Nos. 15-2781 & 15-3068

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JHONATHAN VICTORIA JAVIER,

(NOT DETAINED),

Petitioner,

v.

LORETTA E. LYNCH,
THE ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

PETITION FOR
PANEL REHEARING AND REHEARING EN BANC

Petitioner, Jhonathan Victoria Javier (hereinafter referred to as "Petitioner"), by and through his Attorney, Raymond G. Lahoud, Esquire of Baurkot & Baurkot, respectfully requests the granting of the instant Petition for Panel Rehearing and Rehearing En Banc pursuant to Rules 35(b) and 40(a) of the Federal Rules of Appellate Procedure.

RULE 35(b)(1) STATEMENT

In support of this Petition, Counsel represents the following: I express a belief, based on a reasoned and professional judgment, that the panel's non-precedential opinion in Javier v. Lynch, Nos. 15-2781 & 15-3068 (3d Cir. June 9, 2016) conflicts with prior decisions of this Court. An en banc rehearing, therefore, is "necessary to secure and maintain uniformity of the [C]ourt's decisions." F.R.A.P Rule 35(b)(1)(A).

Additionally, I express a belief, based on a reasoned and professional judgment, that the panel's opinion involves a question of exceptional importance, provided the far reaching implications of the categorical nature of the opinion on hundreds of immigrants who are faced with a conviction for a broad, misdemeanor, over encompassing state statute that can be violated with the uttering of a few words alone, and squarely conflicts with this Court's prior decision. F.R.A.P Rule 35(b)(1)(B).

BACKGROUND

The relevant facts, recounted in detail in the panel opinion can be summarized as follows. See Javier v. Lynch, Nos. 15-2781 & 15-3068 (3d Cir. June 9, 2016) (Attached to this Petition). Petitioner, a native and citizen and native of the Dominican Republic, entered the United States as a Lawful Permanent Resident in

2009. On July 13, 2013, he was arrested in the County of Philadelphia, Pennsylvania and charged with violating, among other statutes, Sections 6108, Carry Firearms in Public in Philadelphia (the "FR Law") and 2706, Terroristic Threats with Intent to Terrorize Another (the "TT Law"), Title 18 of the Pennsylvania Code. On March 7, 2014, he plead guilty to the TT and FR Law violations and was sentenced to a strict term of probation, the maximum of which not exceeding 4 years to the TT Law violation, and a term of confinement with a minimum of 7 months and a maximum of 23 months to the FR Law violation. On May 12, 2014, the Department of Homeland Security (the "Department" or "DHS") commenced removal proceedings before the Immigration Court at York, Pennsylvania. Petitioner was charged as deportable pursuant to Sections 1227(a)(2)(C) and (a)(2)(A)(i), Title 8 of the United States Code. Petitioner admitted to the allegations, but denied removability. Petitioner moved to terminate proceedings, arguing that the Department failed to meet its burdens of proof with respect to removability and that the TT Law is not categorically a crime involving moral turpitude. In an oral decision, the Immigration Court denied Petitioner's motion to terminate, sustained both charges of removability and, finding no relief available, ordered Petitioner removed to the Dominican Republic. Petitioner timely appealed and on August 26, 2015, the Board dismissed the appeal, finding that the TT Law is categorically a crime involving moral turpitude. See In re: Jhonathan Victoria Javier, No. A059 303 967 (BIA Aug.

26, 2015). A Petition for Review timely followed. On June 9, 2016, this Court entered an order denying the Petition for Review, specifically holding that the Pennsylvania TT Law statute is categorically a crime involving moral turpitude. See Javier, Nos. 15-2781 & 15-3068, at 6.

ARGUMENT

The panel decision clearly overlooked the full scope of the mens rea that allows for a TT Law conviction, necessitating a panel rehearing. Moreover, the panel decision requires an en banc rehearing, as it perpetuates an intra-circuit split and, on the exceptionally important issue of the deportation of lawful immigrants to the United States, applies a categorical determination on a broad, over encompassing, misdemeanor state statute that can be violated with the uttering of a few words alone, even if those words are recklessly, not intentionally, communicated.

