**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

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**Name: F[redacted], Y[redacted] N[redacted]**

**A [redacted]018**

**Date of this notice: 7/26/2017**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Kelly, Edward F.
Kendall Clark, Molly
Greer, Anne J.

Userteam: Docket

**U.S. Department of Justice**

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**FUMEY, YANICK NIELS**
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**Atlanta, GA 30303**

**Name: F[redacted], Y[redacted] N[redacted]**

**A [redacted]018**

**Date of this notice: 7/26/2017**

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

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Kelly, Edward F.
Kendall Clark, Molly
Greer, Anne J.

Russell
Userteam:

File: [redacted] 018 – Atlanta, GA

Date: JUL 26 2017

In re: Y[redacted] N[redacted] F[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ryanne Guy Konan, Esquire

ON BEHALF OF DHS: Kelley Fowler
Assistant Chief Counsel

APPLICATION: Termination

The respondent, a native and citizen of Germany, appeals from the Immigration Judge's decision dated February 9, 2017,[1] denying his motion to terminate the instant removal proceedings and ordering him removed. The Department of Homeland Security (DHS) opposes the appeal. The record will be remanded.

The Immigration Judge rejected the respondent's derivative citizenship claim, holding the respondent did not show he automatically acquired United States citizenship as a result of the naturalization of his father because all three of the requirements of section 320(a) of the Immigration and Naturalization Act, 8 U.SC. § 1431(a), had not been satisfied (I.J. at 2-5). Specifically, the Immigration Judge found the respondent was legitimated by his father before the respondent's 16th birthday, and the respondent was under 18 years old when his father naturalized and when the respondent adjusted his status to lawful permanent residence. However, the respondent had not shown that he was in his father's "legal and physical custody" when he obtained lawful permanent resident status because he did not show he was returned to his father's custody from a state mental health institution prior to that time.

The Immigration Judge also found the DHS had established the remaining factual allegations, including the respondent's convictions on March 18, 2015, for aggravated assault on a peace officer, in violation of O.C.G.A. § 16-5-21(c), and on April 17, 2012, for entering an automobile, in violation of O.C.G.A. § 16-8-18 (I.J. at 5-7). Concluding that the former was for an aggravated

[1] The Immigration Judge issued a written decision denying the respondent's motion to terminate on January 31, 2017, and issued a summary of an oral decision on February 9, 2017, indicating that the respondent was ordered removed to Germany in an oral decision that same day. The Immigration Judge did not actually issue a separate oral decision ordering the respondent removed, as required by *Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999). Because the respondent is detained and because the rationale for the removal order is included in the prior written decision on the motion to terminate, we will exercise appellate jurisdiction over this matter despite the fact that the order of removal is embedded in the transcript of the removal hearing (Tr. at 53). All citations to the Immigration Judge's decision are to the January 31, 2017, written decision.

felony "crime of violence," as that term is defined in 18 U.S.C. § 16(a), the Immigration Judge sustained the charge of removability under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (I.J. at 7-16). The Immigration Judge did not sustain the charge of removability under section 237(a)(2)(A)(ii) of the Act.

On appeal, the respondent first argues that the Immigration Judge did not make a finding on competency or whether safeguards were necessary, notwithstanding the medical evidence in the record and the parties' statements (Resp't Br. at 9-11). Second, he argues that the Immigration Judge erred in determining that the respondent's confinement in a mental institution deprived his father of custody for purposes of acquiring citizenship (Resp't Br. at 11-12). Third, he argues the Immigration Judge erred in sustaining the charge of removability under section 237(a)(2)(A)(iii) of the Act (Resp't Br. at 13-20).

As a threshold matter, we deem it necessary to remand the record for further fact-finding regarding the extent and severity of the respondent's mental impairment (Resp't Br. at 9-11). We find the instant record is not ripe for appellate review of issues related to the respondent's mental health, including his competency to participate in the proceedings and what, if any, safeguards were necessary to protect his rights and privileges in the proceedings. *See Matter of J-S-S-*, 26 I&N Dec. 679, 684 (BIA 2015) ("A finding of competency is a finding of fact that the Board reviews to determine if it is clearly erroneous."); *see also Matter of M-J-K-*, 26 I&N Dec. 773 (BIA 2016) (An Immigration Judge has the discretion to select and implement appropriate safeguards, which the Board of Immigration Appeals reviews de novo.).

The record contains evidence the respondent suffers from serious mental health issues and has had lengthy periods of confinement in mental health institutions (I.J. at 4-5; Tr. at 10-12, 18-21, 66; Resp't filing dated Sept. 20, 2016), and the DHS filed a motion requesting a competency finding, supported by additional mental health evidence (DHS filing dated Nov. 28, 2016). However, the Immigration Judge's decision did not include findings regarding the respondent's competency, and the transcript includes only the Immigration Judge's general conclusions that the respondent appeared to understand the nature of the proceedings and that his mental health issues were under control and he had assistance from family and an attorney (Tr. at 12, 18-20, 66).

Accordingly, we will remand the record for the Immigration Judge to conduct a competency inquiry consistent with *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), and to make a competency determination. If, after considering all appropriate evidence, the Immigration Judge determines that the respondent lacks sufficient competency to proceed with the hearing, the Immigration Judge will identify and apply appropriate safeguards and hold a new hearing. *See Matter of M-A-M-*, *supra*, at 483 (noting that the "Immigration Judge will consider the facts and circumstances of an alien's case to decide which . . . safeguards to utilize"). In either case, the Immigration Judge should issue a decision that contains his findings regarding the respondent's competency.

Because we remand for further fact-finding regarding competency, we find it unnecessary to reach the respondent's additional arguments on appeal. On remand, the parties may present additional evidence and argument regarding the respondent's competency and/or removability, including the issue of whether the respondent's father can be considered to have had legal and

physical custody of him during the relevant period.[2] The record will be remanded. The following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the foregoing discussion and the entry of a new decision.

FOR THE BOARD



[2] We observe that the DHS has submitted evidence that U.S. Citizenship and Immigration Services denied the respondent's Application for a Certificate of Citizenship (Form N-600) during the pendency of the appeal (DHS Br., Attachment).

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**UNITED STATES IMMIGRATION COURT**
**Atlanta, Georgia**

| | | |
|---|---|---|
| **IN THE MATTER OF:** | ) | **IN REMOVAL PROCEEDINGS** |
| | ) | |
| **FUMEY, Yanick Niels** | ) | **File No. A#** [redacted] **18** |
| | ) | |
| **Respondent** | ) | |
| | ) | |

**CHARGES:** Section 237(a)(2)(A)(iii) of the Act, in that, at any time after admission, Respondent was convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act, a crime of violence (as defined in section 16 of Title 18, United States Code, but not including a purely political offense) for which the term of imprisonment ordered was at least one year.

