No.

In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

JUAN JOSE MIRANDA-GODINEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General
DONALD E. KEENER
BRYAN S. BEIER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

TABLE OF CONTENTS

In the Supreme Court of the United States

No.

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

JUAN JOSE MIRANDA-GODINEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is not published in the *Federal Reporter* but is available at 2016 WL 1696917. The decision of the Board of Immigration Appeals (App., *infra*, 3a-12a) is unreported. The decision of the immigration judge (App., *infra*, 13a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2016. A petition for rehearing was denied on June 28, 2016 (App., *infra*, 19a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent is a native and citizen of Mexico who was admitted to the United States in 1978 as a lawful permanent resident. Gov't C.A. Br. 3; see App., *infra*, 13a. In 2012, respondent was convicted of arson in violation of California Penal Code § 451(d) (West 2010). App., *infra*, 4a. For that offense, he was sentenced to sixteen months in prison. *Ibid.*

In 2013, the United States Department of Homeland Security (DHS) initiated removal proceedings against respondent. Gov't C.A. Br. 4. DHS charged that respondent is removable because his arson conviction qualifies as an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43). See 8 U.S.C. 1227(a)(2)(A)(iii). In particular, DHS charged that the offense meets the portion of the definition of "aggravated felony" stating that the term includes any "crime of violence (as defined in section 16 of [T]itle 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(F) (footnote omitted). App., *infra*, 5a n.2. DHS maintained that respondent's arson offense meets the definition of "crime of violence" in 18 U.S.C. 16(b) because the offense, "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," *ibid.*

An immigration judge sustained that charge and ordered respondent's removal, agreeing with DHS that respondent's arson offense qualifies as a "crime of violence" under 18 U.S.C. 16(b) and therefore as an "aggravated felony" under the INA. See App., *infra*, 15a, 18a; see also *id.* at 11a. The Board of Immigra-

tion Appeals (Board) dismissed respondent's appeal. *Id.* at 12a. Like the immigration judge, the Board concluded that respondent's arson conviction qualifies as a "crime of violence" under 18 U.S.C. 16(b) and therefore as an "aggravated felony" under the INA. App., *infra*, 11a.

2. Respondent petitioned for judicial review of that decision, renewing his contention that his arson conviction does not qualify as an "aggravated felony" under the INA. While the case was pending in the Ninth Circuit, a divided panel of the Ninth Circuit held in *Dimaya* v. *Lynch*, 803 F.3d 1110 (2015), petition for cert. pending, No. 15-1498 (filed June 10, 2016), that the definition of "crime of violence" in 18 U.S.C. 16(b), as incorporated into the INA's definition of "aggravated felony," is unconstitutionally vague. 803 F.3d at 1112-1120. The Ninth Circuit based that conclusion on this Court's decision in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), which had held unconstitutionally vague part of the definition of the term "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B).

The Ninth Circuit granted respondent's petition for review in light of *Dimaya*'s conclusion that 18 U.S.C. 16(b) is unconstitutionally vague. App., *infra*, 1a-2a. Because the court was "bound by" *Dimaya*, it held that the Board's decision could not be sustained and remanded the case to the Board for termination of the proceeding. *Ibid.*

ARGUMENT

The decision below rested on the Ninth Circuit's holding in *Dimaya* v. *Lynch*, 803 F.3d 1110 (2015), that 18 U.S.C. 16(b), as incorporated into the INA, see 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague.

App., *infra*, 2a. The Attorney General has filed a petition for a writ of certiorari in this Court seeking review of the Ninth Circuit's decision in *Dimaya*. See Pet., *Dimaya*, *supra* (No. 15-1498). This Court should accordingly hold this petition pending its final disposition of *Dimaya* and then dispose of the petition as appropriate in light of that disposition.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's final disposition of the Attorney General's petition for a writ of certiorari seeking review of the Ninth Circuit's decision in *Dimaya* v. *Lynch*, 803 F.3d 1110 (2015), petition for cert. pending, No. 15-1498 (filed June 10, 2016), and then disposed of as appropriate in light of that disposition.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General
DONALD E. KEENER
BRYAN S. BEIER
Attorneys

SEPTEMBER 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-71485
Agency No. A036-421-357

JUAN JOSE MIRANDA-GODINEZ, AKA JUAN MIRANDA, AKA JUAN JOSE MIRANDA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL, RESPONDENT

[Filed: Apr. 28, 2016]
Submitted Apr. 28, 2016[**]
San Francisco, California

MEMORANDUM[*]

On Petition for Review of an Order of the
Board of Immigration Appeals

Before: PAEZ, CLIFTON, and OWENS, Circuit Judges.

