied the modified categorical approach broadly to any statute that includes both, conduct which qualifies as an aggravated felony, and conduct which does not. *See e.g., U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011); *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012). The Supreme Court recently reaffirmed its earlier holdings that apply the modified categorical approach more narrowly. *See Descamps*, 133 S. Ct. at 2283. The modified categorical approach is only applied when the statute of conviction is divisible, meaning that the statute sets out one or more elements of the crime in the alternative so, in effect, the statute contains alternative versions of the crime. *Id.* at 2284. Typically, in cases where the statute is divisible, "the prosecutor charges one of th[e] two alternatives, and the judge instructs the jury accordingly. So if the case involves entry into a building, the jury is 'actually required to find all the elements of generic burglary,' as the categorical approach requires." *See id.* Generic burglary has been limited to entry into a building.

The classic example of a divisible statute is a state burglary statute that includes entry into an automobile **or** entry into a building. *See id*; *Shepard v. United States*, 544 U.S. 13 (2005); *Taylor*, 495 U.S. at 602. In that case, the prosecutor would charge the defendant with either entry into a building or entry into an automobile. The fact finder would have to find that the defendant entered the specific location charged by the prosecutor. Thus, a criminal record showing a conviction for entry into a building would mean that the fact finder *necessarily found*

that the defendant entered the building. Alternatively, if the individual entered an automobile, the conviction would not satisfy the **generic** crime of burglary. Because the statute is divisible the judge is allowed to look beyond the statutory language.

Statutes containing inclusive elements and statutes that are overly broad are not divisible because, unlike the above example, the prosecutor is not required to charge the defendant with violating one specific alternative, and the jury is not required to find that the defendant violated that specific alternative. Statutes are overbroad when they cover several alternative theories of the crime, but do not explicitly lay them out in the statute. For example, the California burglary statute at issue in *Descamps* criminalized all entry into certain locations with intent to commit a felony. *See* Cal. Penal Code § 459; *Descamps*, 133 S. Ct. at 2282. The state argued that the statute was divisible because it covered both illegal entry, which was an aggravated felony, and legal entry, which was not. The Supreme Court rejected this approach. *See id*. The Court explained that the statute was overly broad, and not divisible, because the prosecutor did not have to choose to charge the defendant with either illegal entry or legal entry. *Id.* at 2285-86, 2290. The defendant was merely charged with entering the location with intent to commit a felony. *Id.* at 2282. Similarly, the fact finder was not required to find that the defendant either illegally entered the location or legally entered the location. The jury merely had to find the defendant entered the location. *Id*. Therefore the Supreme Court reasoned that the statute was not divisible, and the judge was not allowed to look to the record of conviction to see whether or not the defendant illegally entered the location. *Id.* at 2285-86, 2293.

Statutes that contain inclusive rather than alternative elements are not divisible, because the prosecutor is not required to charge the defendant with violating one specific alternative, and the jury is not required to find that the defendant violated that specific alternative. For example,

the Tenth Circuit in *United States v. Zuniga-Soto* found that a state assault statute that provided that a person is guilty of assault if he "intentionally, knowingly, or recklessly causes bodily injury," was not divisible. 527 F.3d 1110, 1117-22 (10th Cir. 2008). The different mens rea elements "intentionally," "knowingly," and "recklessly," are not actually *alternative* mens rea elements. Unlike the burglary example from *Descamps*, where the prosecutor is required to either charge the defendant with illegal entry into a building or illegal entry into a car and jury is required to find the same, the prosecutor is not required to choose to charge the defendant with acting either intentionally, knowingly, or recklessly and can secure a conviction if the fact finder determines that the defendant acted at least recklessly. These are inclusive rather than alternative elements and the statute is not divisible.[2]

The Supreme Court's recent decision in *Descamps* supports the Tenth Circuit's approach. The Court stated that for a statute to be divisible, the prosecutor must be required to charge the defendant with one specific alternative and the jury must be required to find the same. *Descamps*, 133 S. Ct. at 2285-86, 2290. The Supreme Court also indicated its support for the proposition that statutes containing an inclusive mens rea element are not divisible, when it vacated the decision of the Third Circuit in *U.S. v. Marrero*, 677 F.3d 155 (3d Cir. 2012). *See Marrero v. United States*, No. 12-6355, 2013 WL 3213618 (U.S. June 27, 2013). In *Marrero* the Third Circuit found that a statute, which criminalized intentional, knowing, or reckless conduct, was divisible. 677 F.3d at 161. The Supreme Court vacated the decision and remanded the case back to the Third Circuit for reconsideration in light of *Descamps*. *Marrero v. United States*, No.

[2] The Eleventh Circuit has indicated that a statute that included both intentional and reckless conduct is divisible, *see United States v. Anderson*, 442 F. App'x 537, 538-40 (11th Cir. 2011). This holding in *Anderson* can no longer stand in light of *Moncrieffe* and *Descamps*.

12-6355, 2013 WL 3213618 (U.S. June 27, 2013). This strongly suggests that the Supreme Court disagrees with the Third Circuit's conclusion that the statute with its inclusive and differing mens rea elements is divisible.