Section 237(a)(2)(A)(ii) of the Act, in that, at any time after admission, Respondent was convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

**APPLICATION:** Respondent's Motion to Terminate

## APPEARANCES

**ON BEHALF OF RESPONDENT:**
Ryanne G. Konan, Esq.
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**ON BEHALF OF THE DEPARTMENT:**
Assistant Chief Counsel
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180 Ted Turner Drive SW, Suite 332
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## DECISION OF THE IMMIGRATION JUDGE

### I. PROCEDURAL HISTORY

Yanick Niels Fumey ("Respondent") is an adult male native and citizen of Germany. He was admitted to the United States at Atlanta, Georgia, on or about October 4, 2001, on a visa waiver. On August 22, 2008, Respondent's status was adjusted to that of a Lawful Permanent Resident ("LPR"). See NTA, at 3.

On April 17, 2012, Respondent was convicted in the Superior Court of Dekalb County, in the State of Georgia, for the offense of "entering an automobile" in violation of section 16-8-18 of the Official Code of Georgia, for which he was sentenced to three (3) years' confinement to serve on probation. See Department's Resp. to Resp't's Mot. to Terminate ("Department's Resp."), at P18–P25 (Jan. 17, 2017).

On March 18, 2015, Respondent was convicted in the Superior Court of Dekalb County, in the State of Georgia, for the offense of "aggravated assault on a peace officer" in violation of section 16-5-21(c) of the Official Code of Georgia, for which he was sentenced to three (3) years' confinement. See Department's Resp. at P1–P17.

On August 24, 2016, the Department of Homeland Security ("Department") issued Respondent a Form I-862, Notice to Appear ("NTA") charging him as removable on two (2) grounds. The first charge alleges that Respondent is removable under section 237(a)(2)(A)(iii) of the Act, in that, at any time after admission, he was convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act, a crime of violence (as defined in 18 U.S.C. § 16, but not including a purely political offense) for which the term of imprisonment ordered was at least one year. The second charge alleges that Respondent is removable under section 237(a)(2)(A)(ii) of the Act, in that, at any time after admission, Respondent was convicted of two crimes involving moral turpitude ("CIMTs") not arising out of a single scheme of criminal misconduct. See NTA, at 3.

On December 22, 2016, Respondent filed a Motion to Terminate with the Court. On January 17, 2017, the Department filed a Response to Respondent's Motion to Terminate.

The Court has carefully reviewed the arguments and record before it. All evidence has been considered, even if not specifically discussed further in this decision. For the reasons set forth below, the Court will deny Respondent's Motion to Terminate.

## II. STATEMENT OF LAW AND DISCUSSION

In his Motion to Terminate, Respondent alleges that he is not removable as charged because he has acquired derivative citizenship through his father. Mot. to Terminate, at 4–5 (Dec. 22, 2016). Alternatively, Respondent argues that he is not removable under INA § 237(a)(2)(A)(iii) because his conviction for aggravated assault on a peace officer is not a crime of violence. Id. at 6–13. In addition, Respondent argues that he is not removable under INA § 237(a)(2)(A)(ii) because his convictions for entering an automobile and aggravated assault on a peace officer are not CIMTs. Id. at 13–14.

### *A. The Court finds that the factual allegations contained in Respondent's NTA have been established by clear and convincing evidence.*

Respondent contests all of the factual allegations contained in his NTA. DAR 00:00:40–00:01:15 (Oct. 18, 2016). For the following reasons, the Court finds that the allegations in Respondent's NTA have been established by clear and convincing evidence. See INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a) (2016).

#### *1. The Department has established the first factual allegation in Respondent's NTA because Respondent has not overcome the presumption of alienage.*

Factual allegation 1 alleges that Respondent is "not a citizen or national of the United States." NTA, at 3. It is unconstitutional, under any circumstances, to remove a United States citizen. See Hall v. Florida, 134 S. Ct. 1986, 1992 (2014); Trop v. Dulles, 356 U.S. 86, 101 (1958). As a result, the Court may terminate a respondent's removal proceedings if he establishes his *prima facie* eligibility for naturalization and that his case involves "exceptionally appealing

or humanitarian factors," 8 C.F.R. § 1239.2(f), and if the Department provides "some form of affirmative communication" attesting to the respondent's *prima facie* eligibility, Matter of Hidalgo, 24 I&N Dec. 103, 106 (BIA 2007). Evidence that a respondent was born outside of the United States creates a rebuttable presumption of alienage. Matter of Hines, 24 I&N Dec. 544, 546 (BIA 2008). Such a showing shifts the burden of proof to the respondent, who must establish his *prima facie* eligibility by a preponderance of credible evidence. Matter of Rodriguez-Tejedor, 23 I&N Dec. 153, 164 (BIA 2001); Matter of Tijerina-Villarreal, 13 I&N Dec. 327, 330 (BIA 1969).

"In determining whether an individual derived citizenship by naturalization, the law in effect when the last material condition (naturalization, age, residence) is met is generally controlling." Rodiriguez-Tejedor, 23 I&N Dec. at 163; Matter of L-, 7 I&N Dec. 512, 513 (R.C. 1957). The current version of INA § 320(a) was amended by the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 ("CCA"), and took effect on February 27, 2001. See Rodriguez-Tejedor, 23 I&N Dec. at 156–57. In Rodriguez-Tejedor, the Board of Immigration Appeals ("Board") held that the CCA is not retroactive; it therefore applies only to those individuals who were under the age of eighteen (18) on February 27, 2001. Id. at 162. Respondent was born on August 29, 1990,[1] and was therefore ten (10) years old on February 27, 2001. See NTA, at 1. Thus, he was under the age of eighteen (18) when the CCA was passed, and it applies to his claim of derivative citizenship.

Under the current version of INA § 320(a), a child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions are fulfilled:

> (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
> (2) The child is under the age of eighteen years.
> (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

In the present case, Respondent admits that he was born in Germany. See Mot. to Terminate, at 2; Certificate of Citizenship Package, Form N-600, Application for Certificate of Citizenship ("N-600"), at 1 (filed in Court Nov. 19, 2016). Thus, the presumption of alienage arises, and Respondent has the burden to establish his *prima facie* eligibility for naturalization. See Hines, 24 I&N Dec. at 546. To that end, Respondent asserts in his Motion to Terminate that he acquired United States citizenship as a result of the naturalization of Julian Komlan Sossou ("Sossou"), Respondent's father. Mot. to Terminate, at 2.

Respondent has shown that he met the first requirement of INA § 320(a). Under INA § 101(c)(1), "[t]he term 'child' . . . includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, . . . if such legitimation or adoption takes place before the child reaches the age of 16 years." Respondent

[1] The Court notes that there are discrepancies throughout the record regarding Respondent's birthday. While Respondent's NTA, Cover Letter for Derivative Citizenship Application, N-600, and Motion to Terminate state that Respondent was born on August 29, 1990, the Order for Legitimation and Respondent's I-360 and I-485 state that he was born on August 28, 1990. Because the difference is inconsequential to Respondent's current arguments, the Court will use the birthdate provided on Respondent's NTA.

has provided a copy of an Order for Legitimation issued by the Juvenile Court of Dekalb County, in the State of Georgia, on October 28, 2005; the Order of Legitimation states that Sossou was adjudged to be Respondent's father. See Mot. to Terminate, Tab C. As noted above, Respondent was born on August 29, 1990, and was therefore fifteen (15) years old at the time of his legitimization. Because Respondent was legitimated prior to reaching the age of sixteen (16), the Order of Legitimation confirms Sossou to be Respondent's father. In addition, Respondent has provided a Certificate of Naturalization for Sossou, issued on July 2, 2003. See Certificate of Citizenship Package, Exhibit C. Therefore, Respondent has shown that his father is a citizen of the United States as of July 2, 2003, satisfying the first requirement of INA § 320(a).

