OPINION BELOW

The opinion of the Tenth Circuit of Appeals is reported as *Rashid v. Gonzales*, 2006 WL 2171522 (10th Cir. 2006).

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STATEMENT OF JURISDICTION

A panel of the Tenth Circuit entered its decision denying a petition from a final deportation order of the Board of Immigration Appeals on August 3, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

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RELEVANT STATUTES

8 United States Code section 1227(a)(2)(A)(iii) provides:

> Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 United States Code section 1101(a)(43)(F) provides:

> As used in this chapter …[t]he term "aggravated felony" means …a crime of violence (as defined in section 16 of Title 18 …) for which the term of imprisonment at least one year ….

16 United States Code section 16 provides:

> The term "crime of violence" means (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the

> person or property of another may be used in the course of committing the offense.

Colorado Revised Statutes section 18-3-204 provides:

> A person commits the crime of assault in the third degree if the person knowingly or recklessly causes bodily injury to another person …. Assault in the third degree is a class I misdemeanor ….

Colorado Revised Statutes section 18-1.3-501 provides:

> Class I [:] Minimum Sentence [-] Six months imprisonment, or five hundred dollars fine, or both[;] Maximum Sentence [-] Eighteen months imprisonment, or five thousand dollars fine, or both.

STATEMENT OF THE CASE

Petitioner, Haroon Rashid, is a native and citizen of Pakistan and was admitted into the United States in 1997 as a lawful permanent resident. He resides in Colorado with his American wife and American-born minor children.

On March 13, 2003, after being taunted because of his ethnic background, Mr. Rashid was involved in a physical altercation in which he and the other person received minor scrapes. Mr. Rashid was charged with a single count of misdemeanor third degree assault. Colorado Revised Statutes section 18-3-204. This was his first offense of any kind. Mr. Rashid convicted of the charge on March 17, 2004 and a sentence was imposed of 35 days in jail (404 days with 366 days suspended).

As a result of this misdemeanor conviction, on April 21, 2004, the Department of Homeland Security placed Mr. Rashid in removal proceedings charged as an "aggravated felon" under 8 U.S.C. § 1227(a)(2)(A). On November 29, 2004, the Immigration Judge ordered the removal of Mr. Rashid.

Mr. Rashid filed a timely appeal to the Board of Immigration Appeals on December 2, 2004. See 8 C.F.R. § 1003.3. The Board had jurisdiction of the underlying removal appeal pursuant to 8 C.F.R. § 1003.1. The Board issued its final decision dismissing the appeal on April 14, 2005. A timely petition was filed by Mr. Rashid in the Court of Appeals on May 12, 2005. See 8 U.S.C. § 1252(b)(1). Although there is no jurisdiction to determine the applicability of the jurisdictional bar of 8 U.S.C. § 1252(a)(2)(C), the Court of Appeals and this Court have jurisdiction to determine the applicability of the jurisdictional bar and whether the Petitioner's conviction was an "aggravated felony." *Alaka v. Attorney General*, 456 F.3d 88, 94-5 (3rd Cir. 2006); *Francis v. Reno*, 269 F.3d 162, 165 (3rd 2001); *Khalayeh v. I.N.S.*, 287 F.3d 978 (10th Cir. 2002). On August 3, 2006, a panel of the Tenth Circuit entered judgment denying the petition for review from a final decision of the Board of Immigration Appeals. The jurisdiction of this Court additionally rests on 28 U.S.C. § 1254(1).

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ARGUMENT

Introduction to the Question Presented

When evaluating whether an offense is an aggravated felony, the Court presumptively applies the categorical approach established in *Taylor v. United States*, 494 U.S. 575, 602, 110 S.Ct. 2143 (1990). This approach prohibits consideration of evidence other than the statutory definition of the offense, thus not taking into account the particular facts underlying a conviction. *Leocal v. Ashcroft*, 543 U.S. 1, 11, 125 S.Ct. 277, 160 L.Ed.2d 271 (2004).