Petitioner Juan Jose Miranda-Godinez petitions for review of a decision of the Board of Immigration Ap-

---

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

peals (BIA) determining that Miranda-Godinez's conviction for arson under California Penal Code § 451(d) was an "aggravated felony" within the meaning of 8 U.S.C. § 1101(a)(43)(F). Specifically, the BIA determined that Miranda-Godinez's arson conviction constituted a "crime of violence" under 18 U.S.C. § 16(b).

However, as the Attorney General concedes, our recent decision in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), controls the outcome of this case. In *Dimaya*, we adhered to the rationale articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015), where the Court held that the definition of a "violent felony" in the residual clause of the Armed Career Criminal Act was unconstitutionally vague. We held that similar language in 18 U.S.C. § 16(b), as incorporated into 8 U.S.C. § 1101(a)(43)(F)'s definition of a "crime of violence," is also unconstitutionally vague. *See Dimaya*, 803 F.3d at 1111. We are bound by this precedent, which does not support the BIA's determination.

The petition for review is **GRANTED** and we **REMAND** to the BIA for termination of removal proceedings.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA 20530

File: A036 421 357—San Francisco, CA

IN RE: JUAN JOSE MIRANDA-GODINEZ A.K.A. JUAN MIRANDA A.K.A. JUAN JOSE MIRANDA

[Filed: Apr. 28, 2014]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Jon Wu, Esquire

AMICUS CURIAE FOR THE RESPONDENT:
James Feroli, Esquire

CHARGE:
Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION:
Termination; withholding of removal; Convention Against Torture

The respondent appeals the Immigration Judge's November 4, 2013, decision finding him removable and

ordering him removed to Mexico. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, a native and citizen of Mexico and a lawful permanent resident of the United States, was convicted on June 15, 2012, of the offense of arson in violation of section 451(d) of the California Penal Code ("§ 451(d)"), a felony offense for which he was sentenced to a term of imprisonment of 1 year and 4 months (Exhs. 1&3). The Immigration Judge concluded that the respondent's conviction for arson was not categorically an aggravated felony crime of violence under 18 U.S.C. § 16(b) (I.J. August 9, 2013), decision at 1). The Immigration Judge then proceeded to the modified categorical approach and concluded that the plea colloquy demonstrates that the respondent was convicted of setting fire to property that belongs to another, as the respondent pled "no contest" to "Count 2" of the information,[1] which stated that the respondent "did willfully, unlawfully, and maliciously set fire to and burn and cause to be burned the property of another, to wit, John Doe . . . " (I.J. August 9, 2013, decision at 1; Exhs. 2&3). As such, the Immigration Judge concluded that the re-

[1] We note that a "no contest" plea is treated the same as a guilty plea in California. *See* CAL. PENAL CODE ANN. § 1016.

spondent was convicted of a crime of violence and ordered the respondent removed.

The respondent filed a motion asking the Immigration Judge to reconsider his decision, claiming that the plea colloquy revealed that no one was injured and there was no damage to property (Respondent's Motion to Reconsider at 2). In a September 20, 2013, decision the Immigration Judge noted that the Supreme Court has articulated that under the categorical and modified categorical approaches, an adjudicator must look only to the elements of the conviction, not the particular facts behind the conviction (I.J. September 20, 2013, decision at 1). *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) (*quoting Taylor v. United States*, 495 U.S. 575, 600 (1990).[2]

The Immigration Judge adopted his prior conclusions in a November 4, 2013, decision, further articulating that the respondent's conviction is an aggravated felony crime of violence under the modified categorical approach, noting that an Immigration Judge may apply the modified categorical approach under the Supreme Court's recent decisions in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) and *Descamps v. United States, supra* (I.J. November 4, 2013, decision at 2). The respondent now appeals.

