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## **I. INTRODUCTION**

Respondent, N.B., respectfully submits that the Immigration Judge erred in determining that: 1) his prior conviction barred him from withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act and the Convention Against Torture, Article 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988); and, 2) he failed to establish eligibility for deferral of removal under the Convention Against Torture, art. 3. Respondent requests the Board remand these proceedings for consideration of his applications for withholding of removal under INA § 241(b)(3) or the Convention Against Torture, art. 3, or, in the alternative, that it grant him deferral of removal under the Convention Against Torture, art. 3.

## **II. STATEMENT OF FACTS & PROCEDURAL HISTORY**

The subject of this appeal is the August 13, 2018 decision by the Immigration Judge to deny Respondent's application for withholding of removal under INA § 241(b)(3) and the Convention Against Torture, art. 3, and deferral of removal under the Convention Against Torture, art. 3—resulting in an order to remove Respondent to Jamaica. I.J. at 1. The Immigration Judge issued the decision after withholding-only proceedings initiated after the Department of Homeland Security issued to Respondent a Notice of Intent/Decision to Reinstate Prior Order, and an Asylum Officer found he had established a reasonable fear of persecution upon return to Jamaica. I.J. at 1-2. The Immigration Judge found Respondent testified credibly and corroborated his testimony. I.J. at 5-6. This brief adopts the findings of fact of the Immigration Judge, except to extent they differ from the following.

Respondent is a bisexual man from Jamaica who fled to the United States after a violent attack on his person, and who fears that if he returns to Jamaica “. . . [his] life would be in

danger, [and that he would have to look] over [his] back every second of [his] life.” Tr. at 55. As the Immigration Judge recounts, Respondent realized he was romantically and sexually attracted to both men and women around the age of ten. I.J. at 3. As he progressed in his adolescence he dared not express this to anyone else or act on his feelings, because as he explained “I kept them closeted for fear of retaliation and possible danger.” Tr. at 37; I.J. at 3.

When Respondent returned to Jamaica in 2013, news of his relationship with a man in the United States had travelled back to his neighborhood. Tr. at 46; I.J. at 4. This is when the trouble began. Residents of his neighborhood, even those who had been childhood friends, spewed invective at him including Jamaican slurs for members of the LGBT community. Tr. at 47; I.J. at 4. Desiring to avoid conflict or becoming a target, Respondent denied his bisexuality to those harassing him. Tr. 48; I.J. at 4 He also declined to approach the police, recounting the time a classmate’s gay uncle was rebuffed by them after attempting to report an attack against him. Tr. at 49; I.J. at 3. Respondent then became a victim of a violent encounter based on his sexual orientation.

Three armed and masked men abducted Respondent from the side of the road at night, pulling him into a van—demanding to know if he was gay. Tr. at 51; I.J. at 4. He denied being gay, and offered his cell phone and money to his captors. Tr. at 52; I.J. at 4. Before kicking him out of their van, the assailants threatened Respondent’s life if they were ever to see him again. *Id.* Respondent then sought shelter in his sister’s house. Tr. at 55; I.J. at 4. To avoid being targeted again he neither approached the police, nor relayed the details of the incident to his sister. Tr. at 53-54; I.J. at 4. Within months he would flee Jamaica to the United States. Tr. at 55; I.J. at 4.

In the United States, Respondent would be the victim of crime again—resulting in the loss of his brother. Exh. 6 at 14 (p. 8 of Pre-Sentencing Report). A New Jersey Grand Jury for

Essex County indicted Respondent for violating N.J. Stat. § 2C:35-5(a)(1), possession of a controlled substance with intent to distribute. Exh. 10 at 9, 14. The statute makes unlawful the “manufacture, distribution or dispens[ing], or possess[ion] . . . with intent to manufacture, distribute or dispense, a controlled dangerous substance.” N.J. Stat. § 2C:35-5(a)(1). Police officers, responding to a home invasion and shooting at Respondent’s home, found a box of baby wipes containing cocaine. Exh. 6 at 14 (p. 8 of Pre-Sentencing Report).

### **III. ISSUES PRESENTED FOR REVIEW**

The issues presented by this appeal are as follows:

1. Whether Respondent is barred from withholding of removal under INA § 241(b)(3) or the Convention Against Torture, art. 3 because his conviction for possession with intent to distribute a controlled substance under N.J. Stat. § 2C:35-5(a)(1) is a particularly serious crime.
2. Whether Respondent qualifies for deferral of removal under the Convention Against Torture, art 3 by having established it is more likely than not that he will be tortured by or with the acquiescence of the Government of Jamaica.

### **IV. STANDARD OF REVIEW**

The Board “. . . review[s] questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo.” 8 C.F.R. § 1003.1(d)(3)(ii).

### **V. SUMMARY OF ARGUMENT**

Respondent’s argument is two-fold. First, Respondent argues his conviction for possession of a controlled substance under N.J. Stat. § 2C:35-5(a)(1) does not bar him from eligibility for withholding of removal under INA § 241(b)(3) or the Convention Against Torture, art. 3. Respondent’s conviction is for an offense that does not fall under the presumption of

particular seriousness created by *Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002), because it did not involve unlawful trafficking. Neither, as a matter of discretion under *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007), does the offense rise to the level of a particularly serious crime. Finally, even if the conviction is for an offense that is presumptively a particularly serious crime under *Matter of Y-L-*, unusual circumstances present to rebut the presumption.