B. Mr. G- Was Not Charged Under a Divisible Statute.

The statute Mr. G- was charged under, Ga. Code Ann § 16-11-37(a), is not divisible. The statute provides that:

> A person commits the offense of a terroristic threat when he or she threatens to commit any crime of violence, to release any hazardous substance, as such term is defined in Code Section 12-8-92, or to burn or damage property with the purpose of terrorizing another or of causing the evacuation of a building, place of assembly, or facility of public transportation or otherwise causing serious public inconvenience or in reckless disregard of the risk of causing such terror or inconvenience. …

Ga. Code. Ann. § 16-11-37(a).

The IJ concluded that the statute was divisible because it covers both intentional and reckless conduct. *See* IJ Dec. 5. This was error. The "purposeful" and "reckless disregard" elements are not *alternative* elements but are *inclusive* elements. The prosecutor charging a defendant with violation of this statute is not required to choose between charging the defendant with either purposeful or reckless conduct, and the jury can convict if they find that the defendant acted at least recklessly.

Numerous examples in the Georgia jurisprudence show that in a typical case under Ga. Code Ann. § 16-11-37(a) the defendant is charged with a violation of the statute generally. The jury is instructed that they may find the defendant guilty if they find that he acted *either* purposefully or recklessly. For example, in *Schneider v. State*, 718 S.E.2d 833 (Ga. Ct. App. 2011), the defendant was charged with "threaten[ing] to commit a crime of violence, to wit: to give [the victim] a heart attack by throwing a hair dryer into the water-filled bathtub which she occupied." *Id.* at 837. The indictment does not specify whether the defendant was charged with

purposeful or reckless conduct. In that case the jury was instructed that "a person commits the offense [of terrorist threats] when he 'threatens to commit any crime of violence with the purpose of terrorizing *or* in reckless disregard of the risk of causing such terror." *Id.* (emphasis added). The jury was not required to find that the defendant acted purposeful or alternatively that he acted recklessly. They could convict if they found the defendant acted *at least* recklessly.

Additionally, in *Koldewey v. State*, the Court affirmed a conviction for terroristic threats because the "circumstances [were] sufficient to support an inference that the telephone call was made with the intent to terrorize [the victim], *or at least* in reckless disregard or the risk of causing such terror." 714 S.E.2d 371, 374 (Ga. Ct. App. 2011) (emphasis added). This also shows that the Georgia courts interpret the mens rea component of the crime as an inclusive element. *See id.* ("To prove the crime of terroristic threats as alleged in Counts 1 through 4, the State's burden was to show that [the defendant] 'threaten[ed] to commit any crime of violence… with the purpose of terrorizing another … or in reckless disregard of the risk of causing such terror or inconvenience.").

Because Georgia interprets differing mens rea components of the statute as an inclusive element, the statute cannot be deemed divisible. The Court's decision in *Descamps* makes it clear that a statute is only divisible if the prosecutor is required to charge the defendant with one specific alternative element and the jury is required to find the same. *Descamps*, 133 S. Ct. at 2285-86, 2290. In Mr. G-'s case, the prosecutor is not required to charge the defendant with either purposeful or reckless conduct, and the fact finder can convict if it finds that the defendant exhibited *either* purposeful or reckless conduct. The Georgia statute therefore resembles the California burglary statute that the Supreme Court deemed indivisible in *Descamps*. That statute

covered both illegal and legal entry into locations but the prosecutor was not required to charge the defendant with either alternative, and the fact finder could convict if it found that the defendant either legally or illegally entered the location. The same is true here regarding purposeful and reckless conduct. *See Descamps*, 133 S. Ct. at 2285-86, 2290. The Georgia statute is more appropriately considered as an over broad statute, rather than a statute containing alternative elements. The statute is not divisible and the adjudicator cannot look at the record of conviction.. *See id.*

C. Under the Pure Categorical Approach, Statutes that Criminalize Conduct Committed With a Mens Rea of Reckless Disregard Are Not Crimes of Violence Under 18 U.S.C. § 16.

When examined under the categorical approach, Mr. G-'s conviction for having made terroristic threats according to Ga. Code Ann. § 16-11-37(a) is not categorically a crime of violence as defined by either Section 16(a) or 16(b) of Title 18. In *Moncrieffe v. Holder*, the Supreme Court held that the facts of conviction are not considered. 133 S. Ct. 1678, 1684 (2013). Instead, courts consider whether the state's statute of conviction covers conduct that falls outside of the federal definition of an aggravated felony. *See Leocal v. Ashcroft,* 543 U.S. 1, 7 (2004); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). Furthermore, to constitute a crime of violence under either section of 18 U.S.C. § 16, a statute of conviction must require proof of mens rea greater than recklessness; therefore a crime based on the minimum conduct of "reckless disregard" is insufficient to satisfy this prong. *See United States v. Palamino-Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010).

1. The minimum conduct described in the statute of conviction: "in reckless disregard," does not amount to a crime of violence under 18 U.S.C. § 16(a).