I. The Panel Decision Clearly Overlooked the Full Scope of the Mens Rea Necessary for a TT Law Conviction and, therefore, a Panel Rehearing Must be Granted.

The panel decision clearly overlooked the full scope of the mens rea that could lead to one's conviction for a violation of the TT Law. The TT Law states that "[a] person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to: [] commit any crime of violence with intent to terrorize another." 18 Pa. Cons. Stat. § 2706(a)(1). The panel decision held that the

TT Law has a specific intent requirement and that it "need not look any further to determine that a violation of section 2706(a)(1) is a 'crime involving moral turpitude.'" Javier, Nos. 15-2781 & 15-3068, at 6. The panel noted its reliance on the communication of the threat and its requisite scienter and held that the TT Law "unambiguously requires that the threat be communicated with a specific 'intent to terrorize.'" Id. (citing 8 Pa. Cons. Stat. § 2706(a)(1)). Given this "specific intent requirement, [the panel held it] need not look any further to determine that a violation of section 2706(a)(1) is a 'crime involving moral turpitude.'" Id. at 6. The transmission, the panel held, must itself be intentional to qualify as a crime involving moral turpitude, regardless of any unrelated intentions to commit a separate offense—the threat must be made with the specific intent to instill terror. Id.

This specific intent to instill fear is not always necessary to violate the TT Law. To "establish the crime of terroristic threats pursuant to section 2706(a)(1) of the [Pennsylvania] Crimes Code, the Commonwealth must prove that the defendant 'communicate[d], either directly or indirectly, a threat to commit any crime of violence with intent to terrorize another[.]'" See Commonwealth v. Vergilio, 103 A.3d 831, 833-834 (Pa. Super. 2014) (quoting 18 Pa.C.S.A. § 2706(a)(1)) (citing Commonwealth v. Tizer, 684 A.2d 597, 600 (Pa.Super.1996). In a 2014 published and precedential decision analyzing the TT Law, the Pennsylvania Superior Court held that

> the elements necessary to establish a violation of the terroristic threats statute [at Section 2706(a)(1), Title 18 of the Pennsylvania Code] are: (1) a threat to commit a crime of violence; and (2) that the threat was communicated with the intent to terrorize or with reckless disregard of the risk of causing such terror.

Vergilo, 103 A.3d at 833 (citing Commonwealth v. Ferrer, 423 A.2d 423, 424 (Pa.Super.1980)) (emphasis added). Crucial here is the second, necessary element: the threat must be communicated with the "intent to terrorize or with reckless disregard of the risk of causing such terror." Id. (emphasis added). It is this very element that the panel overlooked. A specific intent to terrorize is but one mens rea that may lead to a violation of the TT Law; the second is with a "reckless disregard of the risk of causing such terror." Id.

Here, the least culpable conduct is the communication of a threat with reckless disregard for the risk of causing terror, not a communication with the specific intent to terrorize. Partyka v. Att'y Gen., 417 F.3d 408, 411 (3d Cir. 2005) (stating that, under the categorical approach, one must "read the applicable statute to ascertain the least culpable conduct necessary to sustain a conviction under the statute."). Given that the communication of a threat may be made with reckless disregard for the risk of causing terror, it is clear that the TT Law is not categorically a crime involving moral turpitude. The panel clearly overlooked or misapprehended the full scope of the TT Law and the varying mens reas. Given this, a panel rehearing must be granted.

II. The Panel Decision Perpetuates an Intra-Circuit Split on Whether a Specific Offense is a Crime Involving Moral Turpitude and, Therefore, an En Banc Rehearing Must be Granted.

