No. 03-583

In the Supreme Court of the United States

JOSUE LEOCAL, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction of driving under the influence and causing serious bodily injury, in violation of Fla. Stat. Ann. § 316.193(3)(c)(2), is a "crime of violence" under 18 U.S.C. 16(a) that renders petitioner removable under the immigration laws as an aggravated felon.

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 5a-7a) is unreported. The decision of the Board of Immigration Appeals (Pet. App. 1a-4a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2003. The petition for a writ of certiorari was filed on September 29, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Haiti who arrived in the United States in 1980 and became a lawful permanent resident alien in 1987. See Pet. 4. In

October 2000, petitioner was convicted in Florida of driving under the influence (DUI) causing serious bodily injury to another, in violation of Fla. Stat. Ann. § 316.193(3)(c)(2) (West 2001). Petitioner was sentenced to two and one half years of imprisonment for that felony offense. Pet. App. 2a.

In November 2000, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner based on his DUI conviction, which the INS alleged was an aggravated felony that renders petitioner removable from the United States under 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. 2a; Pet. 5. In October 2001, an immigration judge determined that petitioner is removable as charged by the INS. The immigration judge denied petitioner's applications for relief from removal because it determined that petitioner had failed to establish his eligibility for relief. Accordingly, the immigration judge ordered petitioner removed to Haiti. Pet. App. 2a, 3a-4a; Pet. 5.[1]

2. In August 2002, the Board of Immigration Appeals (BIA) sustained the immigration judge's decision and ordered petitioner removed to Haiti. Pet. App. 1a-

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[1] On March 1, 2003, functions of several border and security agencies, including certain functions formerly performed within the Department of Justice by the INS were transferred to the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441(2), 451(b), 116 Stat. 2192, 2196 (to be codified at 6 U.S.C. 251(2), 271(b)). The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. See *Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9824, 9830-9846 (2003) (to be codified at 8 C.F.R. Pts. 1001-1337) (Justice Department implementing regulations as recodified after Homeland Security Act).

4a; see *id.* at 2a n.1 (discussing reopening of petitioner's appeal following faulty service of original BIA order).

In pertinent part, the BIA determined that petitioner's status as an aggravated felon was established by precedent of the Eleventh Circuit, within which petitioner's removal proceeding was conducted. Pet. App. 2a-3a. The BIA explained (*ibid.*) that in *Le* v. *U.S. Attorney General*, 196 F.3d 1352 (1999), the Eleventh Circuit had determined that a conviction of DUI causing serious bodily injury, in violation of Fla. Stat. Ann. § 316.193(3)(c)(2) (West 2001), is an "aggravated felony" under the immigration laws if the alien received a sentence of at least one year, because that offense is a "crime of violence" under 18 U.S.C. 16(a). *Le*, 196 F.3d at 1354; see 8 U.S.C. 1101(a)(43)(F) (defining "aggravated felony" to include crimes of violence under 18 U.S.C. 16 for which the term of imprisonment is at least one year). The BIA further explained that "the meaning of the term 'crime of violence' under 18 U.S.C. § 16 is a matter of federal criminal law" rather than immigration law, and the BIA therefore follows precedential interpretations of Section 16 by the relevant federal court of appeals (here, the Eleventh Circuit). Pet. App. 3a.

Petitioner did not seek a judicial stay of his removal. In November 2002, the INS removed petitioner to Haiti in accordance with the BIA's final order of removal. See Pet. 4. Petitioner's removal, however, did not itself prevent direct judicial review of petitioner's removal order. See *Moore* v. *Ashcroft*, 251 F.3d 919, 922 (11th Cir. 2001).