The categorical approach is generally used to determine if the conviction under the state statute is comparable to the federal offense making the alien deportable in the Act. *See, e.g.*, *Moncrieffe*, 133 S. Ct. at 1681; *Nijhawan v. Holder*, 557 U.S. 29 (2009). The state's statute of conviction is then examined in order to determine if it fits within the "generic" definition of a corresponding aggravated felony. *See Gonzales*, 549 U.S. at 186. There is a finding of a categorical match if a conviction of the offense under the state statute "'necessarily' involved... facts equating to [the] generic [federal offense]." *Shepard v. United States*, 125 S. Ct. 1254, 1262 (2005). Most importantly, "because [the] Court examines what the state conviction necessarily involved and not the facts underlying the case, it [must] presume that the conviction 'rested upon [nothing] more than the *least of the acts*' criminalized, before determining whether even those acts are encompassed by the generic federal offense." *Moncrieffe*, 133 S. Ct. at 1684 (citing *Johnson v. United States*, 130 S. Ct. 1265 (2010)). Therefore, the minimum conduct must be looked at in determining whether a state conviction falls within the federal definition of a crime of violence. *See United States v. Miguel*, 701 F.3d 165, 169 (4th Cir. 2012) (citing *United States v. Diaz-Ibarra*, 522 F.3d 343, 348 (4th Cir. 2008)). As such, the Supreme Court in *Moncrieffe* held that a conviction under a state statute falls within the "generic" federal definition of a corresponding aggravated felony if the state conviction "necessarily" proscribes conduct that is an offense under the "generic" federal definition and the "generic" federal crime must "necessarily" prescribe felony punishment for that conduct. 133 S. Ct. at 1681.

Mr. G-'s conviction for having made terroristic threats is not a crime of violence under 18 U.S.C. § 16(a). In order for his conviction to qualify as a crime of violence under Section 16(a),

the conviction must have "as an element the *use*, attempted *use*, or threatened *use* of physical force against the person." 18 U.S.C. § 16(a). Courts have required *specific intent* or a "higher degree of intent" to employ force in order to satisfy the "use" requirement of Section 16(a). Mere recklessness or negligent conduct does not suffice. *See Tran v. Gonzales*, 414 F.3d 464, 469 (3d Cir. 2005); *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir. 2001). Thus, an offense predicated on reckless or negligent conduct does not meet the "use of physical force" required by Section 16(a). *See Leocal v. Ashcroft*, 125 S. Ct. 377, 382 (2004); *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010); *see also United States v. Torres-Miguel*, 701 F.3d 165, 169 (4th Cir. 2012).

Further, the intentional use of force must be a component of the offense, and "if *any* set of facts would support a conviction without proof of that component [use of force], then the component most decidedly is not an element-implicit or explicit-of the crime." *United States v. De La Rosa-Hernandez*, 264 F. App'x 446, 449 (5th Cir. 2008). In Mr. G-'s case, he pled guilty to terroristic threats pursuant to Ga. Code Ann. § 16-11-37(a). The Georgia statute states that:

> (a) A person commits the offense of a terroristic threat when he or she threatens to commit any crime of violence, to release any hazardous substance, as such term is defined in Code Section 12-8-92, or to burn or damage property with the purpose of terrorizing another or of causing the evacuation of a building, place of assembly, or facility of public transportation or otherwise causing serious public inconvenience *or in reckless disregard of the risk of causing such terror or inconvenience.* No person shall be convicted under this subsection on the uncorroborated testimony of the party to whom the threat is communicated.

Ga. Code Ann. § 16-11-37(a).

The Supreme Court established in *Moncrieffe* that "it [must] presume that the conviction 'rested upon [nothing] more than the *least of the acts*' criminalized" before a categorical match can be determined. 133 S. Ct. at 1684. Thus the BIA must assume that Mr. G-'s conviction for making terroristic threats under the statute was committed in "reckless disregard of the risk of

causing such terror or inconvenience" since this is the minimum conduct covered. Moreover, in order for an offense to be considered a crime of violence, a mens rea greater than recklessness is required. *See Palomino Garcia*, 606 F.3d at 1336. Because Mr. G- could have been convicted under the Georgia statute based on facts proving the minimally-listed mens rea of reckless conduct, his conviction is not a crime of violence. Further, in order for a conviction to be a crime of violence under Section 16(a) the conduct must have "as an element the use, attempted use, or threatened *use of physical force*." Since an offense under the Georgia statue in "reckless disregard" may lack the element of physical force, Mr. G-'s conviction is not a crime of violence because Section 16(a) requires physical force.

2. The minimum conduct described in the statute of conviction: "in reckless disregard," does not amount to a crime of violence under 18 U.S.C. § 16(b).

Numerous circuits have held that "reckless" crimes cannot be considered crimes of violence under Section 16(b) of Title 18. *See United States v. Zuniga-Soto*, 527 F.3d 110, 1124 (10th Cir. 2009); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129-31 (9th Cir. 2006); *Oyebanji v. Gonzales*, 418 F.3d 260, 263-65 (3d Cir. 2005); *Tran v. Gonzales*, 414 F.3d 464 (3d Cir. 2005). Section 16(b) covers offenses that by their nature involve "a substantial risk that physical force against the person or property of another may be used…" 18 U.S.C. § 16. Even though Section 16(b) is broader than Section 16(a), "it contains the same formulation found to be determinative in 16(a): the use of physical force against the person," and as such, it requires a higher mens rea than reckless or negligent conduct. *See Leocal v. Ashcroft*, 125 S. Ct. 377, 383 (2004); *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010). The limitation on Section 16(b) occurs because the crimes require "purposeful conduct, rather than negligent or reckless conduct" in order to be

considered crimes of violence and reckless crimes "are not the type of violent crimes Congress intended to distinguish as worthy of removal." *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008).