The panel decision perpetuates an intra-circuit split on one specific state statute and whether that statute is categorically a crime involving moral turpitude. The TT Law states that "[a] person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to: [] commit any crime of violence with intent to terrorize another." 18 Pa. Cons. Stat. § 2706(a)(1). The panel decision held that the TT Law has a specific intent requirement and that it "need not look any further to determine that a violation of section 2706(a)(1) is a 'crime involving moral turpitude.'" Javier, Nos. 15-2781 & 15-3068, at 6. The panel noted that it need not focus on the threatened "crime of violence," but the communication of the threat and its requisite scienter. Id. at 7. In doing so, the panel held that the TT Law "unambiguously requires that the threat be communicated with a specific 'intent to terrorize.'" Id. (citing 8 Pa. Cons. Stat. § 2706(a)(1)). This is different in "character" from simple assault, which is encompassed in the phrase "crime of violence." Id. Regardless of what the threat was, how it was communicated, what the words were, who said, how it was said, the distance in miles due to the internet and social media between the threatened and the person making the threat, whether the threat was recklessly communicated—the panel declared that a "threat communicated with a specific intent to terrorize is an act 'accompanied by

a vicious motive or a corrupt mind' so as to be categorically morally turpitudinous." See id., at 7.

The panel's decision squarely conflicts with this Court's decision in Larios, 402 F. App'x 705 (3d Cir. 2010). In Larios, another panel of this Court found that an analogous New Jersey terroristic threat statute encompassed non-turpitudinous conduct because it could be applied to a threat to commit simple assault. Id. at 709. Given that simple assault is non-turpitudinous, a threat to commit simple assault is non-turpitudinous. Id. Given that Larios was not precedential opinion, the panel in the instant matter ignored it in its entirety, disagreeing with the Larios' Court's focus on the crime that was being threatened, relying instead on "threat" itself, regardless of the "threatened" conduct. The Larios Court's decision relied on Bovkun v. Ashcroft, 283 F.3d 166, 170 (3d Cir. 2002).

In Bovkun, this Court considered the TT Law. Id. There, the Court found that Pennsylvania lacked a definition to a "crime of violence," and looked to Section 16, Title 18 of the United States Code for guidance, noting that

> [t]he actus reus of this offense is a threat to commit a crime of violence, and the mens rea is . . . the intent to terrorize another . . . . Because the actus reus must be shown in every case, Section 2706 always demands proof of a 'threat[] to commit a crime of violence.' The Pennsylvania Legislature has not defined the meaning of the term 'crime of violence' as it is used in Section 2706, and therefore the term is to be construed according to the fair import of its terms.

Id. (citing 18 Pa.C.S.A. § 105; 18 Pa.C.S.A. § 2706; 18 U.S.C. § 16; Commonwealth v. Ferrer, 283 Pa.Super. 21, 423 A.2d 423, 424 (1980)). Applying the "fair import," a "crime of violence," as used in the TT Law is "an offense that has as an element "the use, attempted use, or threatened use of physical force against the person or property of another." Bovkun, 283 F.3d at 170 (citing 18 U.S.C. § 16). Given this, the panel was required to adhere to the form and nature of the statute, with respect to itself and as it sits within the overall statutory scheme. The TT Law falls within Chapter 27 of the Pennsylvania Criminal Code, which relates to assaults. See generally 18 Pa.C.S.A §§ 2701 – 2706. The statute and the violence, or attempted violence it criminalizes includes the simplest of assaults to the serious aggravated assaults—each with its varying degrees of violence, intents and the like, including the Pennsylvania Simple Assault statute, a non-turpitudinous crime. Id. at § 2701; see also Jean-Louis v. Att'y Gen., 582 F.3d 462, 465 (3d Cir. 2009) (holding that the least culpable conduct in the Pennsylvania Simple Assault statute was "reckless," and, therefore, not categorically a CIMT). A TT Law conviction may be sustained by proving a threat to commit simple assault. Given that simple assault itself is non-turpitudinous, the Larios Court correctly concluded that the threat itself is likewise not categorically morally turpitudinous.

Moreover, ignoring the "predicate" or "underlying" offense, however unrelated it may be, contradicts this Court's precedent in United States v. Mahone,