3. In an unpublished per curiam order, the Eleventh Circuit dismissed on jurisdictional grounds petitioner's petition for review of the BIA's decision. Pet. App. 5a-7a. The court of appeals determined that *Le* is binding

circuit precedent that constitutes a "*de novo* determination that a DUI that causes serious bodily injury to another is a crime of violence." *Id.* at 7a. The court thus concluded that petitioner is an aggravated felon based on his Florida conviction. Accordingly, the court held that its review of petitioner's removal order was barred under 8 U.S.C. 1252(a)(2)(C), which denies courts jurisdiction to review final orders of removal entered against aggravated felons and certain other criminal aliens. Pet. App. 6a-7a; see generally *INS* v. *St. Cyr*, 533 U.S. 289, 310-314 (2001) (determining that Section 1252(a)(2)(C) does not bar habeas corpus review of questions of law in removal proceedings).

ARGUMENT

Petitioner correctly observes (Pet. 8-14) that the courts of appeals have adopted differing approaches in applying the "crime of violence" definition of 18 U.S.C. 16 to state statutes that criminalize impaired driving that results in the death or injury of another. Whether or not that issue might warrant this Court's review in another case, it does not warrant review in this case. The petition for a writ of certiorari should be denied.

1. The definition of "aggravated felony" in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(F), provides that the term includes "a crime of violence (as defined in section 16 of title 18 * * *) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F) & note 3. Section 16 of Title 18 of the United States Code in turn defines a "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.

18 U.S.C. 16.

2. Several courts of appeals have applied one or the other of the two paragraphs of 18 U.S.C. 16 to DUI convictions under state statutes that establish death or bodily injury as an element of the offense. In *Le* v. *U.S. Attorney General*, 196 F.3d 1352 (1999), and the instant unpublished decision, the Eleventh Circuit has determined that the offense of DUI causing serious bodily injury to another is a crime of violence under Section 16(a) "because one element of the offense includes the actual use of physical force" to cause the injury. *Id.* at 1354; see Pet. App. 7a. The Eleventh Circuit has not addressed whether DUI causing serious bodily injury is a crime of violence under Section 16(b). See *Le*, 196 F.3d at 1354.[2]

In *Bazan-Reyes* v. *INS*, 256 F.3d 600 (2001), the Seventh Circuit concluded that the Wisconsin offense of

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[2] In 1999, the Supreme Court of Florida determined that there is no scienter requirement for a conviction of DUI manslaughter under Fla. Stat. Ann. § 316.193(3)(c)(3), but there must be a causal connection between the death and the operation of the vehicle. See *State* v. *Hubbard*, 751 So.2d 552 (1999). The Florida Supreme Court observed that some States have established a scienter requirement such as negligence for DUI manslaughter, while others have made DUI manslaughter a "strict liability" offense. *Id.* at 559-560. The court additionally observed that "an argument could be made that a reasonable person would never drive while intoxicated, so therefore an intoxicated driver is presumptively negligent." *Id.* at 563 n.26. The Eleventh Circuit's decisions in *Le* and this case, however, do not turn on the presence or absence of a scienter requirement in the statute of conviction.

homicide by intoxicated use of a vehicle is not a crime of violence under Section 16(a) because, "[a]lthough a conviction for [that offense] requires that the offender actually hit someone, it does not require that he intentionally used force to achieve that result." *Id.* at 609. The Seventh Circuit further concluded in *Bazan-Reyes* that a conviction under the Wisconsin statute did not constitute a crime of violence under Section 16(b). Quoting the Fifth Circuit's decision in *United States* v. *Chapa-Garza*, 243 F.3d 921 (2001)—which involved convictions under a Texas statute that classifies third and subsequent convictions for ordinary DUI (*i.e.*, not DUI causing death or serious bodily injury) as felonies, see *id.* at 923 n.5—the Seventh Circuit stated that "§ 16(b) only applies 'when the nature of an offense is such that there is a substantial likelihood that the perpetrator will *intentionally* employ physical force against another's person or property in the commission thereof.'" *Bazan-Reyes*, 256 F.3d at 611 (quoting *Chapa-Garza*, 243 F.3d at 925).