Since Mr. G-'s minimum conduct under the statute of conviction presumes a conviction by means of reckless conduct, his violation of Section 16(b) was not a crime of violence. Mr. G-'s conviction under the reckless conduct lacks the purposeful conduct required for an offense to be a crime of violence under Section 16(b) and a conviction under this purpose-less minimal conduct is not the type of crime that Congress intended to be worthy of removal. Additionally, Mr. G-'s offense of simply making a terroristic threat *might involve the possibility* of a future injury. This does not mean that the "substantial risk" of physical force that is required by Section 16(b) *necessarily* underlies the offense. Therefore, Mr. G-'s conviction of having made terroristic threats under the Ga. Code Ann. § 16-11-37(a) does not preclude him from eligibility for cancellation of removal.

3. The label that the state assigns to a statute is inconclusive of whether it is a crime of violence under the aggravated felony definition.

Even though the Georgia statute specifically states that "a person commits the offense of a terroristic threat when he or she threatens to commit any *crime of violence*..." which is followed by a list of different kinds of conduct which may lead to a conviction under the statute, courts of appeals have held that the label that the state attaches to the crime of conviction is not determinative of whether the offense is a crime of violence. *See United States v. Palomino Garcia*, 606 F.3d 1317, 1329 (11th Cir. 2010); *United States v. McFalls*, 592 F.3d 707, 716 (6th Cir. 2010); *United States v. Fierro-Reyna*, 466 F.3d 324, 327 (5th Cir. 2006). Additionally, the Tenth Circuit has stated that in order "to determine whether a particular state's criminal statute

falls within the ambit of the term 'crime of violence'… we look not to how a state has labeled its statute, but rather consider whether the statute corresponds with the 'uniform generic definition' of the crime…" *United States v. Garcia-Caraveo*, 586 F.3d 1230, 1233 (10th Cir. 2009). Therefore, the fact that the label "crime of violence" is attached to Ga. Code Ann. § 16-11-37(a) does not determine whether a conviction under the Georgia statute it is a crime of violence as defined by federal law.

II. Mr. G-'s Conviction is Not an Aggravated Felony Under the Modified Categorical Approach.

Issue: Whether the IJ correctly concluded that Mr. G-'s conviction is not an aggravated felony under the modified categorical approach when the Georgia statute criminalizes conduct that does not require or present a substantial risk of physical force.

In the alternative, if the Board does apply the modified categorical approach, Mr. G-'s conviction is not a crime of violence. Applying the modified categorical approach, a court may only look to the record of conviction for the purpose of "determin[ing] which statutory phrase was the basis for conviction." *Descamps v. United States*, 133 S. Ct. 2276, 2285. Mr. G-'s record reveals that he pled guilty to the statutory phrase "did threaten to commit a crime of violence with the purpose of terrorizing another." Exh. 2, Grand Bill of Indictment, February, 2007; Exh. 2, Record of Sentence. Once the Court has determined the statutory phrase they may not look further in the record of conviction in order to determine exactly which crime of violence Mr. G- threatened to commit. *See Descamps*, 133 S. Ct. at 2285. Accepting that Mr. G- pled guilty to threatening to commit a crime of violence with the purpose of terrorizing another, Mr. G-'s conviction is still not a crime of violence. The Eleventh Circuit has not determined whether

a conviction under this statute constitutes a federal crime of violence.[3] Georgia case law demonstrates that a conviction under the statute does not fit within either of the definitions contained in 18 U.S.C. § 16. Georgia case law does not define what constitutes a "crime of violence" under Georgia law. It reveals that a Georgia "crime of violence" does not necessarily involve the use or threatened use of violent force as required by the Supreme Court in *Johnson* to constitute a crime of violence under 18 U.S.C. § 16(a). *See Johnson v. United States,* 559 U.S. 133, 140 (2010). Additionally, making a threat does not involve a substantial risk that physical force will be used *in the course of committing the offense* so it is not a crime of violence under 18 U.S.C. § 16(b).

A. The Court May Not Look to the Record of Conviction in Order to Determine what "Crime of Violence" Mr. G- Threatened to Commit.