662 F.3d 651 (3d Cir. 2011). There, this Court analyzed the Pennsylvania Terroristic Threat statute with respect to whether it is categorically a crime of violence, as defined in Section 4B1.2(a)(1) of the United States Sentencing Guidelines. See United States v. Mahone, 662 F.3d 651 (3d Cir. 2011), abrogated, in part, by Descamps v. United States, 133 S. Ct. 2276 (2013). In resolving this question, this Court employed the formal categorical approach, found overall statute divisibility and, when evaluating Section 2706(a)(1), Title 18 of the Pennsylvania Code, noted the broad nature of the phrase "crime of violence," and the need to make a determination as to the underlying – the predicate event threatened. Id. This Court recognized the need, at least initially, to look further to determine the predicate crime of violence that the defendant had threatened to commit. Mahone, 662 F.3d at 653; see also United States v. Brown, 765 F.3d 278 (3d Cir. 2014) (holding that Mahone, 662 F.3d at 653 remains binding precedent and that, when the underlying predicate crime of violence that a defendant had threatened to commit may not be determined from the record alone, then the overbroad nature of the phrase "crime of violence" in the Pennsylvania Terroristic Threat statute prevents any categorical determinations and any further factual inquiry).

In the instant matter, the determination is not under Section 4B1.2(a)(1) of the United States Sentencing Guidelines; rather, it is whether the TT Law is a crime involving moral turpitude. This difference, however, does not alter the principles of

the categorical approach. Once again, Petitioner asks this Court: why would the predicate offense only matter in first and not the latter when the manner of determination in both are the same? To ignore the predicate offense that is threatened is to ignore the categorical approach itself. Here, the panel not only ignored the predicate offense threatened, it also ignored several of this Court's prior decisions relating to the TT Law.

In light of the panel's clear perpetuation of an intra-circuit split, the full Court must close the rift now created. An en banc rehearing is "necessary to secure and maintain uniformity of the [C]ourt's decisions." F.R.A.P Rule 35(b)(1)(A).

III. The Panel's Decision Involves a Question of Exceptional Importance, Provided the Far-Reaching Implications of the Panel's Categorical Determination as to a Broad, Over Encompassing State Misdemeanor Statute that May be Violated With the Most Non-Turpitudinous of Uttered Words, and, Therefore, an En Banc Rehearing Must be Granted.

The panel's decision involves a question of exceptional importance, given its far-reaching implications on immigrants who may face removal for conduct that is non-turpitudinous, given the panel's declaration that the TT Law is categorically—always—a crime involving moral turpitude. An en banc rehearing must be granted.

Deportation is banishment—banishment for life. It is separation from children, parents, siblings, spouses, friends, education, and employment. As discussed supra, the panel has decided to simply ignore the words and of the TT Statute: what was the threatened conduct. It could be a yell, a scream, a post on social media posted by an person hundreds of miles away from the reader of the post, a Facebook, Twitter, or text message from a man in Pennsylvania to a woman in California, or, for that matter, in Turkey, England, or Lebanon, where there is absolutely no means that the "threat" can actually be carried out. Moreover, the panel relied on the words "specific intent," failing to recognize that the least culpable conduct is the communication of a threat with reckless disregard for the risk of causing terror; the mens rea clearly is not always the communication with the specific intent to terrorize. The panel's opinion has the ability to reach far and effect many who will face more than one or two days in jail as a result of a conviction—it is a question of permanent banishment from the United States of America.

For this reason, the panel's decision is not just legally incorrect, but also produces a dangerous result that will separate families over a few uttered words that may be perceived as threatening. The exceptional importance of this issue is an additional reason necessitating en banc resolution.

CONCLUSION

For the reasons set forth herein, Petitioner, Jhonathan Victoria Javier, respectfully requests that this Court grant rehearing en banc, or, alternatively, a panel rehearing.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: June 23, 2016

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CERTIFICATION OF SERVICE

I, Raymond G. Lahoud, Esquire, being an attorney duly licensed to practice before this Court and, acting as Counsel for Petitioner, Jhonathan Victoria Javier, hereby certify that I have served the within Petition for Panel Rehearing and En Banc Hearing, by depositing a true copy of the same, enclosed in a postpaid properly addressed United States Postal Service wrapper and caused it to be mailed upon the following on this 23rd day of June, 2016:

Ms. Elizabeth R. Chapman, Esquire
Office of Immigration Litigation
Post Office Box 878
Washington, DC 20044

I further attest that, on this 23rd day of June, 2016, I caused the within to be filed with this Court, through its Electronic Case Management System, to which the above-named is registered.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: June 23, 2016

Raymond G. Lahoud, Esquire

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 15-2781 and 15-3068

JHONATHAN VICTORIA JAVIER,
Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,
Respondent

On Petition for Review of a Decision of the Board of Immigration Appeals
(A059-303-967)

Immigration Judge: Walter Durling

Submitted Under Third Circuit L.A.R. 34.1(a)
March 21, 2016

Before: GREENAWAY, JR., VANASKIE, and SHWARTZ, *Circuit Judges*.