In *Omar* v. *INS*, 298 F.3d 710 (2002), the Eighth Circuit rejected the reasoning of *Bazan-Reyes* and upheld a determination of the Board of Immigration Appeals that the Minnesota offense of vehicular homicide arising from DUI is a crime of violence under Section 16(b). Without considering the application of Section 16(a), the Eighth Circuit concluded that a conviction under that vehicular homicide statute satisfied Section 16(b) because "there are no circumstances where the offense of criminal vehicular homicide does not present a substantial risk that physical force will injure another." *Id.* at 718. Judge Heaney dissented, stating the view that Section 16(b) is ambiguous as applied to the Minnesota vehicular homicide statute and that it should be deemed not to apply on the facts of *Omar* because of the depor-

tation context of that case. *Id.* at 720-723 (Heaney, J., dissenting).

The Ninth Circuit has held that the offense of DUI causing bodily injury to another is a crime of violence under 18 U.S.C. 16(a) and (b) if the statute of conviction requires that the defendant acted intentionally or recklessly, but not if the statute "can be violated through negligence alone." *United States* v. *Trinidad-Aquino*, 259 F.3d 1140, 1145, 1146 (9th Cir. 2001); see *Ursu* v. *INS*, 20 Fed. Appx. 702, 705 (9th Cir. 2001) (DUI manslaughter is not crime of violence under *Trinidad-Aquino*). Judge Kozinski dissented in *Trinidad-Aquino*, reasoning that "[d]riving a vehicle while intoxicated and then killing or injuring somebody is the classic example of an offense that 'by its nature, involves a substantial risk' that physical force will be used against another" and, accordingly, constitutes a crime of violence under Section 16(b). 259 F.3d at 1147 (Kozinski, J., dissenting) (quoting 18 U.S.C. 16(b)).

In an unpublished decision, the Sixth Circuit stated that the Indiana offense of DUI resulting in the death of another person is a crime of violence under both Section 16(a) and Section 16(b). *United States* v. *Santana-Garcia*, No. 98-2234, 2000 WL 491510 *2 (2000) (noted at 211 F.3d 1271 (Table)).

3. As the foregoing discussion demonstrates, the application of 18 U.S.C. 16 to felony DUI convictions that include death or bodily injury as an element of the offense presents difficult questions under Section 16(a) as well as under Section 16(b). This case presents *only* an application of Section 16(a). The BIA ordered petitioner removed on the basis that his Florida conviction is an aggravated felony under Section 16(a) in light of *Le*. Pet. App. 2a-3a. The court of appeals similarly dismissed the petition for review in light of *Le*, which

expressly did not interpret or apply Section 16(b). *Id.* at 7a; see *Le*, 196 F.3d at 1354. The application of Section 16(b) to petitioner's Florida conviction is an issue that has not been addressed below and, accordingly, should not be reviewed by this Court. See *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."); *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996) ("[W]e generally do not address arguments that were not the basis for the decision below.").

The court of appeals' determination that it lacked jurisdiction over the petition for review was a "*de novo*" determination, Pet. App. 6a, rather than a review of the BIA's removal order under the substantial-evidence standard, see 8 U.S.C. 1252(b)(4). Nevertheless, the question whether petitioner is an aggravated felon under 18 U.S.C. 16 bears directly on petitioner's removability as well as the reviewability of his removal order. The Court's prudential policy against granting certiorari to review issues that were not the basis for the decision below therefore is reinforced in this case by principles of deference to agency decision-making. Those deference principles counsel against deciding in the first instance, in this Court, the unexplored issue whether petitioner's Florida conviction is a crime of violence under Section 16(b)—which presumably would determine petitioner's removability if the conviction were not a crime of violence under Section 16(a). See generally *INS* v. *Ventura*, 537 U.S. 12, 16-18 (2002) (discussing rule against judicial decision, on review of a removal order, of issues that have not been considered by the BIA in the first instance).

The legal issues that petitioner raises would be better addressed by this Court, if at all, in a future case

that would allow the Court to interpret and apply *both* 18 U.S.C. 16(a) *and* 18 U.S.C. 16(b). The unpublished decision in this case does not present an opportunity for the Court to consider all of the various approaches that have been adopted by the courts of appeals in the cases discussed above.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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