DHS argues that because it is not clear from the statute of conviction which crime of violence Mr. G- threatened to commit the Court may apply the modified categorical approach in order to determine this factual information. *See* DHS Brief 6. DHS cites no support for this proposition. It is contrary to clearly established precedent. The Supreme Court has consistently held that the focus in determining which convictions qualify as aggravated felonies is on the statutory elements, not the facts underlying the conviction. *See, e.g., Taylor v. United States,* 495 U.S. 575, 600 (1990). The Court has only allowed examination of the record of conviction in the case of divisible statutes in order to determine "which statutory phrase, contained within a

[3] DHS cites *U.S. v. Greer*, 440 F.3d 1267 (11th Cir. 2006), for the proposition that the Eleventh Circuit has held that convictions under Ga. Code Ann. §16-11-37(a) were violent felonies under the Armed Career Criminal Act. However, *Greer* merely held that the district court had the authority to determine whether these convictions were violent felonies. *Greer*, 440 F.3d at 1273. While the Court did provide a summary of the district court's initial determination that the convictions were violent felonies, it did not express approval or disapproval of this, and limited its holding to the proposition that the district court was allowed to make this determination and did not need a jury to do so. *Id.*

statute listing several different crimes, covered a prior conviction." *Descamps*, 133 S. Ct. at 2284-85 (internal citations omitted). In order for a statute to be deemed divisible it must contain a list of alternative elements. It is not divisible if it merely uses broad language that covers multiple alternatives. *Id.* at 2285. For example, in *Descamps*, the Supreme Court found that a statute which criminalized all entries into certain locations with intent to commit a felony was not a divisible statute. *Id.* The state had argued that the statute was divisible because its generic use of the word entry necessarily covered both legal and illegal entries. *Id.* at 2282-83. The Court rejected this approach, holding that statutes that merely use broad language rather than formally listing alternative elements are not divisible. Therefore, a court is not allowed to look to the record of conviction. *Id.* at 2285.

In this case, it is clear that once a court applies the modified categorical approach to determine that Mr. G- was convicted of threatening to commit a crime of violence with the purpose of terrorizing another, it cannot then proceed to examine the record of conviction in order to determine which crime of violence Mr. G- threatened to commit. This case presents the same situation that the Court confronted in *Descamps.* In *Descamps* the state had argued that the statutory phrase "entry" was divisible although the statute itself did not list any alternative elements because it necessarily included both illegal and legal entries. *Id.* at 2285. DHS argues that the statutory phrase "crime of violence" is divisible because it necessarily covers several different crimes. *See* DHS brief 6. In *Descamps* the Court made it clear that a statute is not divisible just because it uses broad language that covers several different alternatives; it is only divisible if the statute specifically lists all of the potential alterative elements. *Id.* at 2285-86, 2290. The statutes in this case and in *Descamps* are not divisible, because they do not list alternative elements. The Court held in *Descamps* that the state may not look to the record of

conviction to determine whether the defendant legally or illegally entered the location. Similarly, in the current case, the state may not look to the record of conviction in order to determine which crime of violence Mr. G- threatened to commit. *Id.*

B. Mr. G-'s Conviction is not a Crime of Violence Under Section 18 U.S.C. § 16(a).

When applying the modified categorical approach, the Court is allowed to look at "the charging document, plea, verdict or judgment, and sentence" to determine which offense under the statute of conviction the defendant was charged with. *Accardo v. U.S. Att'y Gen.*, 634 F.3d 1333, 1336 (11th Cir. 2011) (citing *Jaggernauth v. U.S. Att'y Gen*., 432 F.3d 1346, 1354 (11th Cir. 2005)). Examining the one-count indictment shows that Mr. G- "did threaten to commit a crime of violence with the purpose of terrorizing another." Exh. 2, Grand Bill of Indictment. When this document is considered, it is determined that Mr. G- pled guilty to Section 16-11-37(a) of the Georgia statute, threatening to commit a crime of violence with the purpose of terrorizing.

Section 16-11-37(a) does not have as an element "the use, attempted use, or threatened use of *physical* force against the person or property of another" that Title 18 Section 16(a) requires in order to qualify an offense as a crime of violence. Furthermore, the Georgia statute does not define Georgia crimes of violence. Georgia has convicted defendants for threatening to commit crimes of violence under the state statute when the offenses lack the "violent force" necessary to constitute a violent felony under a federal definition such as Section 16(a). *See Johnson v. United States*, 559 U.S. 133, 133-34 (2010); *see also Koldewey v. State*, 714 S.E.2d 371 (Ga. Ct. App. 2012). Violent force is defined as "force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 133-34. The state statute punishes the threat to commit a crime of violence, and without a definition of a crime of violence, a crime of violence

under the state statute cannot necessarily include the "violent force" required in *Johnson*. *Id*. Without this "violent force" finding required by the "physical force" element of Title 18 Section 16(a), an offense under a state statute cannot fall within the federal definition of a crime of violence.

In *In re K.J.*, the defendant was convicted of having made a terroristic threat for having made "contemporaneous acts of pounding her first into her hand and exclaiming that she was 'going to get' the instructor" for disciplining her. 668 S.E.2d 775, 776 (Ga. Ct. App. 2008). Georgia law did not require the defendant to take "overt, physical aggressive action toward the victim." *Id*. Yet the state still found her to have completed the crime for purposes of the Georgia statute. *Id*. In this context, "going to get" could have meant any type of action that did not necessitate violent force and the defendant could have been statutorily convicted for the threat to commit non-violent acts. The Eleventh Circuit has also held that a statutory conviction for making extortionate extensions of credit under Title 42 Section 892(a) is not categorically a crime of violence because one could commit the offense "*without* the attempted, threatened, or actual use of physical force against the person or property of another." *Accardo v. U.S. Att'y Gen.*, 634 F.3d 1333, 1338 (11th Cir. 2011). The court held that one could violate the statutory provision by threatening to harm the reputation of the debtor through non-violent means, which lacks any contemplated use of physical or violent force. *Id*. By this reasoning, Mr. G-'s conviction of having committed a terroristic threat under Ga. Code Ann. § 16-11-37(a) does not necessarily equate to having committed a violent crime within the aggravated felony definition set forth in the Act.