---

[2] We note that any reference in the Immigration Judge's decision as to whether or not the respondent has also been convicted of an aggravated felony under section 101(a)(43)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(E)(i), is not relevant in these proceedings, as the respondent was only charged with an aggravated felony crime of violence under section 101(a)(43)(F) of the Act.

On appeal, the respondent and amicus curiae argue that § 451(d) is not a divisible statute.[3] Specifically, the respondent and amicus curiae argue that the California statute prohibits the burning of *any* property, which is broader than the generic federal definition, which is limited to property *of another*. (Respondent's Br. at 5-8; Amicus Br. at 6-15). Therefore, the respondent and amicus curiae argue that § 451(d) is overly broad and not divisible. We disagree.

California law provides that "[a] person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned . . . any structure, forest land or property . . . " (§ 451). The statute articulates different levels of punishment based on the subject matter of the arson. The relevant portion of that statute provides:

> (d) Arson of property is a felony punishable by imprisonment in the state prison for 16 months, two, or three years. For purposes of this paragraph, arson of property does not include one burning or causing to be burned his or her own personal property unless there is an intent to defraud or there is injury to another person or another person's structure, forest land, or property.

CAL. PENAL CODE ANN. § 451(d). A crime of violence is defined as "any 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

---

[3] We acknowledge with appreciation the thoughtful arguments raised in the brief submitted by amicus curiae, James Feroli, Esquire, on behalf of the Immigrant and Refugee Appellate Center, LLC.

used in the course of committing the offense." 18 U.S.C. § 16(b). Not every violation of § 451(d) involves a risk that physical force will be used against the person or property *of another*, as there is a realistic probability that § 451(d) may be violated by a defendant "burning or causing to be burned his or her own personal property" where "there is an intent to defraud," or "injury to another person or another person's structure, forest land, or property." *See Miranda-Rosales v. Mukasey*, 260 Fed. Appx. 979, 981 (9th Cir. 2007) (holding that a conviction under § 451(d) is not categorically a crime of violence, as the statute encompasses setting fire to one's own property, which would not constitute a crime of violence) (unpublished); *see also People v. Jameson*, 177 Cal. App. 3d 658 (Cal. Ct. App. 1986) (upholding sentence enhancement for defendant's prior conviction for "burning his own property with intent to defraud an insurer."). Therefore, we agree with the Immigration Judge that the statute is not a categorical crime of violence (I.J. August 9, 2013, decision at 1). *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

Shortly before the present removal proceedings began, the Supreme Court decided *Descamps v. United States, supra*, which clarified the "divisibility" concept and held that the modified categorical approach may only be applied in narrow circumstances. Under *Descamps*, a criminal statute is divisible, so as to warrant a modified categorical inquiry, only if: (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction; and (2) at least one (but not all) of those listed offenses or combinations of

disjunctive elements is a categorical match to the relevant "generic" federal standard. *Id.* at 2281, 2283. In other words, an Immigration Judge cannot conduct a modified categorical inquiry merely because the elements of a crime can sometimes be proved by reference to *conduct* that fits the generic federal standard; under *Descamps*, such crimes are merely "overbroad," they are not "divisible." *Id.* at 2285-86, 2290-92. Under *Descamps*, the term "element" means a fact about a crime which "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find . . . , unanimously and beyond a reasonable doubt." *Id.* at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)).

Section 450 of the California Penal Code defines "property" for purposes of the relevant statute to be "real property or personal property, other than a structure or forest land." CAL. PENAL CODE ANN. § 450(c). In turn, section 7 of the California Penal Code defines "real property" to be lands, tenements, and hereditaments, and "personal property" to be money, goods, chattels, things in action, and evidences of debt. CAL. PENAL CODE ANN. §§ 7(11), (12).