In addition, Respondent has shown that he met the second requirement of INA § 320(a). As noted above, Respondent was born on August 29, 1990; thus, he was twelve (12) years old when his father naturalized. Therefore, Respondent was under the age of eighteen (18) when his father naturalized, and he has satisfied the second requirement of INA § 320(a).

However, Respondent has not demonstrated that he met the third requirement of INA § 320(a). As indicated by the plain language of the statute, all three (3) of the above requirements must be satisfied concurrently before an alien obtains derivative citizenship. Thus, an alien must reside in the "legal and physical custody" of their parent (1) after the alien has obtained LPR status, (2) after the alien's parent has been naturalized, and (3) while the alien is still under the age of eighteen (18). See Matter of Guzman-Gomez, 24 I&N Dec. 824, 825–26 (BIA 2009).

The Department concedes that Respondent adjusted his status to that of an LPR on August 22, 2008—seven (7) days before his eighteenth birthday. See NTA, at 3; Department's Resp. at 2. However, Respondent has not demonstrated that he was in the legal and physical custody of Sossou when he obtained LPR status.

It is undisputed that Respondent obtained his LPR status as a Special Immigrant Juvenile ("SIJ"). One of the requirements for SIJ status is that the alien be "declared dependent on a juvenile court located in the United States," or "legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States." INA § 101(a)(27)(J)(i). Thus, in order to obtain SIJ status, legal custody must have been transferred by the state from Sossou to another qualified individual or entity.

The record establishes that Respondent was in the legal and physical custody of a mental institution beginning in February of 2004. It is undisputed that Respondent was granted SIJ status because of his placement with the Georgia Division of Family and Children Services ("DFACS"). See Department's Position on Resp't's Claim to United States Citizenship ("Department's Position on Citizenship"), Form I-360, Petition for Amerasian, Widowe(er) or Special Immigrant ("I-360") (filed in Court Nov. 29, 2016); Mot. to Terminate, 2–3; Department's Resp. at 2–4. Respondent has also provided a letter from the Coastal Harbor Treatment Center in Savannah, Georgia, stating that he was placed in a residential treatment program in February of 2004. See Mot. to Terminate, Tab C. In addition, Respondent concedes in his Motion to Terminate that "[c]ustody [of Respondent] was given to a mental institution for treatment purposes." Id. at 5. Thus, the record establishes that Respondent was in the legal and physical custody of someone other than Sossou beginning in February of 2004. As a result, Respondent could only have obtained derivative citizenship through his father if legal and

physical custody was transferred to his father prior to Respondent's eighteenth birthday on August 29, 2008.

However, Respondent has not established that he was in the legal and physical custody of his father prior to August 29, 2008. The letter from Coastal Harbor Treatment Center indicates a tentative discharge date of February 2005, see id. Tab C, but Respondent has not established that he was actually discharged from treatment in February of 2005. In fact, Respondent states in his Motion to Terminate that he acquired LPR status "[w]hile under treatment," and that "Respondent was issued a green card in 2008 while under the care of DFACS." Id. at 2, 5. Indeed, Respondent has provided no evidence that he was returned to his father's custody before August 29, 2008.

As a result, Respondent has not demonstrated his *prima facie* eligibility for naturalization through derived citizenship because he has not established that, at any point in time, he concurrently satisfied the requirements of INA § 320(a). Moreover, United States Citizenship and Immigration Services ("USCIS") has not approved Respondent's N-600, and the Department contests Respondent's *prima facie eligibility*. See Hidalgo, 24 I&N Dec. at 106 (requiring "some form of affirmative communication" attesting to Respondent's *prima facie* eligibility); Department's Resp. at 2–4. Therefore, the Court finds that the first factual allegation in Respondent's NTA has been established by clear and convincing evidence because Respondent has not overcome the presumption of alienage. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a).

*2. The Department has established the remaining factual allegations in Respondent's NTA.*

Factual allegation 2 alleges that Respondent is a native and citizen of Germany. See NTA, at 3. The Department has provided an I-360 and a Form I-485, Application to Register Permanent Residence or Adjust Status ("I-485"), both of which are signed by Respondent and indicate that he was born in "Stuttgart" and is a German citizen. See Department's Position on Citizenship, I-360, at 1; id. I-485, at 1–2. The N-600 provided by Respondent confirms that Respondent's country of birth and citizenship is Germany, and he has a German passport. See Certificate of Citizenship Package, N-600, at 1–2. Moreover, Respondent concedes in his Motion to Terminate that he was born in Germany. Mot. to Terminate, at 2. Thus, the Court finds that factual allegation 2 has been established by clear and convincing evidence.

Factual allegation 3 alleges that Respondent was admitted to the United States at Atlanta, Georgia, on or about October 4, 2001, on a visa waiver. See NTA, at 3. Respondent's I-485 and N-600 confirm that Respondent's last arrival was on October 4, 2001, and that he entered at Atlanta, Georgia. Certificate of Citizenship Package, N-600, at 1; Department's Position on Citizenship, I-485, at 1. Moreover, Respondent concedes in his Motion to Terminate that he arrived in the United States on the same date. Mot. to Terminate, at 2. Thus, the Court finds that factual allegation 3 has been established by clear and convincing evidence.

Factual allegation 4 alleges that Respondent's status was adjusted to that of an LPR on August 22, 2008. See NTA, at 3. Respondent's N-600 confirms that he obtained his LPR status on August 22, 2008, and the stamp on Respondent's I-485 states that his application for adjustment was approved on the same date. See Certificate of Citizenship Package, N-600, at 3; Department's Position on Citizenship, I-485, at 1. Moreover, Respondent concedes in his Motion

to Terminate that he "was issued a green card in 2008." Mot. to Terminate, at 5. Thus, the Court finds that factual allegation 4 has been established by clear and convincing evidence.

Factual allegations 5 and 6 allege that Respondent was convicted of aggravated assault on a peace officer, in violation of O.C.G.A. § 16-5-21(c), on March 18, 2015, in the Superior Court at Dekalb County, Georgia, and that he was sentenced to a term of three (3) years' imprisonment. See NTA, at 3. Respondent argues that allegations 5 and 6 of the NTA are insufficient for two reasons: (1) O.C.G.A. § 16-5-21(c) is a sentencing statute, and therefore does not detail the elements of the crime at issue, nor does it mention a "peace officer," and (2) the portion of the statute that does list the elements of the crime (subsection (d)), states that the minimum punishment for such an offense is five (5) years, but Respondent was sentenced to only three (3) years. See Mot. to Terminate, at 10–11. Thus, Respondent argues, "the NTA has not established clearly the offense for which Respondent was convicted since the offense in the NTA does not state the elements of the crime in order for Respondent to establish a defense." Id. at 11.