The cases DHS cites for the proposition that other circuits have found making terroristic threats to be a crime of violence under 18 U.S.C. § 16(a) are inapposite[4]. In the majority of the cases they cite the statute criminalizing terroristic threats specifically required a threat to kill or cause bodily harm. *See United States v. Mahone*, 662 F.3d 651 (3d Cir. 2011) (defendant conviction was a crime of violence when he threatened *to kill* the victim); *Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003) (statute criminalizing threats to cause *death or great bodily injury* to another person was a crime of violence); *United States v. Santos*, 131 F.3d 16, 21 (1st Cir. 1997) (statute criminalizing threats "to *take the life of, to kidnap, or to inflict bodily harm*" was a crime of violence)(emphasis added); *United States v. Bonner*, 85 F.3d 522 (11th Cir. 1996) (statute criminalizing threats to *assault, kidnap, or murder* was a crime of violence); *United States v. McCaleb*, 908 F.2d 176, 178 (7th Cir. 1990) (statute criminalizing threatening *the life of the president* was a crime of violence); *United States v. Left Hand Bull*, 901 F.2d 647 (8th Cir. 1990) (statute criminalizing threat *to cause injury* was a crime of violence). All of these statutes require proving that the defendant threatened to kill or cause bodily harm, which involves the threatened use of physical force. Unlike these cases, the Georgia statute criminalizes generally any threat to commit a crime of violence. *See* Ga. Code Ann. §16-11-37(a). This could encompass threats to damage the reputation of another, which does not necessarily involve a threat to use physical force, so the reasoning of those cases does not apply here. The remaining case cited by DHS is similarly inapposite. In *Boykun v. Aschroft*, the Court found that a Pennsylvania statute for criminalizing threats to commit a "crime of violence,"

[4] It is also important to note that the majority of the cases cited by DHS were decided before the Supreme Court's decision in *Johnson* clarifying that "force" in 18 U.S.C. § 16 means "violent force." *See Johnson*, 559 U.S. 133, 133-34 (2010). It is therefore uncertain whether they remain good precedent.

which did not define the term, met the federal definition for a crime of violence because there were no cases indicating that Pennsylvania applied the statute to threats not involving the use of force. *See* 283 F.3d 166, 170 (3d Cir. 2002). In contrast, here, there are cases showing that Georgia applies its terroristic threat statute to threats that do not involve the use of force and the reasoning of *Boykun* does not apply. *See, e.g.*, *Koldewey v. State*, 714 S.E.2d 371 (Ga. Ct. App. 2011) (upholding a conviction for terroristic threats when the defendant threaten to "get" the victim).

C. Mr. G-'s Conviction is not a Crime of Violence Under 18 U.S.C. § 16(b) Because there is No Substantial Risk that Physical Force Will be Used in the Course of Committing the Offense.

In order for a conviction to be a crime of violence under 18 U.S.C. § 16(b) there must be a "substantial risk that physical force against the person or property of another may be used *in the course of committing the offense.*" (emphasis added). The classic example the Supreme Court has given of an offense falling under this definition is the crime of burglary because "burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime." *See Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004). The main focus is on whether or not there is a substantial risk that physical force will be used *during the commission of the crime. See Accardo v. U.S. Att'y Gen.*, 634 F.3d 1333, 1338-39 (11th Cir. 2011) (holding that the crime of making extortionate loans was not a crime of violence under 18 U.S.C. § 16(b) because the crime is completed when the loan is extended with the understanding the failure to pay could result in harm so there is no a substantial risk that physical force will be used *in the course of committing the* offense); *United States v. Evans*, 478 F.3d 1332, 1342-45 (11th Cir. 2007) (holding that threatening to use a weapon of mass destruction did not involve a substantial risk that physical force against a person would be used in the course of committing the offense

because any risk to persons arising from the crime would occur after the threat was made and at this time the crime is already completed).

In the majority of cases where Courts have found that offenses involve a substantial risk that physical force may be used they have focused on the possibility that the defendant will encounter the victim during the course of committing the offense resulting in a violent confrontation. *See James v. United States*, 550 U.S. 192, 203-04 (2007) ("The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party – whether the occupant, a police officer, or a bystander – who come to investigate."); *Cole v. Att'y Gen.*, 712 F.3d 517, 528 (11th Cir. 2013) (finding the crime of pointing a firearm at another person was a crime of violence because "there is a substantial risk that the act of pointing a firearm at another will provoke the sort of confrontation that leads to the intentional use of physical force …where the crime necessarily involves an encounter with the victim."). In cases where the crime does not necessarily involve an encounter with the victim courts have been reluctant to find that the crime involves a substantial risk that physical force will be used. *See Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1083 (9th Cir. 2007) (holding that a statute criminalizing harassment was not a crime of violence when the crime could be carried out over the phone or by sending letters because there was no encounter between the defendant and the victim and therefore there was no substantial risk that physical force would be used in carrying out the offense.").