JUDGMENT

This cause came to be considered on the record from the Board of Immigration Appeals ("BIA") and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on March 21, 2016. On consideration whereof, it is now hereby:

ORDERED and ADJUDGED by this Court that the petition for review of the BIA's order dated July 13, 2015 is dismissed for lack of jurisdiction and the petition for

review of the BIA's order dated August 19, 2015 is denied.

All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Marcia M. Waldron,
Clerk

Date: June 9, 2016

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 15-2781 and 15-3068

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JHONATHAN VICTORIA JAVIER,
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March 21, 2016

_____

Before: GREENAWAY, JR., VANASKIE, and SHWARTZ, *Circuit Judges*.

(Opinion Filed: June 9, 2016)

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OPINION[*]

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[*] This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

GREENAWAY, JR., *Circuit Judge*.

Jhonathan Victoria Javier petitions for review of two orders of the Board of Immigration Appeals ("BIA") affirming the Immigration Judge's ("IJ's") order of removal. For the reasons that follow, we will dismiss for lack of jurisdiction the petition for review of the BIA's order dated July 13, 2015 and deny the petition for review of the BIA's order dated August 19, 2015.

I. BACKGROUND

Javier is a citizen and native of the Dominican Republic. In 2009, he entered the United States as a lawful permanent resident. In July 2013, Javier was arrested for carrying a firearm in public, in violation of 18 Pa. Cons. Stat. § 6108, and for making terroristic threats, in violation of 18 Pa. Cons. Stat. § 2706(a)(1). He was convicted of both charges in the Court of Common Pleas of Philadelphia County, Pennsylvania, in March 2014.

Later in 2014, the Department of Homeland Security issued Javier a notice to appear, charging him with removability due to his convictions. Following a removal hearing held on April 2, 2015,[1] the IJ issued an oral decision concluding that Javier was removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(i) as an alien convicted of a "crime

[1] At Javier's request, the IJ continued his removal proceedings while Javier pursued post-conviction relief in state court. At the April 2, 2015 hearing, Javier informed the IJ that his requests for post-conviction relief had been denied.

involving moral turpitude" based on his conviction for terroristic threats.[2] The IJ also concluded that Javier was removable pursuant to 8 U.S.C. § 1227(a)(2)(C) as an alien convicted of a "firearm offense" based on his conviction for carrying a firearm in public.

Javier appealed to the BIA. In an order dated August 19, 2015, the BIA affirmed the IJ's order of removal and dismissed Javier's appeal based solely on Javier's terroristic threats conviction.[3] The BIA explained that the offense defined by 18 Pa. Cons. Stat. § 2706(a)(1) involves "an intentional action whose goal is to inflict [] psychological distress [that follows an invasion of the victim's sense of personal security which] violates the norms of society to such a degree as to constitute moral turpitude." A.R. 4 (citing *Commonwealth v. Tizer*, 684 A.2d 597, 600 (Pa. Super. 1996)). The BIA concluded that it "need not address the question of whether [Javier's] conviction for carrying firearms in public in violation of Pennsylvania law also renders [him]

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[2] Section 1227(a)(2)(A)(i) also requires that the "crime involving moral turpitude" be one for which "a sentence of one year or longer may be imposed" and that the crime be "committed within five years . . . after the [alien's] date of admission." 8 U.S.C. § 1227(a)(2)(A)(i). These requirements are not at issue in this petition.