Respondent references the incorrect statutory provision. The Department has provided a True Bill of Indictment from the Superior Court of Dekalb County indicating that Respondent was indicted for aggravated assault on a peace officer in violation of O.C.G.A. § 16-5-21(c); the indictment was filed on February 6, 2014. See Department's Resp. at P6. However, Respondent's Motion to Terminate quotes the current version of subsection (c), which did not take its current form until June 30, 2014. From May 13, 2011 to June 30, 2014—the time period during which Respondent was indicted—subsection (c) read as follows:

> A person who knowingly commits the offense of aggravated assault upon a peace officer while the peace officer is engaged in, or on account of the performance of, his or her official duties shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years.

O.C.G.A. § 16-5-21(c) (effective May 13, 2011 to June 30, 2014). Contrary to Respondent's assertions, the plain language of the statute not only contains the elements of the crime, but also explicitly mentions a "peace officer."

Moreover, the Court must accept Respondent's conviction and sentence as decided by the court that convicted him and as shown in the relevant conviction documents. See INA § 240(c)(3)(B) (listing the documents that "constitute proof of a criminal conviction"); Matter of Danesh, 19 I&N Dec. 669, 670 (BIA 1988) ("[T]he law is well established that in [removal] proceedings the immigration judge cannot go behind the judicial record to determine the guilt or innocence of an alien."). In this case, the Department has provided a number of documents demonstrating that Respondent was convicted under O.C.G.A. § 16-5-21(c) and sentenced to three (3) years' imprisonment by the Superior Court of Dekalb County, Georgia; they include a Final Disposition Felony Confinement Sentence Form, a transcript of the plea hearing, and a True Bill of Indictment. See Department's Resp. at P1–P17. Because these documents constitute proof of Respondent's conviction and sentence under INA § 240(c)(3)(B), the Court finds that factual allegations 5 and 6 have been established by clear and convincing evidence.

Factual allegation 7 alleges that Respondent was convicted of entering an automobile, in violation of O.C.G.A. § 16-8-18, on April 17, 2012, in the Superior Court at Dekalb County, Georgia. See NTA, at 3. As with Respondent's conviction for aggravated assault on a peace

officer, the Department has provided a number of conviction documents from the Superior Court of Dekalb County confirming Respondent's conviction, including a plea agreement, transcript of plea hearing, and a True Bill of Indictment. See Department's Resp. at P18–P25. Under INA § 240(c)(3)(B), these documents constitute proof of Respondent's conviction. The Court therefore finds that factual allegation 7 has been established by clear and convincing evidence.

Finally, factual allegation 8 alleges that the above crimes "did not arise out of a single scheme of criminal misconduct." NTA, at 3. This, too, is confirmed by the conviction documents provided by the Respondent. Respondent's conviction for aggravated assault on a peace officer was based on conduct that took place on January 10, 2014, and involved assaulting a peace officer with a knife. See Department's Resp. at P8. In contrast, Respondent's conviction for entering an automobile was based on conduct that took place on June 12, 2010, and involved unlawfully entering a vehicle with the intent to commit a theft therein. Id. at P24. Because there is no indication that these two crimes are related, much less part of a single scheme of misconduct, the Court finds that factual allegation 8 has been established by clear and convincing evidence.

Accordingly, the Court finds that all of the allegations contained in Respondent's NTA have been established by clear and convincing evidence. See INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a).

### *B. The Court will sustain the charge of removability under INA § 237(a)(2)(A)(iii), but will not sustain the charge of removability under INA § 237(a)(2)(A)(ii).*

Respondent argues that he is not removable under INA § 237(a)(2)(A)(iii) for two reasons: (1) his conviction under O.C.G.A. § 16-5-21(c) is not categorically a crime of violence; and (2) the definition of "crime of violence" under 18 U.S.C. § 16(b) is unconstitutionally vague. See Mot. to Terminate, at 6–10, 12–13. Additionally, Respondent argues that he is not removable under INA § 237(a)(2)(A)(ii) because neither his conviction under O.C.G.A. § 16-5-21(c) nor his conviction under O.C.G.A. § 16-8-18 qualify as CIMTs. See Mot. to Terminate, at 13–14.

To determine whether an alien's prior conviction qualifies as an aggravated felony or a CIMT, the Court "applies either the categorical approach or the modified categorical approach, depending on the statutory scheme." Gelin v. U.S. Att'y Gen., 837 F.3d 1236, 1241 (11th Cir. 2016) (citing Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1310 (11th Cir. 2011)); see also Donawa v. U.S. Att'y Gen., 735 F.3d 1275, 1280–81 (11th Cir. 2013); Matter of Chairez, 26 I&N Dec. 819, 821 (BIA 2016). The Court begins by applying the categorical approach, which requires the Court to look to the elements of the crime, rather than the facts of the specific offense. Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); Moncrieffe v. Holder, 133 S. Ct. 1678, 1684–85 (2013); Leocal v. Ashcroft, 543 U.S. 1, 7 (2004); Gelin, 837 F.3d at 1241; United States v. Keelan, 786 F.3d 865, 870 (11th Cir. 2015), cert. denied, 136 S. Ct. 857 (2016); Cole v. U.S. Att'y Gen., 712 F.3d 517, 527 (11th Cir. 2013); Donawa, 735 F.3d at 1280; Fajardo, 659 F.3d at 1305 (quoting Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir. 2002)); Chairez, 26 I&N Dec. at 822–24.

The Court does this by "'compar[ing] the elements of the statute forming the basis of the [respondent's] conviction'" with the elements of the generic definition of the corresponding offense at issue. See United States v. Lockett, 810 F.3d 1262, 1266 (11th Cir. 2016) (quoting

Descamps v. United States, 133 S. Ct. 2276, 2281 (2013)). In making this comparison, the Court "must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized" by the statute. Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013) (alterations in original) (quoting Johnson v. United States, 559 U.S. 133, 137 (2010)); see also Donawa, 735 F.3d at 1280. If the least of the acts criminalized in the state offense necessarily constitutes the generic offense, then the state offense is a categorical match to the generic crime and the analysis is concluded. See generally Descamps, 133 S. Ct. 2276 (2013); see Gelin, 837 F.3d at 1241; Matter of Silva-Trevino, 26 I&N Dec. 826, 833 (BIA 2016). However, if there is a "realistic probability, not a theoretical probability, that the State would apply its statute to conduct that falls outside the generic definition of a crime," the Court may not categorically treat all convictions arising under the state statute either CIMTs or aggravated felonies. Gelin, 837 F.3d at 1246 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185–89, 192–93 (2007)). In order to show a "realistic probability," a respondent "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." Duenas-Alvarez, 549 U.S. at 193.

When a statute is not a categorical match to the offense at issue, the Court must determine whether the statute is divisible. See Lockett, 810 F.3d at 1266. A statute is divisible when it "lists multiple, alternative elements, and so effectively creates 'several different . . . crimes.'" Descamps, 133 S. Ct. at 2285 (quoting Nijhawan v. Holder, 557 U.S. 29, 35 (2009)); see also Spaho v. U.S. Attt'y Gen., 837 F.3d 1172, 1177 (11th Cir. 2016). When determining whether a statute is divisible, the Court turns to state case law to determine if the alternatives in a statute are essential elements prescribed by the statute. See United States v. Howard, 742 F.3d 1334, 1346 (11th Cir. 2014) ("[C]ourts conducting divisibility analysis in [the Eleventh Circuit] are bound to follow any state court decisions that define or interpret the statute's substantive elements . . . .").