Mr. G-'s conviction for making terroristic threats is not a crime of violence under 18 U.S.C. § 16(b) because it does not involve a substantial risk that physical force will be used in the course of committing the offense. Georgia courts have held that the crime of making

terroristic threats "is completed when the threat is communicated to the victim with the intent to terrorize." *Lomax v. State*, 738 S.E.2d 152, 154 (2013). Therefore the offense is complete as soon as the defendant makes the threat and the court in considering whether the offense involves a substantial risk that physical force will be used in the course of committing the offense may only consider the risk that physical force will be used while the defendant is making the threat. They may not consider the risk that the defendant will act on the threat because by this time the offense is completed and any risk that physical force would be used would not be *during the commission of the offense. See Accardo*, 634 F.3d at 1338-39; *Evans*, 478 F.3d at 1342-45. There is a very small risk that the defendant will use force while making the threat. This is unlike the classic burglary example. In that scenario the burglar while illegally present in the location is likely to run into the victim or another innocent bystander and will need to use physical force to overcome that person and continue carrying out the crime. *See Leocal*, 543 U.S. at 10. In contrast it is unlikely that a defendant will need to use force to overcome the victim in order to complete the crime of making a terroristic threat, as completion of the crime requires only the uttering of a few words.

Additionally, Mr. G-'s conviction does not involve a substantial risk that physical force will be required during the commission of the offense because there is no necessary encounter between the defendant and the victim. The Court has held that the main risk that physical force will be used during the commission of an offense occurs when there is a possibility of a face-to-face encounter between the defendant and victim. *See James*, 550 U.S. at 203-04. A conviction for terroristic threats does not necessarily involve a face-to-face encounter with the victim. Georgia courts have made it clear that the offense of terroristic threats can be committed over the telephone, *see Drew v. State*, 568 S.E.2d 506 (2002), and against an absent third party, *see*

Shepard v. State, 496 S.E.2d 530 (1998), showing that it is not necessary or even likely that a defendant convicted of making terroristic threats was involved in a face-to-face encounter with the victim. The making of a threat to someone not in the defendant's physical proximity involves no risk that physical force will be required in the course of committing the offense, *see Malta-Espinoza*, 478 F.3d at 1083, and therefore a conviction for terroristic threats is not a crime of violence under 18 U.S.C. § 16(b).

Other cases in which courts have found a conviction for making threats to be a crime of violence are inapposite. For example, in *Matter of Malta*, 23 I&N Dec. 656 (BIA 2004), the Board concluded that a California statute that criminalized making threats involved a substantial likelihood that physical force would be used in the commission of the offense because a conviction under the California statute required evidence that the defendant had engaged in a course of harassing conduct and that the defendant had the means to carry out the threat. The Board's conclusion that the conviction was a crime of violence rested largely on the fact that the statute required evidence of a course of conduct, rather than one isolated threat, and evidence that the defendant had the ability to carry out the threat. These factors greatly increase the risk that the defendant will use physical force in the course of carrying out the offense. The Georgia statute at issue in Mr. G-'s case neither requires that the state prove that the defendant engaged in a course of conduct nor had the ability to carry out the threat. *Matter of Malta* does not apply.

III. The IJ Correctly Granted Mr. G- Cancellation of Removal as a Matter of Discretion.

Issue: Whether the IJ correctly granted Mr. G- discretionary relief based on his factual finding that social and humane considerations outweighed the evidence of criminality.

The IJ may grant cancellation as a matter of discretion if the social and humane considerations presented in the alien's favor outweigh the adverse factors evidencing his

undesirability. *See Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998). Favorable considerations include: family ties in the US; duration of residence in the country; how young the immigrant was when he arrived in the U.S.; evidence of hardship to the immigrant's family if he is deported; history of employment; evidence of value and service to the community; proof of rehabilitation from crime; and any other evidence attesting to a respondent's good character. *See Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990) (finding that the immigrant's duration of time in the United States, his marriage to a United States citizen, the existence of his four U.S. citizen children, the presence of all of his extended family in the United States, and considerations of the hardship his family would face if he were deported amounted to unusual equities counseling in favor of his application for cancellation or removal). Adverse considerations include the circumstance of deportation, additional violations of U.S. immigration laws, the existence of a criminal record and other evidence of bad character. *Id.* When considering the immigrant's criminal record, evidence indicating the underlying motive for the crime, and evidence indicating rehabilitation, are important. *Id.*; *Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998). If the immigrant's equities outweigh the adverse factors, then the immigrant should be granted cancellation in the exercise of discretion. *See C-V-T-*, 22 I&N Dec. 7 (BIA 1998) (holding that an immigrant should be granted cancellation in the exercise of discretion when the immigrant had been convicted of a drug offense but had been a lawful permanent resident for 15 years, had worked hard, was self-supporting, and cooperated with the police in securing the arrest of a drug dealer).

