UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
YORK, PENNSYLVANIA

IN THE MATTER OF: **XXXXXXXXXXXXXXX** **IN REMOVAL PROCEEDINGS**	**FILE NO.: XXX-XXX-XXX**

RESPONDENT'S OPPOSITION TO AGGRAVATED FELONY CHARGE

Immigration Judge: XXXXXXXXXXXXXXXXXXXXX

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Undersigned Counsel, Raymond G. Lahoud, Esquire of the Law Offices of Baurkot & Baurkot, on behalf of Respondent, XXXXXXXXX XXXXXXXX ("Respondent"), respectfully requests that this Honorable Court dismiss the Department of Homeland Security's Aggravated Felony Charge and submits this brief in support of his request.

XXXXXXXXX XXXXXXXX is a citizen and national of Trinidad & Tobago, who entered the United States in March of 2003 as a B2 Visitor. He later applied to adjust his status to that of permanent resident. His application was approved on August 13, 2007, as a CR-6, a conditional resident. His status was later adjusted in August of 2010 to that of IR-6. On June 2, 2011, the Department of Homeland Security ("DHS") commenced removal proceedings against Respondent, charging him as removable from the United States pursuant to Section 237(a)(2)(A)(iii) of the Immigration & Nationality Act ("INA"). DHS incorrectly argues that Respondent is an aggravated felon as defined by INA Section 101(a)(43)(F). Citing to

Respondent's 2010 plea of guilty to violating Title 11, Section 621(a)(1) of the Delaware Code, which states that

> (a) A person is guilty of terroristic threatening when that person commits any of the following:
>
> (1) The person threatens to commit any crime likely to result in death or in serious injury to person or property;
> (2) The person makes a false statement or statements:
> a. Knowing that the statement or statements are likely to cause evacuation of a building, place of assembly, or facility of public transportation;
> b. Knowing that the statement or statements are likely to cause serious inconvenience; or
> c. In reckless disregard of the risk of causing terror or serious inconvenience; or
> (3) The person commits an act with intent of causing an individual to believe that the individual has been exposed to a substance that will cause the individual death or serious injury.

Del. Code Ann. tit. 11, § 621 (West). DHS mistakenly claims that Delaware's Terroristic Threatening statute is a crime of violence, under the aggravated felony statute. The aggravated felony statute includes a "wide array of offenses." Singh v. Gonzales, 432 F.3d 533, 538 (3d Cir. 2006). INA Section 101(a)(43)(F) brings "a crime of violence [defined in 18 U.S.C. § 16] for which the term of imprisonment [is] at least one year" within the ambit of the definition. Id. A "crime of violence" is defined 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.

It must first be noted that, under Delaware Law, 11 § 621(a)(1) is a misdemeanor. See 11 § 621(b) (which holds that "any violation of paragraph (a)(1) of this section shall be a class A misdemeanor . . . ."). Therefore, "[a]s an initial matter . . . [the law] could [not] be a 'felony' under [18 U.S.C.] § 16(b), which relies on the state's grading of the offense to determine whether it is a 'felony.'" Singh, 432 F.3d at 538 (internal citations omitted). Therefore, this Court "must consider whether [the] conviction was for an offense 'that has as an element the use, attempted use, or threatened use of physical force against the person or property of another' under § 16(a)." Id. The "underlying facts of the conviction are not relevant; rather, [the Court] must 'look to the elements and the nature of the offense of conviction' when determining whether it is a crime of violence. Id. (quoting Leocal v. Ashcroft, 543 U.S. 1, 11 (2004)) (emphasis added).

To qualify as a "crime of violence" within 18 U.S.C. § 16(a), "a criminal statute must require a mens rea of specific intent to use force; mere recklessness is insufficient . . . . It is not dispositive that the crime may be proven by a showing of specific intent -- all that is necessary to place it outside § 16(a) is that it could also be established with proof of a lesser mens rea." Id. (internal citations omitted) (emphasis added). For example, the Third Circuit held that Simple Assault, under Title 18, Section 2701(a)(1) of the Pennsylvania Code, does not fall under the purview of Section 16(a), because the statute is violated even if one "recklessly" causes bodily injury to another, and, given that violation of the statute "requires no more than a mens rea of recklessness . . . therefore does not describe a crime of violence within the meaning" of the crime of violence statute. Popal v. Gonzales, 416 F.3d 249, 254-55 (3d Cir.2005).

As noted, Paragraph (a)(1) of Section 621 of the Delaware statute provides that a person is guilty of terroristic threatening if "[t]he person threatens to commit any crime likely to result in death or in serious injury to person or property." In Andrews v. Delaware, the Delaware

Supreme Court discussed Section 621(a)(1) and held that a conviction under Section 621(a)(1) requires not only that the defendant uttered words that threaten serious injury or death, but also that the defendant had the intent to threaten or intimidate the victim with those words. See Andrews v. Delaware, 930 A.2d 846, 853-54 (Del. 2007). The Court held that a "defendant need not intend to carry out the threat, but it is not enough to show only that the defendant merely intended to utter threatening words." Id. at 854. In Singh, the Third Circuit clearly stated that to meet the crime of violence requirement, a "mens rea of specific intent to use force." Singh, 432 F.3d at 538. As noted earlier, it "is not dispositive that the crime may be proven by a showing of specific intent -- all that is necessary to place it outside § 16(a) is that it could also be established with proof of a lesser mens rea." Id.