[3] Javier filed a notice of appeal of the IJ's April 2, 2015 order but did not submit a brief until July 10, 2015, three days before the BIA issued its opinion. On July 13, 2015, the BIA summarily affirmed the IJ's decision on the basis that Javier's notice of appeal was insufficient to apprise the BIA of the grounds for Javier's appeal. Javier then resubmitted his brief along with a motion for reconsideration explaining the reasons for the delay in transmitting his brief. In its August 19, 2015 order, the BIA explained that it had accepted Javier's reasons and sua sponte reopened Javier's appeal to consider the arguments in his brief. Javier has petitioned for review of both the BIA's July 13, 2015 and August 19, 2015 orders; by Order dated August 26, 2015, we consolidated Javier's petitions.

removable." *Id.* Javier then submitted this timely petition, arguing that the BIA erred as a matter of law in concluding that a section 2706(a)(1) offense is categorically a "crime involving moral turpitude" and that the IJ erred as a matter of law in concluding that a section 6108 offense is categorically a "firearm offense."

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to review the BIA's final order of removal pursuant to 8 U.S.C. § 1252(a). We "review the administrative record on which the final removal order is based." *Li Hua Yuan v. Att'y Gen.*, 642 F.3d 420, 425 (3d Cir. 2011) (quoting *Zhang v. Gonzales*, 405 F.3d 150, 155 (3d Cir. 2005)). "[T]hat means reviewing only the BIA's decision" unless the BIA's decision "specifically references the IJ's decision." *Id.*[4]

We review legal determinations by the BIA de novo, "subject to established principles of deference." *Wang v. Ashcroft*, 368 F.3d 347, 349 (3d Cir. 2004). We afford deference to the BIA's definition of moral turpitude, but we owe no deference to the BIA's interpretation of a state criminal statute. *See Knapik v. Ashcroft*, 384 F.3d 84, 87 n.3, 88 (3d Cir. 2004).

III. ANALYSIS

"In determining whether a state law conviction constitutes a [crime involving moral turpitude] . . . we[] have historically applied a 'categorical' approach, 'focusing on

[4] Thus, contrary to Javier's assertion, we lack jurisdiction to review the IJ's decision that 18 Pa. Cons. Stat. § 6108 constitutes a "firearm offense" because the BIA did not reference the IJ's decision on this issue. We also lack jurisdiction to review the BIA's July 13, 2015 order dismissing Javier's appeal because it is not a final order of removal; the BIA reopened Javier's case. Therefore, we will dismiss for lack of jurisdiction Javier's petition for review of the BIA's July 13, 2015 order.

the underlying criminal statute rather than the alien's specific act.'" *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 465 (3d Cir. 2009) (quoting *Knapik*, 384 F.3d at 88). Under the categorical approach, "we read the applicable statute to ascertain the least culpable conduct necessary to sustain a conviction under the statute." *Partyka v. Att'y Gen.*, 417 F.3d 408, 411 (3d Cir. 2005). If "a statute covers both turpitudinous and non-turpitudinous acts" then we turn to a modified categorical approach and "look to the record of conviction to determine whether the alien was convicted under that part of the statute defining a crime involving moral turpitude." *Id.* "The modified categorical approach still 'retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime.'" *United States v. Brown*, 765 F.3d 185, 190 (3d Cir. 2014) (quoting *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013)).

As a general rule, a criminal statute is determined to define a crime as categorically involving "moral turpitude only if all of the conduct [the statute] prohibits is turpitudinous." *Partyka*, 417 F.3d at 411 (quoting *Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003)). "[T]he hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation." *Mahn v. Att'y Gen.*, 767 F.3d 170, 174 (3d Cir. 2014) (quoting *Partyka*, 417 F.3d at 414). Although the Immigration and Nationality Act does not define "moral turpitude," "the BIA and this Circuit have defined morally turpitudinous conduct as 'conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed to other persons, either individually or to society in general.'" *Id.* (quoting *Knapik*, 384 F.3d at 89). An act is turpitudinous if it "is accompanied by a vicious motive or a corrupt mind."

Partyka, 417 F.3d at 413 (quoting *Matter of Franklin*, 20 I. & N. Dec. 867, 868 (BIA 1994)).