The only adverse consideration in Mr. G-'s case is his criminal record. He has not violated any other immigration laws and there is no other evidence of bad character. Mr. G- has two serious convictions: a controlled substance offense in 2011, and a terroristic threat

conviction in 2007. Both of these convictions are relatively minor offenses. *See* IJ Dec. 6. Additionally, Mr. G-'s motivation for committing the crime is important factor to consider, *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990), and in this case it further exemplifies the minor nature of the offense. Mr. G-'s conviction for terroristic threats is based on a voicemail message he left the mother of his children one night while he was drunk. Exh. 8, Prehearing Statement. The record shows that Mr. G- only made the threat out of desperation after learning that the mother intended to take his children away and move them out of state. *See* Exh. 8, Prehearing Statement; Exh. 7, Letter of Lawford Cunningham ("Michael reiterated over and over again to me that he had no intention to hurt anyone and it was only in the heat of the moment that he expressed himself in that manner. He regretted every moment of that … Knowing him I personally can attest to the fact that he never meant a word of that statement and would never, ever, act on those words!!"). His conduct was not based on an intent to cause harm to Ms. B-, but rather based on a fear that he would lose touch with his children. This does not indicate bad character but a lapse in judgment brought about by extreme emotional distress.

Additionally, evidence of rehabilitation is important when assessing the adverse consequences of an immigrant's criminal record. *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990). In this case, the IJ made a finding of fact that Mr. G- was rehabilitated. IJ Dec. 6. His two convictions are over three and six years old. *See* IJ Dec. 6. Mr. G- has not been involved in any other criminal matters since that time and ADA Voelker personally testified that "he has made significant changes in his life and will be a law abiding contributing member of society." *See* Exh. 11, Letter of ADA Lynne G. Voelker. Additionally, Mr. G- successfully completed a family violence intervention program and drug and alcohol classes. *See* Tr. 55; Exh. 8, Prehearing Statement. He has taken responsibility for his actions, *see* Exh. 8, Prehearing

Statement, and apologized to those he hurt. *See* Exh. 7, Letter of Lawford Cunningham; Exh. 7. Letter of Donae B-. The record shows that since his conviction for threatening the mother of his children, he has taken affirmative steps to repair their relationship and Ms. B- reports being on good terms with him. Exh. 7, Letter of Donae B-. Ms. B- expressed to the court that "the cordial relationship that we have now developed is what I have longed for." *Id.*

Mr. G- presented evidence of unusual equities and favorable considerations in support of his application for cancellation of removal. Mr. G- came to the United States in 1983 when he was six years old. IJ Dec. 2. He has lived in this country for 30 years. He no longer has any family in Jamaica and has not been there in over 20 years. Exh. 4, Letter from Jennifer Cunningham; Exh. 8, Letter from Leanora Lindo ("Coming here at such a young age, I don't think he would remember anyone, or anyone would remember him."). Mr. G-'s entire family now resides in the United States, including his four U.S. citizen children. Exh. 8, Prehearing Statement. His family would suffer great hardship if he were deported. Mr. G-'s children both wrote to the Court to express their love for their father and the grief his deportation would cause them. *See* Exh. 4, Letters of Jenae G-, Exh. 4, Letter of Jai B--G-. His daughter wrote that "he means everything to [her]" and that deporting him "would hurt us really badly." Exh. 4, Letter of Jenae G-. His son wrote that he "is a vital figure in our lives and we need and love him." Exh. 4, Letter of Jai B--G-. Additionally, Mr. G- provides financial support for his children. Exh. 7, Letter of Jennifer Cunningham. Mr. G-'s children would clearly suffer greatly if he were deported. Additionally, Mr. G- has been gainfully employed in the construction and food service industries. *See* Exh. 3, Application for Cancellation of Removal for Certain Permanent Residents. He is an involved member of the community. *See* Exh. 7, Letter of Lawford Cunningham (discussing Mr. G-'s willingness to help and tutor children in math); Exh. 4, Team

Player Certificate. Lastly, Mr. G- has exhibited good character by cooperating with the law enforcement and assisting with the arrest and conviction of two felons responsible for armed robbery and aggravated assault. *See* Exh. 11, Letter of ADA Lynne G. Voelker. "Mr. G- reported the violent crime knowing that he could be charged with possession of controlled substances that the responding officers would find in his apartment … and did not receive any type of benefit or deal for taking responsibility for the drug possession charges he faced." *Id.* ADA Voelker testified that "without [Mr. G-'s] full cooperation the[] two violent criminals would not have been convicted." *Id.*; *see also Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998) (finding the defendant's cooperation with the police in facilitating the arrest and conviction of a drug dealer and the ADA's 'unusual recommendation on the respondent's behalf" are favorable considerations). The unusual equities and favorable considerations in this case greatly outweigh the adverse factors and therefore the IJ correctly granted Mr. G- cancellation as a matter of discretion. *See Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998).

CONCLUSION

For the foregoing reasons Mr. G- respectfully request the Board to affirm the IJ's grant of cancellation of removal.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I certify that on July 11, 2013, I mailed, first class mail, postage prepaid one copy of the foregoing Brief to the following address: Department of Homeland Security, Office of Chief Counsel, 146 CCA Road Lumpkin, GA 31815.

_____
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