If the statute is not divisible, then the inquiry ends and there can be no finding that the conviction qualifies as either an aggravated felony or a CIMT. See Lockett, 810 F.3d at 1267; Fajardo, 659 F.3d at 1305–06. If the statute is divisible, and some of the alternative elements qualify as the generic offense, while other elements do not, the Court then applies the modified categorical approach and analyzes the record of conviction to determine which alternative element "formed the basis of the [respondent's] prior conviction." Descamps, 133 S. Ct. at 2284–86; see also Silva-Trevino, 26 I&N Dec. at 833. In analyzing the record of conviction, the Court can consider "the charging document, plea, verdict, and sentence." Fajardo, 659 F.3d at 1305; see also Shepard v. United States, 544 U.S. 13, 16 (2005) (holding that the Court is "limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented").

For the reasons stated below, the Court finds that Respondent is removable under INA § 237(a)(2)(A)(iii), for having committed an aggravated felony, but is not removable under INA § 237(a)(2)(A)(ii), for having been convicted of two (2) CIMTs.

*1. Respondent is removable under section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony because his conviction for aggravated assault on a peace officer qualifies as a crime of violence.*

Under INA § 237(a)(2)(A)(iii), "any alien who is convicted of an aggravated felony at any time after admission is deportable." The term "aggravated felony" is defined to include "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year." INA § 101(a)(43)(F). 18 U.S.C. § 16 further defines the term "crime of violence" 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.

Under 18 U.S.C. § 16(a), "the question is whether the 'use, attempted use, or threatened use of physical force against the person or property of another' is an element of the State offense." Matter of Francisco-Alonzo, 26 I&N Dec. 594, 597 (BIA 2015) (quoting 18 U.S.C. § 16(a)). Such physical force must be violent in nature. Chairez, 26 I&N Dec. at 821; Matter of Guzman-Polanco, 26 I&N Dec. 806, 808 (BIA 2016) (holding that circuit law applies in determining whether force through indirect means, such as poison, qualifies as "violent" force), clarifying Matter of Guzman-Polanco, 26 I&N Dec. 713, 716 (BIA 2016). Where such an element is present within the statute of conviction, the offense categorically constitutes a crime of violence. See Francisco-Alonzo, 26 I&N Dec. at 597.

However, the analysis changes in reference to 18 U.S.C. § 16(b); for an offense to fall within the scope of this subsection, the crime must be a felony 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." Id. The BIA has concluded that section 16(b) involves "the risk of violent force that is present in the 'ordinary' case arising under the statute of conviction." Francisco-Alonzo, 26 I&N Dec. at 598 (quoting Matter of Ramon Martinez, 25 I&N Dec. 571, 574 (BIA 2011)). Stated another way, "the proper inquiry is whether the conduct encompassed by the elements of the offense presents a substantial risk that physical force may be used in the course of committing the offense in the 'ordinary case.'" Id. at 601; see Keelan, 786 F.3d at 871.

Additionally, the Supreme Court has cautioned that 18 U.S.C. § 16 requires a "higher degree of intent than negligent or merely accidental conduct." Leocal, 543 U.S. at 9–11. The United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") has also rejected the sufficiency of a recklessness *mens rea*. United States v. Palomino Garcia, 606 F.3d 1317, 1334–37 (11th Cir. 2010); see also United States v. Estrella, 758 F.3d 1239, 1253 (11th Cir. 2014); United States v. Romo-Villalobos, 674 F.3d 1246, 1250–51 (11th Cir. 2012) (reaffirming the applicability of Palomino Garcia and distinguishing recklessness from general intent, which requires "something more").

In this case, the Court finds that Respondent is removable under INA § 237(a)(2)(A)(iii) because his conviction for aggravated assault on a peace officer qualifies as a crime of violence. Preliminarily, the Court notes that Respondent was sentenced to three (3) years' confinement for this conviction. See Department's Resp. at P5, P15. Thus, Respondent was sentenced to more than one (1) year of imprisonment, as required by INA § 101(a)(43)(F).

In their respective filings, Respondent and the Department reference O.C.G.A. § 16-5-21 as it is currently codified. See Mot. to Terminate, at 6–8; Department's Resp. at 4–7. However, as explained in detail above, Respondent was convicted under O.C.G.A. § 16-5-21 as it was codified when Respondent was indicted on February 6, 2014. See Part II.A.2. At that time, the statute read as follows:

> A person who knowingly commits the offense of aggravated assault upon a peace officer while the peace officer is engaged in, or on account of the performance of, his or her official duties shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years.

O.C.G.A. § 16-5-21(c) (effective May 13, 2011 to June 30, 2014). In addition, the crime of aggravated assault is defined in O.C.G.A. § 16-5-21(a) as the following:

> A person commits the offense of aggravated assault when he or she assaults:
> (1) With intent to murder, to rape, or to rob;
> (2) With a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury; or
> (3) A person or persons without legal justification by discharging a firearm from within a motor vehicle toward a person or persons.

O.C.G.A. § 16-5-21(a) (effective May 13, 2011 to June 30, 2014). Thus, aggravated assault in Georgia contains two essential elements: (1) that an assault was committed on the victim and (2) that it was aggravated by the use of a deadly weapon or the intention to murder, to rape, or to rob. Durden v. State, 755 S.E.2d 909, 912 (Ga. Ct. App. 2014); Weaver v. State, 568 S.E.2d 836, 837 (Ga. Ct. App. 2002). Although aggravated assault with intent to murder, rape, or rob is a specific intent crime, aggravated assault with a deadly weapon is a general intent crime. Barnes v. State, 675 S.E.2d 233, 235 (Ga. Ct. App. 2009).

Under O.C.G.A. § 16-5-20(a), a person commits a simple assault if he:

> (1) Attempts to commit a violent injury to the person of another; or
> (2) Commits an act which places another in reasonable apprehension of immediately receiving a violent injury.

Under Georgia law, the attempt to commit a violent injury is included in the crime of assault. Lovelace v. State, 527 S.E.2d 878, 880 (Ga. Ct. App. 2000). Accordingly, the Georgia courts have interpreted O.C.G.A. § 16-5-20(a) to require "such a demonstration of violence, coupled with an apparent ability to inflict injury so as to cause the person against whom it is directed reasonably to fear the injury unless he retreats to secure his safety." Lewis v. State, 560 S.E.2d 73, 74–75 (Ga. Ct. App. 2002) (quoting Hise v. State, 194 S.E.2d 274, 274 (Ga. Ct. App. 1972)). Put another way, "because assault is an attempted battery, the State must show that a 'substantial step' was made toward committing the battery in order to sustain a conviction for simple assault." Id. (quoting Hamby v. State, 328 S.E.2d 224, 226 (Ga. Ct. App. 1985). Thus, in Georgia, "a mere verbal threat, without more, does not constitute assault." Bradley v. State, 745 S.E.2d 763, 767 (Ga. Ct. App. 2013).