Here, the statute has no mens rea. Andrews, 930 A.2d at 853 (holding that the Terroristic Threatening statute does not prescribe the necessary mens rea). Delaware law unambiguously states that when "the state of mind sufficient to establish an element of an offense is not prescribed by law, that element is established if a person acts intentionally, knowingly or recklessly." Del. Code Ann. tit. 11, § 251 (West); see also Andrews, 930 A.2d at 853 (holding that "when a statute does not prescribe the mens rea required, the State must prove the defendant acted intentionally, knowingly or recklessly."). Here, the statute, lacking a specific mens rea, can be violated if one acts intentionally, knowingly or recklessly. Id. There is no specific intent to carry out the threat. There is no specific intent to "specific intent to use force," as required by the Third Circuit's Singh decision. See Singh, 432 F.3d at 538. There is merely the intentionally made, knowingly made, or recklessly made uttering of words, coupled with the intentional, knowing or reckless mens rea to cause a person to feel threatened. DHS' argument is flawed in that DHS fails to take into account the fact that there exist several mens reas in which

the crime can be committed, with the least being recklessness. Third Circuit case law was quite clear in Singh (requiring specific intent to use force to establish a crime of violence) and the Delaware Supreme Court 's Andrews decision provided that there are three possible mens reas – intentional, knowing and reckless.

The Andrews, 930 A.2d at 853-54, continued in discussing the statute in question here. The Court held that Section 621(a)(1) "punishes mere words, because the statute is meant to protect against the fear threats engender. An intent to actually carry out the threat is immaterial." Id. (citing Allen v. State, 453 A.2d 1166, 1168 (Del. 1982) (holding that the "statute imposes criminal liability for the use of words . . . . Even if the actor does not intend to actually carry out his threat, the threat itself creates identifiable injuries, e.g., mental distress or panic, that the Criminal Code should protect against. Thus, the crime is complete when the actor threatens . . . . Whether the threatened act is completed is immaterial.")). The Andrews' Court then went on to review the facts of the particular case before it to determine if the defendant's actions had the requisite mens rea. Id. at 853-54 (stating that the State argued that the "evidence supports the mens rea of intent."). This Court, unlike the Delaware Supreme Court and contrary to what the DHS does in its brief, can only consider the statute itself and cannot review the facts of the case as the "underlying facts of the conviction are not relevant." Singh, 432 F.3d at 538. This Court must only "'look to the elements and the nature of the offense of conviction'" when determining whether it is a crime of violence. Id. (internal citations omitted). Therefore, this Court "must consider whether [the] conviction was for an offense 'that has as an element the use, attempted use, or threatened use of physical force against the person or property of another' under § 16(a)." Id. The "underlying facts of the conviction are not relevant; rather, [the Court] must 'look to the elements and the nature of the offense of conviction'" when determining whether it is a crime of

violence. Id. (quoting Leocal, 543 U.S. at 11 (2004)). The Andrews Court continued in splitting the statute and found that there is a requirement of finding both the mens rea with respect to uttering of the words as well as a mens rea with respect to actually threatening the victim. The Andrew's Court never held that the minimal mens rea is anything specific. Rather, the Court stated that there are essentially two different actions, each requiring its own mens rea, which could be intentional, knowing or reckless.

The facts, when reviewed in the Andrew's Court, found the necessary mens rea to be intentional. Nonetheless, in the instant case, given that we cannot establish the necessary mens rea (which can only be done by reviewing the underlying facts of the case), the mens rea is, by Delaware Law, either reckless, knowing or intentional. Given that a "crime of violence" within 18 U.S.C. § 16(a), requires criminal statutes to have a "mens rea of specific intent to use force" and that, when recklessness is the least possible culpable mens rea, the criminal statue is automatically outside the scope of 18 U.S.C. § 16(a). Id. Mere "recklessness is insufficient" to amount to a crime of violence. Id. (holding that "[i]t is not dispositive that the crime may be proven by a showing of specific intent -- all that is necessary to place it outside § 16(a) is that it could also be established with proof of a lesser mens rea."). Thus, since one could violate Section 621(a)(1) by proving each elements with a mens rea of recklessness, Section 621(a)(1) cannot be deemed a crime of violence under 18 U.S.C. § 16(a). Singh, 432 F.3d at 538 (holding that mere "recklessness is insufficient" to amount to a crime of violence.).

That statute lacks an explicit mens rea. This, coupled with the fact that when a "state of mind sufficient to establish an element of an offense is not prescribed by law, that element is established if a person acts intentionally, knowingly or recklessly," provides that the mens rea can be intentional, knowing or reckless, the Delaware Terroristic Threatening statute is not a

crime of violence. Del. Code Ann. tit. 11, § 251; Singh, 432 F.3d at 538 (holding that mere "recklessness is insufficient" to amount to a crime of violence.).

Respondent, by and through his Counsel, respectfully requests that this Honorable Court dismiss DHS' aggravated felony count.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: July 21, 2011

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PROOF OF SERVICE

On July 21, 2011, I, Raymond G. Lahoud, Esquire, served the attached brief, via personal delivery to:

DHS, Chief Counsel (Removal)
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Respectfully Submitted:

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