8 U.S.C. section 1227(a)(2)(A)(iii) provides: "Any alien who is convicted of an aggravated felony at any time after admission is deportable." An "aggravated felony" is defined at 8 U.S.C. section 1101(a)(43)(F):

> As used in this chapter …[t]he term "aggravated felony" means …a crime of violence (as defined in

> section 16 of Title 18 …) for which the term of imprisonment at least one year ….

Thus, the definition has two requirements (1) a crime of violence as defined by 18 U.S.C. section 16, and (2) a term of imprisonment of at lease one year. The offense for which Mr. Rashid was convicted, third degree misdemeanor assault, has a maximum sentence of 18 months, although Mr. Rashid was sentenced to a term of actual imprisonment of only 35 days. Colorado Revised Statutes (C.R.S.) sections 18-1.3-501 and 18-3-204.

A "crime of violence" is then defined by 18 U.S.C. section 16 as:

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

The Tenth Circuit properly determined that the statutory language of Colorado's third degree assault statute does not necessarily include the use or threatened use of physical force and concluded, therefore, that it is not a crime of violence under § 16(a). *Rashid v. Gonzales*, 2006 WL 2171522, *2 (10th Cir. 2006); C.R.S. 18-3-204; *see also*,; *Chrzanoski v. Ashcroft*, 327 F.3d 188, 196-7 (2nd Cir. 2003); *Francis v. Reno*, 269 F.3d 162, 171-2 (3rd Cir. 2001); *United States v. Villegas-Hernandez*, ____ F.3d. ____, 2006 WL 3072558 (5th Cir. 2006); *Sing v. Ashcroft*, 386 F.3d 1228, 1234 (9th Cir. 2004); and *United States v. Perez-Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005).

The Tenth Circuit panel then considered § 16(b) and held that, as a matter of law, third degree misdemeanor assault met that section's requirements for an "aggravated felony." Section 16(b) also has two requirements. First, the offense must be a "felony" and, second, the offense must involve a substantial risk that physical

force against a person or property may be used in the course of the offense. *Vellegas-Hernandez*, ____ F.3d ____, 2006 WL 3072558 (each requirement must be independently satisfied). The Circuit Court found that § 16(b) was ambiguous and looked beyond the statute to particular facts underlying the conviction to determine whether the offense of third degree assault involved a substantial risk of physical force. *Rashid*, 2006 WL 2171522, *2-3. It is there that the Circuit Court erred because it overlooked the first requirement and did not need to reach the second.

There Is a Conflict Among the Circuit Courts
As to Whether A Misdemeanor Assault
Is An Aggravated Felony

In its argument before the Immigration Judge and the Board of Immigration Appeals, the Respondent Government contended that the Colorado misdemeanor third degree assault offense by law constitutes a "felony" within the meaning of federal "crime of violence" definition under 18 U.S.C. § 16(b) because the misdemeanor offense is potentially punishable by more than one year. In order for the Board of Immigration Appeals and then the Tenth Circuit panel to reach the second requirement of § 16(b), they also had to agree with the Government's argument. Two previous Tenth Circuit decisions have also held that a misdemeanor offense that is punishable by more than one year is a "felony" for the purposes of the Immigration and Nationality Act (INA). *United States v. Rodriguez-Rojo*, 175 Fed. Appx. 982, 2006 WL 979303, **2 (10th Cir. 2006) (regarding a Texas offense) and *United States v. Saenz-Mendoza*, 287 F.3d 1101, 1103-4 (10th Cir. 2002) (regarding a Utah offense).

The Tenth Circuit's decisions follow opinions from other Circuits which have similarly held that misdemeanor offenses punishable by more than one year are felonies under the INA. *United States v. Pacheco*, 225 F.3d 148, 154-55 (2nd Cir. 2000); *United States v. Graham*, 169 F.3d 787, 792 (3rd Cir. 1999); *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000); *United States v. Urias-Escobar*, 281 F.3d 165, 167-68 (5th Cir. 2002); *United States v. Gonzales-Vela*, 276 F.3d 763, 767-68 (6th Cir. 2001); *Guerro-Perez v. INS*, 242 F.3d 727, 734-37 (7th Cir. 2001); *United States v.*

Gonzales-Tamariz, 310 F.3d 1168, 1170-71 (9th Cir. 2002); and *United States v. Christopher*, 239 F.3d 1191, 1193-94 (11th Cir. 2001). However, these opinions almost uniformly relied upon the preliminary provision, 8 U.S.C. § 1101(a)(43), and failed to make the detailed analysis of 18 U.S.C. § 16(a) and (b) as expressly directed by § 1101(a)(43).