Accordingly, as noted by the Department, the plain language of O.C.G.A. § 16-5-21(a), as well as the Georgia courts' interpretation of this provision, demonstrate that it has as an element "the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a); see Department's Resp. at 4–7. Although the crime of which Respondent was convicted—aggravated assault on a peace officer—is "a separate and distinct crime from aggravated assault, . . . the only difference is that knowledge of the fact that the victim was a police officer is an essential element of the crime." Garrett v. State, 703 S.E.2d 666, 668 (Ga. Ct. App. 2010) (citing Bundren v. State, 274 S.E.2d 455 (1981)).

Respondent argues that Georgia's definition of aggravated assault is not a crime of violence because "actual injury to the other person need[] not be shown," and, therefore, "the minimum realistic probability is that someone could be convicted of aggravated assault under Georgia law if he uses a banana or a BB gun as a weapon, and intentionally put another in apprehension of immediately receiving a violent injury." Mot. to Terminate, at 8–9. However, Respondent has provided no Georgia case law that supports his interpretation of the "minimum realistic probability" of the Georgia aggravated assault statute, nor does Respondent's conviction qualify as support for this interpretation, because Respondent was convicted of assaulting an officer with a deadly weapon—a knife. See Department's Resp. at P11. Moreover, although Respondent is correct that the Georgia statute contains no actual injury requirement, see Turbeville v. State, 601 S.E.2d 461, 464 (Ga. Ct. App. 2004), a crime of violence under 18 U.S.C. § 16(a) is not limited to the *use* of force, but also involves the *attempted* or *threatened* use of force.

Respondent also directs the Court to United States v. Palomino Garcia, 606 F.3d 1317, for the proposition that the Eleventh Circuit has held that "aggravated assault [is] not a crime of violence." Mot. to Terminate, at 9. Respondent misreads Palomino Garcia, a case in which the Eleventh Circuit held that an Arizona aggravated assault statute was not categorically a crime of violence because it "require[d] only a simple assault with the sole aggravating factor being the victim's status as a law enforcement officer," and prohibited conduct that was not only intentional or knowing, but also reckless. 606 F.3d at 1333–37. This case is distinguishable from Palomino Garcia, because the Georgia statute at issue requires the use of a deadly weapon or the intent to murder, to rape, or to rob. See Durden, 755 S.E.2d at 912; Weaver, 568 S.E.2d at 837. Moreover, the Court in Palomino Garcia analyzed the defendant's conviction under the generic definition for "aggravated assault," rather than the generic definition for "crime of violence," in accordance with the U.S. Sentencing Guidelines. 606 F.3d at 1331–32.

Thus, the Court finds that Respondent's conviction under O.C.G.A. § 16-5-21(c) for aggravated assault on a peace officer is a crime of violence under 18 U.S.C. § 16(a), because Respondent was sentenced to more than one (1) years' imprisonment and the crime has as an element the use, attempted use, or threated use of violent physical force.[2] Accordingly, the Court

[2] Respondent also argues that the definition of "crime of violence" under 18 U.S.C. § 16(b) is unconstitutionally vague in light of Johnson v. United States, 559 U.S. 133 (2010). See Mot. to Terminate, at 12–13. However, the Court need not decide this issue, because it finds that Respondent's conviction is a crime of violence under 18 U.S.C. § 16(a). See Part II.B.1. Although the United States Courts of Appeals are split on this issue, the United States Supreme Court has yet to resolve the split. Therefore, this Court is bound by the most recent and relevant precedent on this issue published by the Eleventh Circuit. In this case, that precedent is United States v. Keelan, 786 F.3d at 871, which applies 18 U.S.C. § 16(b) in analyzing whether a conviction is a crime of violence. This logic has been affirmed by the Board in an unpublished opinion, in which it stated that "[a]lthough Keelan was decided before Johnson, it is not for the Immigration Judge or this Board to declare that Eleventh Circuit precedent has been

finds that Respondent is removable under INA § 237(a)(2)(A)(iii), and will therefore sustain the charge of removability.

*2. Respondent is not removable under section 237(a)(2)(a)(ii) of the Act for having been convicted of two (2) CIMTs.*

Under section 237(a)(2)(A)(ii) of the Act, an alien is removable if, after admission, he has been convicted of two (2) or more CIMTs, "not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial." The Board has described "moral turpitude" as "a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." Matter of Perez-Contreras, 20 I&N Dec. 615, 617–18 (BIA 1992) (citing Matter of Short, 20 I&N Dec. 136, 139 (BIA 1989)). Moral turpitude does not depend on felony or misdemeanor distinction. Short, 20 I&N Dec. at 139. Nor does the seriousness of a criminal offense or the severity of the sentence imposed determine whether a crime involves moral turpitude. Matter of Serna, 20 I&N Dec. 579, 581–82 (BIA 1992). A finding that a crime is a CIMT requires "reprehensible conduct committed with some degree of scienter," such as specific intent, knowledge, willfulness, or recklessness. Matter of Louissaint, 24 I&N Dec. 754, 756–57 (BIA 2009); see also Matter of Silva-Trevino, 26 I&N Dec. 826, 828 n.2, 833–34 (BIA 2016); Matter of Leal, 26 I&N Dec. 20, 21 (BIA 2012).

Respondent argues that neither his conviction for aggravated assault on a peace officer nor his conviction for entering an automobile qualifies as a CIMT. See Mot. to Terminate, at 13–14. For the reasons stated below, the Court finds that Respondent is not removable under INA § 237(a)(2)(A)(ii) because although his conviction for aggravated assault on a peace officer qualifies as a CIMT, his conviction for entering an automobile does not.

i. Respondent's conviction for aggravated assault on a peace officer qualifies as a CIMT.

As noted above, the Georgia statute for aggravated assault on a peace officer under O.C.G.A. § 16-5-21(c) contains three essential elements: (1) that an assault was committed on a peace officer; (2) that the assault was aggravated by the use of a deadly weapon or the intention to murder, to rape, or to rob; and (3) that the defendant knew the victim was a peace officer. Durden, 755 S.E.2d at 912; Garrett, 703 S.E.2d at 668; Weaver, 568 S.E.2d at 837; Bundren v. State, 274 S.E.2d 455 (1981). The Court finds that Respondent's conviction for aggravated assault on a peace officer is categorically a CIMT because it requires either the specific intent to kill, rape, or rob, or the use of a deadly weapon. See Barnes, 675 S.E.2d at 235.