Here, Title 18, Section 2706(a) of the Pennsylvania Consolidated Statutes is divisible into three variations of the same offense—i.e., subsections (a)(1), (a)(2), and (a)(3). *See Brown*, 765 F.3d at 191–92. Javier was convicted under section 2706(a)(1). *See* A.R. 230 (Order of Sentence stating that Javier was convicted under "18 § 1706 §§ A1," which the Order entitled "Terroristic Threats W/ Int To Terrorize Another"). Section 2706(a)(1) states that "[a] person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to: [] commit any crime of violence with intent to terrorize another." 18 Pa. Cons. Stat. § 2706(a)(1). As discussed below, because of this specific intent requirement, we need not look any further to determine that a violation of section 2706(a)(1) is a "crime involving moral turpitude."

Cf. Commonwealth v. Walker, 836 A.2d 999, 1001 (Pa. Super. 2003) ("[O]ne commits terroristic threats [] by threatening a crime of violence with specific intent to cause terror (subsection 1), or by threatening anything that causes terror with reckless disregard of the risk of causing terror (subsection 3).").[5]

Javier argues that "crime of violence" encompasses simple assault, which he contends is a non-turpitudinous crime. Therefore, he contends, the statute encompasses

[5] Javier argues that the BIA erred by not applying the modified categorical approach to evaluate whether his conviction constituted a crime involving moral turpitude. This argument is unavailing. Under either the categorical approach or modified categorical approach, we would still conclude that Javier was convicted of a crime involving moral turpitude.

the non-turpitudinous crime of threatening to commit simple assault and the District Court erred in concluding that section 2706(a)(1) is categorically a "crime involving moral turpitude."

We disagree. Our focus in determining whether section 2706(a)(1) is categorically a crime involving moral turpitude is not the threatened "crime of violence," but the communication of the threat and its requisite scienter. After all, the harm that section 2706(a)(1) seeks to prevent is not the "crime of violence," but rather the consequences of the threat—i.e., "the psychological distress that follows from an invasion of another's sense of personal security." *Commonwealth v. Fenton*, 750 A.2d 863, 865 (Pa. Super. 2000) (quoting *Tizer*, 684 A.2d at 600). And section 2706(a)(1) unambiguously requires that the threat be communicated with a specific "intent to terrorize." 18 Pa. Cons. Stat. § 2706(a)(1); *Walker*, 836 A.2d at 1001.

A threat communicated with intent to terrorize is of a different character than simple assault, and therefore we do not equate such a threat with simple assault. *See Chanmouny v. Ashcroft*, 376 F.3d 810, 814–15 (8th Cir. 2004) (reasoning that Minnesota terroristic threat statute's "requisite intent to terrorize [] serves to distinguish Chanmouny's offense from simple assault" because "[s]imple assault typically is a general intent crime, and it is thus different in character"). We conclude that a threat communicated with a specific intent to terrorize is an act "accompanied by a vicious motive or a corrupt mind" so as to be categorically morally turpitudinous. *See Partyka*,

417 F.3d at 413. Because the BIA did not legally err by so concluding, we will deny Javier's petition.[6]

IV. CONCLUSION

For the foregoing reasons, we will dismiss for lack of jurisdiction the petition for review of the BIA's order dated July 13, 2015 and deny the petition for review of the BIA's order dated August 19, 2015.

[6] Javier's reliance on *Larios v. Attorney General*, 402 F. App'x 705 (3d Cir. 2010), is unavailing. There, a panel of this Court found that an analogous New Jersey terroristic threat statute encompassed non-turpitudinous conduct because it could be applied to a threat to commit simple assault. *Id.* at 709. The panel reasoned that because simple assault is non-turpitudinous, a threat to commit simple assault is non-turpitudinous. *Id.* *Larios* is a not precedential opinion which we are not bound to follow. We disagree with the panel's focus on the "crime of violence," rather than the criminalized conduct itself—which requires a malicious scienter. It has long been established that "moral turpitude normally inheres in the intent." *See, e.g.*, *Jean-Louis*, 582 F.3d at 469 (quoting *Matter of Abreu-Semino*, 12 I. & N. Dec. 775, 777 (BIA 1968)); *see also Michel v. INS*, 206 F.3d 253, 263 (2d Cir. 2000) ("[C]orrupt scienter is the touchstone of moral turpitude."). Therefore, we focus on the intent required by section 2706(a)(1) and agree with the BIA that the offense as defined under section 2706(a)(1) is categorically a crime involving moral turpitude.