In direct contrast to these decisions, where the language of § 16(b) has been compared with that found in § 16(a), Circuit courts have ruled that Congress meant what it said - that misdemeanor convictions may be felonies under § 16(a) if they possess the required element, but are categorically excluded from the definition of an aggravated felony under § 16(b). *Sing v. Gonzales*, 432 F.3d 533, 538 (3rd 2006); *Francis*, 269 F.3d at 168-69 (3rd Cir); *Villegas-Hernandez*, ___ F.3d ___, 2006 WL 3072558 (5th Cir.); *Flores v. Ashcroft*, 350 F.3d 666, 669 (7th Cir. 2003); *Singh*, 386 F.3d at 1231, n. 3 (9th Cir); *see also*, *United States v. Ponce-Casalez*, 212 F.Supp.2d 42, 44-46 (D.R.I. 2002); *United States v. Villanueva-Gaxiola*, 119 F.Supp.2d 1185, 1190 (D.Kan. 2000).

As the Third Circuit stated in *Francis*:

> …Congress did not use the term "felony in § 16(a). Rather, § 16(a) is narrowly drawn to include only those crimes whose elements require the "use, attempted use, or threatened use of physical force." Although § 16(b) is specifically limited to felonies, it does not include all felonies. It is limited to those felonies that "by [their] nature involve[s] a substantial risk that …force …may be used." Clearly, Congress intended to include felonies and misdemeanors under subsection (a), but only intended certain felonies to be included under subsection (b)."

Francis, 269 F.3d at 168.

The *Francis* Court then recognized the discussion in the Senate Report for the Comprehensive Crime Control Act of 1984 that makes this clear:

> …The term "crime of violence" is defined, for purposes of all Title 18 U.S.C. in Section 1001 of the Bill… The term means an offense - *either a felony or a misdemeanor* - that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or any felony* that, by its nature, involves the substantial risk that physical force against person or property may be used in the course of its commission. S.Rep. No. 225 (1983).

Francis, 269 F.3d at 169 (emphasis in opinion). The Court also notes the purpose in recognizing the state categorization of the offense as a misdemeanor or felony:

> Thus, by relying upon state law to provide the categorization, we eliminate the redundancy that would otherwise result from including both a maximum of one year imprisonment under § 1101(a)(43)(F) and the condition precedent of "felony" in § 16(b) that is expressly incorporated in § 1101(a)(43)(F).

Francis, 269 F.3d at 170.

This interpretation is consistent with the rule of lenity embodied in the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien. *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 2290, 150 L.Ed.2d 347 (2001); *Francis*, 269 F.3d at 170.

> We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment of exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the

> individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433 (1948).

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CONCLUSION

This is an issue of law arising out of the undue reliance of certain circuits upon the language of 8 U.S.C. § 1101(a)(43)(F) without engaging in a proper analysis of 18 U.S.C. §16. As discussed above, the decision of the Tenth Circuit below, as well as decisions of other Circuits, are in direct conflict those Circuits which have conducted a proper analysis and have reached the rule that 18 U.S.C. § 16(b) categorically excludes state misdemeanors from the definition of "aggravated felony."

For these reasons, the Petitioner respectfully requests this Court accept the Writ and resolve this important and recurring matter.

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Wherefore, Petitioner, Haroon Rashid,
respectfully submits his Writ of Certiorari this 1st day
of November, 2006.

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APPENDIX

Rashid v. Gonzales, 2006 WL 2171522 (10th Cir. 2006)

In re Haroon Rashid, No. A46 188 443,
Board of Immigration Appeals (April 14, 2005)

In the Matter of Haroon Rashid, No. A46 188 443,
Order of the Immigration Judge (November 29, 2004)

In the Matter of Haroon Rashid, No. A46 188 443,
Oral Decision and Order of the Immigration Judge
(November 29, 2004)