The Board has recognized that not all offenses involving the "injurious touching of another" require the moral depravity necessary to qualify as CIMTs. Matter of Sanudo, 23 I&N Dec. 968, 970 (BIA 2006). However, the presence of an aggravating factor, such as serious physical injury

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implicitly overruled by the Supreme Court." Mario Francisco-Alonzo, A 209-275-076 (BIA March 2, 2016) (unpublished) (cited for persuasiveness). Moreover, the constitutionality of 18 U.S.C. § 16(b) is currently under review by the United States Supreme Court in Lynch v. Dimaya, No. 15-1498, a case in which the Court heard oral arguments on January 17, 2017.

or the use of a deadly weapon, "can be important in determining whether a particular assault amounts to a crime involving moral turpitude." See Matter of Solon, 24 I&N Dec. 239, 245 (BIA 2007); Matter of Sejas, 24 I&N Dec. 236, 237 (BIA 2007). Thus, it is well-settled that offenses requiring the specific intent to kill, see Sanudo, 23 I&N Dec. at 971; Matter of Baker, 15 I&N Dec. 50, 51–52 (BIA 1974), modified by Perez-Contreras, 20 I&N Dec. at 619–20; Matter of Awaijane, 14 I&N Dec. 117, 118–19 (BIA 1972); Matter of J-, 4 I&N Dec. 512, 514 (BIA 1951); Matter of O-, 3 I&N Dec. 193, 196 (BIA 1948), to rape, see Matter of Beato, 10 I&N Dec. 730, 732 (BIA 1964); Matter of B-, 5 I&N Dec. 538, 539 (BIA 1953); Matter of P-, 5 I&N Dec. 392 (BIA 1953), 397–98, or to rob, see Matter of Martin, 18 I&N Dec. 226, 227 (BIA 1982); J-, 4 I&N Dec. at 516–17; Matter of Z-, 5 I&N Dec. 383, 384 (BIA 1953), are categorically CIMTs.

In addition, the Board has repeatedly held that assault with a deadly weapon qualifies as a CIMT. See Sanudo, 23 I&N Dec. at 971; Matter of Fualaau, 21 I&N Dec. 475, 476–78 (BIA 1996); Danesh, 19 I&N Dec. at 670–71; Matter of Logan, 17 I&N Dec. 367, 368–69 (BIA 1980); Matter of Medina, 15 I&N Dec. 611, 612–14 (BIA 1976); Baker, 15 I&N Dec. at 51–52; Matter of Ptasi, 12 I&N Dec. 790, 791 (BIA 1968); Matter of Goodalle, 12 I&N Dec. 106, 107 (BIA 1967); J-, 4 I&N Dec. at 514–15; Matter of G-R-, 2 I&N Dec. 733, 734–40 (BIA 1946); Matter of N-, 2 I&N Dec. 201 (BIA 1944); Matter of R-, 1 I&N Dec. 209, 210–11 (BIA 1942); see also Sosa-Martinez v. U.S. Att'y Gen., 420 F.3d 1338, 1342 (11th Cir. 2005). This is true even if the statute at issue does not specify a level of intent, because the use of a deadly weapon inherently requires a "depraved motive." O-, 3 I&N Dec. at 196 ("There would appear to be little or no difference . . . from the standpoint of moral turpitude, between an assault with intent to do great bodily harm, and assault with a deadly and/or dangerous weapon . . . ." (citations omitted)); see also Matter of Ptasi, 12 I&N Dec. at 791.

Moreover, an assault containing either of the above aggravating factors is a CIMT regardless of whether the victim sustains a physical injury. See Matter of Leal, 26 I&N Dec. at 26 n.4 ("Although we indicated [in Matter of Fualaau, 21 I&N Dec. at 478,] that the infliction of serious bodily injury upon a victim was necessary to make a reckless *simple assault* crime a [CIMT], we did not indicate that the infliction of such an injury was a general requirement of all cases involving recklessness." (citation omitted)); Matter of Ruiz-Lopez, 25 I&N Dec. 551, 554 (BIA 2011) (confining the physical injury requirement to simple assault cases); e.g., Medina, 15 I&N Dec. at 613–14 (holding that an aggravated assault statute requiring use of a deadly weapon but no serious bodily injury was a CIMT); O-, 3 I&N Dec. at 198 (same).

In his Motion to Terminate, Respondent argues that his conviction under O.C.G.A. §16-5-21(c) for aggravated assault on a peace officer is not a CIMT because it does not require that the defendant physically injure his victim, and "a simple non-injurious assault is not transformed into a CIMT simply because the victim was a peace officer." Mot. to Terminate, at 14. In support of his assertion, Respondent cites to Matter of B-, 5 I&N Dec. at 541, a case in which the Board held that the respondent's conviction for simple assault was not a CIMT. However, as noted above, and by the Board in B-, "[i]t is firmly established that simple assault does not necessarily involve moral turpitude." Id. Moreover, although Respondent correctly asserts that simple assault does not transform into a CIMT merely because it was committed against a police officer, the conviction in Respondent's case is for *aggravated* assault; thus, unlike the conviction in B-, it involves "the use of a deadly or dangerous weapon." Id.

Respondent also argues that the statute is not a CIMT because it "does not require knowledge on the part of the offender that the victim was an officer." Mot. to Terminate, at 14. Respondent correctly cites Matter of O-, 4 I&N Dec. 301 (BIA 1951) for this proposition, but again references the incorrect version of the statute at issue. Compare Mot. to Terminate, at 14, with Part II.A.2. As noted above, the statute under which Respondent was convicted requires that the defendant have knowledge of the officer's status. See Garrett, 703 S.E.2d at 668.

Accordingly, the Court finds that Respondent's conviction under O.C.G.A. § 16-5-21(c) is categorically a CIMT, because it requires the specific intent to kill, rape, or rob, or the use of a deadly weapon, and also requires knowledge of the officer's stautus.

ii. Respondent's conviction for entering an automobile does not qualify as a CIMT.

The crime of entering an automobile is defined under Georgia law as "enter[ing] any automobile or other motor vehicle with the intent to commit a theft or a felony." O.C.G.A. §16-8-18. On its face, the statute contains two essential elements: (1) entering an automobile and (2) possessing the specific intent to commit a theft or a felony. See Neslein v. State, 653 S.E.2d 825, 827 (Ga. Ct. App. 2007).

The Board has historically held that entering onto another person's property is not, by itself, categorically a CIMT. Matter of M-, 2 I&N Dec. 721, 722–24 (BIA/AG 1946); Matter of G-, 1 I&N Dec. 403, 404–05 (BIA 1943). Instead, conviction under a statute prohibiting entry onto another's property—most analogously, a burglary statute—is only a CIMT if it also requires that the defendant possess the intent to commit a crime that, by itself, constitutes a CIMT.[3] See, e.g., M-, 2 I&N Dec. at 722–24; G-, 1 I&N Dec. at 404–05. As a result, the Board has found a burglary conviction to be a CIMT when the statute of conviction requires the intent to commit larceny, Matter of Moore, 13 I&N Dec. 711, 712 (BIA 1971); Z-, 5 I&N Dec. at 384–85; Matter of V-T-, 2 I&N Dec. 213 (BIA 1944); R-, 1 I&N Dec. at 541, or the intent to commit theft, Matter of Frentescu, 18 I&N Dec. 244, 245 (BIA 1982); Matter of De La Nues, 18 I&N Dec. 140, 143 n.7, 145 (BIA 1981); Matter of Leyva, 16 I&N Dec. 118, 120 (BIA 1977), but not when it merely requires the intent to commit "a crime," M-, 2 I&N Dec. at 722, 725; G-, 1 I&N Dec. at 404–06. But see Louissaint, 24 I&N Dec. at 758–59. When a statute requires the intent to "commit a felony," the offense is only a felony if the underlying intended felony is a CIMT. See Short, 20 I&N Dec. at 139–41 (holding that assault with "intent to commit a felony" is only a CIMT if the underlying intended felony is a CIMT); Matter of L-, 6 I&N Dec. 666, 669 (BIA 1955) (holding that burglary with "intent to commit a felony" was a CIMT when the underlying crime—larceny—was a CIMT); Matter of M-, 2 I&N Dec. 525, 527–28 (BIA 1946) (holding that assault with "intent to commit a felony" was a CIMT because the underlying crime—abortion—was a CIMT at the time); Matter of J-, 2 I&N Dec. 477, 478–81 (BIA 1946) (holding that assault with "intent to commit any felony" was a CIMT because the underlying crime—manslaughter—was a CIMT).