While the definition of property contains no requirement that the property belong to anyone, California cases have interpreted "arson of property" to require either proof that the property does not belong to the perpetrator or, in this case of burning of one's own property, proof of an intent to defraud or injury to another person or another person's structure, forest land, or property. *See People v. Goolsby*, 222 Cal. App. 4th 1323, 1330 (Cal. Ct. App. 2014) (in holding that arson of property is not a lesser included offense

of arson of a structure, the court noted that "arson of property requires proof the property either did not belong to the defendant (because it is not unlawful to burn one's own personal property), or in burning or causing one's own property to burn, 'there is an intent to defraud or there is injury to another person or another person's structure, forest land, or property.'") (internal citation omitted); *see People v. L.T.*, 103 Cal. App. 4th 262, 265-66 (Cal. Ct. App. 2002) (holding that arson of property is committed under § 451(d) when the property burned does not belong to the person causing the fire).

In examining a similar section of the California Penal Code, the United States Court of Appeals for the Ninth Circuit, the jurisdiction in which this case arises, found that a conviction for recklessly setting fire to a structure or forest land under § 452(c) did not categorically qualify as a crime of violence because it is not limited to fires that damage the property of others. *See Jordison v. Gonzales*, 501 F.3d 1134, 1135 (9th Cir. 2007). However, the court in that case went on to specifically note that § 452(c) is "unlike other California crimes of burning, which do require proof that someone else's property was damaged." *Id.* at 1135, & n.2 (noting that there is an exemption under § 451(d) for burning one's own property); *see also People v. Morse*, 116 Cal. App. 4th 1160, 1164 (Cal. Ct. App. 2004) (discussing the legislative history of California arson statutes, and noting that the current versions of §§ 451(d) & 452(d) "exempt[] burning or causing to be burned one's own personal property" aside from the exceptions dealing with fraud and/or injury).

Moreover, nothing in our research revealed a realistic probability that a perpetrator could be convicted under § 451(d) for burning or causing to be burned his own property, without also requiring the state to prove either an intent to defraud or proof of injury to another person or another person's structure, forest land or property. *See* Judicial Counsel of California Criminal Jury Instructions § 14.83 (2014 edition) (instructing that to be convicted of burning one's own personal property, the elements are 1) willfully and maliciously; 2) setting fire to, burning, or causing to be burned . . . one's own personal property; 3) with a specific intent to defraud; or 4) resulting in injury . . .); *see also Gonzales v. Duenas-Alvarez, supra* (in focusing on the minimum conduct criminalized by a state offense there must be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.").

Therefore, as California court cases hold that "arson of property" under § 451(d) requires proof that the property burned does not belong to the person causing the fire, or, in the case of burning of one's own property, proof of an intent to defraud or injury to another person or another person's structure, forest land, or property, we hold that these are alternative elements of two distinct offenses. Thus, as the distinction renders the statute divisible within the meaning of *Descamps*, the Immigration Judge was correct in applying the modified categorical approach.

As found by the Immigration Judge, the plea colloquy demonstrates that the respondent was convicted of "arson of property" that belonged to another, as the

respondent pled "no contest" to "Count 2" of the information, which stated that the respondent "did willfully, unlawfully, and maliciously set fire to and burn and cause to be burned the property of another, to wit, John Doe . . . " (I.J. August 9, 2013 decision at 1; Exhs. 2&3). *See Descamps v. United States, supra*, at 2283 (the modified categorical approach permits an Immigration Judge to consult a limited class of documents (i.e., "judicially recognizable") to determine which alternative elements formed the basis of the defendant's conviction). We agree with the Immigration Judge that the respondent was convicted of an offense that "by its nature, involves a substantial risk that physical force against the person or property of another may be used . . . ;" therefore, the respondent was convicted of a crime of violence under 18 U.S.C. § 16(b). Moreover, as the respondent was sentenced to 16 months for this offense, it was a crime "for which the term of imprisonment [is] at least one year." Accordingly, the respondent is removable for an aggravated felony under section 101(a)(43)(F) of the Act.[4]