Moreover, the Board has held that intent to commit a theft alone is not enough, because not all thefts are CIMTs. See, e.g., Matter of Grazley, 14 I&N Dec. 330, 333 (BIA 1973); Matter of

[3] One notable exception to this rule is that entry into an occupied dwelling is categorically a CIMT, even if the defendant's intent was just to commit "a crime." See Louissaint, 24 I&N Dec. at 758–59.

P-, 2 I&N Dec. 887, 887 (BIA 1947); Matter of H-. 2 I&N Dec. 864, 865 (BIA 1947); Matter of D-, 1 I&N Dec. 29, 3334 (BIA 2006). Instead, the Board has held that only those theft statutes that prohibit taking with the intent to "deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded" are CIMTs. Matter of Diaz-Lizarraga, 26 I&N Dec. 847, 853 (BIA 2016). While a statute need not require the defendant to intend a "*literally* permanent taking," any statute that prohibits theft with the intent to commit a *temporary* taking is overbroad. Id. at 850, 852–53 (noting that the purpose of the standard is "to distinguish between substantial and reprehensible deprivations of an owner's property on the one hand and, on the other, mere de minimis takings in which the owner's property rights are compromised little, if at all.").

In Georgia, the first element of the crime of entering an automobile is not, on its own, morally turpitudinous, because it merely prohibits entry into a motor vehicle, and does not pertain to occupied dwellings. Thus, Respondent's conviction for entering a vehicle is a CIMT only if it requires that the Respondent intended to commit a CIMT upon entering the vehicle; in this case, the CIMT at issue is theft. See Department's Resp. at P24 (stating that Respondent was convicted of entering a vehicle "with intent to commit a theft therein").

Georgia has a series of statutes criminalizing "theft." See, e.g., O.C.G.A. § 16-8-2 (theft by taking); id. § 16-8-3 (theft by deception); id. § 16-8-14 (theft by shoplifting). In this case, the most helpful statute for defining "theft" in the context of entering an automobile is the crime of theft by taking under O.C.G.A. § 16-8-2, because the former is often a lesser-included offense of the latter. See Neslein, 653 S.E.2d at 827; Williams v. State, 566 S.E.2d 477, 478 (Ga. Ct. App. 2002); Travis v. State, 532 S.E.2d 430, 431–32 (Ga. Ct. App. 2000); Phillips v. State, 290 S.E.2d 142, 143 (Ga. Ct. App. 1982). Under O.C.G.A. § 16-8-2, a person commits the crime of theft by taking when "he unlawfully takes, or being in lawful possession thereof, unlawfully appropriates any property of another *with the intention of depriving him of the property*, regardless of the manner in which the property is taken or appropriated." Id. (emphasis added). Furthermore, the term "deprive" is defined by Georgia statute as "without justification: (A) [t]o withhold property of another *permanently or temporarily*; or (B) [t]o dispose of the property so as to make it unlikely that the owner will recover it." O.C.G.A. § 16-8-1(1) (emphasis added).[4]

On its face, the theft by taking statute allows an individual to be convicted of theft with only the intent to temporarily deprive the owner of property. Accordingly, an individual could be convicted of entering an automobile in Georgia with only the intent to commit a temporary taking. This is less than the morally turpitudinous intent to deprive another of property permanently or "under circumstances where the owner's property rights are substantially eroded." See Diaz-Lizarraga, 26 I&N Dec. at 853. Therefore, because O.C.G.A. § 16-8-18 encompasses conduct that both does and does not constitute moral turpitude, the Court finds that a conviction under this statute is not categorically a CIMT.

Respondent's conviction may still qualify as a CIMT if the statute of conviction and underlying statute are divisible and the record of conviction demonstrates that Respondent was convicted under the morally turpitudinous portion of the statute. See Descamps, 133 S. Ct. at 2284–86. Assuming *arguendo* that the statute criminalizing entering a vehicle is divisible, the

[4] As was recently noted by the Board, Georgia is one of only two (2) states to explicitly include temporary takings in its definition of theft. Diaz-Lizarraga, 26 I&N Dec. at 851–52, 852 n.7.

Court finds that the theft by taking statute is not divisible, because Georgia law does not require a determination of whether a taking is permanent or temporary for a theft conviction. See e.g., Harris v. State, 750 S.E.2d 721 (Ga. Ct. App. 2013) ("Once criminal intent at the time of taking is proved, it becomes irrelevant whether the deprivation is permanent or temporary."); Chastain v. State, 535 S.E.2d 25, 27 (Ga. Ct. App. 2000) (same); Smith v. State, 323 S.E.2d 257, 258–59 (Ga. Ct. App. 1984) (same); Ferrell v. State, 322 S.E.2d 751, 751 (Ga. Ct. App. 1984) ("The intent to withhold property of another even temporarily satisfies the mens rea requirement of the theft by taking statute. Thus, it is irrelevant whether deprivation was permanent or temporary."). Therefore, the theft by taking statute is indivisible, and the modified categorical approach cannot be used to determine if Respondent possessed the intent to commit a permanent taking, which is necessary for his conviction under O.C.G.A. § 16-8-18 to constitute a CIMT.

In light of the foregoing, the Court finds that Respondent's conviction for entering an automobile in violation of O.C.G.A. § 16-8-18 is not a CIMT. Thus, notwithstanding the Court's finding that Respondent's conviction for aggravated assault on a peace officer in violation of O.C.G.A. § 16-5-21(c) is a CIMT, the Department has not established that Respondent is removable under INA § 237(a)(2)(A)(ii), because Respondent has only been convicted of one (1) CIMT.

## III. CONCLUSION

In summary, the Court finds that the factual allegations in Respondent's NTA have been established by clear and convincing evidence. In addition, the Court will sustain the charge of removability under INA § 237(a)(2)(A)(iii), because Respondent's conviction for aggravated assault on a peace officer qualifies as a crime of violence. However, the Court will not sustain the charge of removability under INA §237(a)(2)(A)(ii), because the Department has not established that Respondent was convicted of two (2) CIMTs.

Accordingly, the Court will enter the following orders:

## ORDERS OF THE IMMIGRATION JUDGE

**It is ordered that:** The charge of removability pursuant to section 237(a)(2)(A)(iii) is **SUSTAINED**.

**It is further ordered that:** The charge of removability pursuant to section 237(a)(2)(A)(ii) is **NOT SUSTAINED**.

**It is further ordered that:** Respondent's Motion to Terminate is hereby **DENIED**.

1/31/17
Date

William A. Cassidy
United States Immigration Judge
Atlanta, Georgia