The respondent did not challenge the Immigration Judge's decision to deny his applications for withholding of removal and protection under the Convention Against Torture (I.J. November 4, 2013, decision at 3-6). *See* section 241(b)(3) of the Act, 8 U.S.C. § 1158;

---

[4] Amicus curiae argues that remand is required as the Immigration Judge did not specifically find that the California statute was divisible before proceeding to the modified categorical approach (Amicus Br. at 3-5). We disagree that remand is required, as the respondent and amicus curiae raised legal arguments regarding divisibility before this Board, which we addressed in this decision. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

8 C.F.R. §§ 1208.16-.18. As no argument has been raised on appeal, we consider the matter waived for appellate purposes. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/ ROGER A. PAULEY
ROGER A. PAULEY
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
SAN FRANSCISCO, CALIFORNIA

File: A036-421-357

IN THE MATTER OF JUAN JOSE MIRANDA-GODINEZ,
RESPONDENT

Nov. 4, 2013

IN REMOVAL PROCEEDINGS

CHARGES:
Section 237(a)(2)(A)(iii), alien convicted of an aggravated felony, namely a crime of violence.

APPLICATIONS:
Withholding of removal, protection under the Convention Against Torture.

ON BEHALF OF RESPONDENT:
JOHN WU, Esquire

ON BEHALF OF DHS:
MICHAEL STENBERG, Senior Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Mexico. He is also a lawful permanent resident of the United States. In June 2012, he was convicted for arson of

the property of another in violation of California penal code Section 451(d) and sentenced to a term of 16 months. Respondent was placed in removal proceedings and charged as an aggravated felon.

He contended that he was not removable as an aggravated felon because, one, his conviction is not categorically a crime of violence, in that it is possible for a person to be convicted for burning his own property.

The Court in a written decision dated September 20, 2013, and also in an order dated August 9, 2013, addressed these issues and found that the respondent had been convicted of a crime of violence because the complaint in respondent's case stated specifically that the respondent had burned the property of another person, to wit, John Doe. And in the written orders, the Court pointed out that California courts have construed even property that is considered trash, to be property within the meaning of the arson statute.

The respondent asserts that under *Descamps v. United States*, 133 S. Ct. 2276 (2013) and also under the Supreme Court's recent case of *Moncrieffe v. Holder*, he is not removable because the crime is not categorically a crime of violence. But both *Moncrieffe* and *Descamps* instruct the Court in that case, in that situation, to look to the modified categorical approach. In other words, to look at the noticeable documents under the *Taylor* and *Shepard* analysis to see whether the conviction documents narrow the conduct and allow determination as to whether the respondent's conviction fits within that crime of violence. Here those documents under the modified categorical approach do exactly the narrowing that's required as noted above.

The complaint and the count on which the respondent was found guilty by the trial court specifically noted that the property that was burned was the property of another individual, not the respondent. *See Duenas- Alvarez v. Holder*. For those reasons, the Court finds the respondent is removable as charged.

With respect to respondent's claim for withholding of removal and protection under the Torture Convention, the respondent testified that in general terms, his real fear of returning to Mexico is that there is a lot of crime and violence going on Michoacán at this time. He also mentioned that he was, in 2011 when he was in Mexico, he believes his sister had him taken to a private rehabilitation center to help treat his alcohol abuse. That he was at the rehabilitation center for six months. He escaped from the center; was caught, as he put it, by the people who ran the center, and he asserted that these individuals when he returned to the center, beat him up. He believes that his ribs were cracked, but he said he never went to the doctor. He never went to a hospital. He simply stayed in the center for another few weeks and his ribs healed themselves and eventually, a girlfriend came and got him out of the center and took him with her back to California. He never called the police. He never advised any authorities, any government officials, that these private individuals in the rehab center had beat him.

This is a case where the Court assumes, but does not need to decide, that the respondent's testimony has been credible because even if the respondent's testimony is deems credible, he has failed to meet his burden of proof for withholding of removal and protection under the Torture Convention.

Withholding under Section 241 requires proof by clear probability that the respondent would be harmed in Mexico on account of race, religion, nationality, membership in a particular social group, or political opinion. *See INS v. Stevic*, 467 U.S. 407 (1984). Past persecution under the applicable regulations at 8 C.F.R. 1208.16 gives rise to a presumption of future persecution which the Government can rebut by either showing changed circumstances or the ability of the applicant to relocate.

In this case, the Court finds that the respondent was not persecuted in the past because the respondent has never been harmed by the government or persons the government is unable or unwilling to control. *See Hoxha v. Ashcroft*, 319 F.3d 1179 (9th Cir. 2003). At most, taking respondent's testimony as credible, private individuals at a private facility, according to the respondent, beat him up after he escaped from the private facility. But there is no evidence that any government officials were involved. There is no evidence that any government officials were notified. In addition, the respondent has not identified a cognizable social group which formed one central reason for the alleged mistreatment that he suffered. *See Parussimova v. Mukasey*, 555 F.3d 734 (9th Cir. 2009). A particular social group is a group of individuals closely affiliated with each other, who share either an immutable characteristic or form of voluntary association. The key, as the Court of Appeals has pointed out, to defining a particular social group is that the group be narrowly defined. Neither alcoholics not alcoholics in Mexico nor alcoholics in Mexico who try to escape from rehabilitation centers is sufficiently narrow to constitute a particular social group. And for that reason as

well, the Court finds that respondent has not met his burden of proof with respect to withholding of removal.

With respect to future persecution, the respondent's evidence does not show it is clearly probable he will be harmed by anyone. Again, there is the same problem with nexus. Respondent's sister and his brother remain in Mexico, but this evidence does not show by a clear probability that his sister or his brother intend to do anything to the respondent. It is purely speculative at this point. And as the Government quite rightly points out, the respondent is under no obligation to go to Michoacán. He can go to a different part of Mexico, far away from his sister and his brother, should he desire to do so.

The respondent's far, with respect to general crime and violence in Mexico fails to meet his burden of proof as the Court of Appeals and as the Court have pointed out. An alien's desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground. *Zetino v. Holder*, 622 F.3d 1007, 1016 (9th Cir. 2010).

With respect to the Torture Convention, torture is any act by which extreme cruel and inhumane mistreatment is inflicted on a person intentionally by the government or persons acting with the government's knowledge or acquiescence to punish, to coerce, to obtain information, or for any reason based on discrimination. The regulations instruct the Court to look to evidence of past torture or evidence of mass, flagrant human rights violations, the ability of the applicant to relocate and any other information that might be relevant. The applicant bears the burden of proof. He

cannot meet that burden by stringing together a series of suppositions, all of which are not proven by a preponderance, and if the evidence is inconclusive, the applicant has failed to meet his burden. *See* 8 C.F.R. 1208.18; *Matter of J-F-F-*, 23 I&N Dec. 912, 917 (AG 2006).

In this case, even if the respondent's claim that he was mistreated in the private facility is true, it does not constitute torture within the meaning of the Torture Convention because it was not carried out by the government, and there is no evidence the government was aware of this and failed in its legal duty to intervene. The evidence in the record does not show mass, flagrant human rights violations perpetrated against individuals similarly situated to the respondent. And again, as noted above, the respondent does have the ability to relocate to a different part of Mexico where he will be away from relatives who he thinks, although he has not said it in so many words, might want to mistreat him by putting him in a rehabilitation center.

ORDER

Based on the foregoing, applications for withholding of removal and protection under the Torture Convention are denied.

Respondent is ineligible for voluntary departure because of his aggravated felony conviction.

He is accordingly ordered removed to Mexico.

ANTHONY S. MURRY
Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-71485
Agency No. A036-421-357

JUAN JOSE MIRANDA-GODINEZ, AKA JUAN MIRANDA, AKA JUAN JOSE MIRANDA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL, RESPONDENT

[Filed: June 28, 2016]

ORDER

Before: PAEZ, CLIFTON, and OWENS, Circuit Judges.

Respondent's petition for panel rehearing is DENIED.