Second, Respondent argues he is eligible for deferral of removal under the Convention Against Torture, art. 3 because he established it is more likely than not that he will be tortured by or with the acquiescence of the Government of Jamaica if returned to Jamaica. Respondent points to a constellation of circumstances establishing this likelihood, including: the active threat against his life because of his sexual orientation, the knowledge in his community about his sexual orientation, the criminalization of same sex relationships in Jamaica, and the hostility of Jamaican law enforcement toward members of the LGBT community.

## VI. ARGUMENT

### A. Respondent is not barred from withholding of removal under INA § 241(b)(3) or the Convention Against Torture, art. 3, because Respondent's conviction for possession with intent to distribute a controlled substance under N.J. Stat. § 2C:35-5(a)(1) is not a particularly serious crime.

Respondent's conviction for possession with intent to distribute a controlled substance involved illicit drugs, but did not involve trafficking. It was a possessory offense that is not afforded the presumption of particular seriousness by the Attorney General's opinion in *Matter of Y-L-*. Furthermore, the relevant circumstances reveal the offense is not a particularly serious crime even as a matter of discretion under *Matter of N-A-M-*. Finally, even should the Board conclude that *Matter of Y-L-* controls Respondent's conviction, the unusual circumstances surrounding the offense rebut the presumption of particular seriousness.

**1. The presumption of particular seriousness applied to “unlawful trafficking in controlled substances” by *Matter of Y–L–* does not apply to Respondent’s conviction for possession with intent to distribute under N.J. Stat. § 2C:35-5(a)(1), a possessory offense not involving the “unlawful trading or dealing” essential to a trafficking crime.**

In *Matter of Y–L–*, the Attorney General held that “aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute particularly serious crimes.” 23 I&N Dec. at 274 (internal quotation marks removed). While *Matter of Y–L–* created a presumption that drug-*trafficking* offenses are particularly serious crimes, it did not disturb prior Board precedent holding that drug-*possession* offenses are not. See *Matter of Toboso–Alfonso*, 20 I&N Dec. 819, 823 (BIA 1990) (simple possession of cocaine is not a particularly serious crime).

The Attorney General’s careful distinction between trafficking offenses and possessory offenses mirrors the Board’s longstanding disparate treatment of crimes that present a risk of harm to others and those that do not. Compare *Matter of Garcia–Garrocho*, 19 I&N Dec. 423, 426 (BIA 1986) (burglary that “involve[s] physical injury or potentially life-threatening acts” is a particularly serious crime) with *Matter of Frentescu*, 18 I&N Dec. 244, 247 (burglary with intent to commit theft is not a particularly serious crime). This distinction mirrors the INA’s basic requirement that only those offenses that “indicate[ ] that the alien poses a danger to the community” may constitute particularly serious crimes. See *Matter of G–G–S–*, 26 I&N Dec. 339, 334 (BIA 2014).

Subsequent case law issued after *Matter of Y–L–* has elaborated on the definition of “trafficking,” clarifying the distinction between the “drug trafficking felonies” that are presumptively particularly serious under *Matter of Y–L–* and the possessory drug offenses that are categorically not particularly serious under cases like *Matter of Toboso–Alfonso*. Relying on the term’s plain meaning, the United States Supreme Court explained that “ordinarily

‘trafficking’ means some sort of commercial dealing.” *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006). Similarly, the United States Court of Appeals for the Third Circuit held that “trafficking” must involve “the unlawful trading or dealing of a controlled substance.” *Jeune v. Att’y Gen. of the U.S.*, 476 F.3d 199, 202 (3d Cir. 2007) (quoting *Gerbier v. Holmes*, 280 F.3d 297, 305 (3d Cir. 2002)). Like the federal courts, the Board has reaffirmed its own plain-meaning reading of the term “trafficking” to require “unlawful trading or dealing” of a controlled substance. See *Matter of L–G–H–*, 26 I&N Dec. 365, 368 (BIA 2014) (citing *Matter of Davis*, 20 I&N Dec. 536, 540-41 (BIA 1992)). Taking these precedents into consideration, *Matter of Y–L–*’s presumption of particular seriousness extends only to those offenses that involve “unlawful trading or dealing” in a controlled substance.

A drug-related offense involves unlawful trading or dealing where it necessarily entails “a commercial transaction.” *Matter of L–G–H–*, 26 I&N Dec. at 371. The Board has further defined the phrase “commercial transaction” to mean the “passing of goods from one person to another for money or other consideration.” *Id.* at 371 n.9. The Third Circuit agrees that “[e]ssential to the concept of ‘trading or dealing’ is activity of a ‘business or merchant nature.’” *Steele v. Blackman*, 236 F.3d 130, 135 (3d Cir. 2001) (quoting *Davis*, 20 I&N Dec. at 541). Because commerciality and exchange are crucial elements of trading or dealing, certain felonious criminal activity involving a controlled substance—including transfer without remuneration and manufacture for personal use—does not constitute “trafficking.” See *Steele*, 236 F.3d at 135; *Jeune*, 476 F.3d at 204.

Here, Respondent’s conviction under N.J. Stat. § 2C:35-5(a)(1) is not a “drug trafficking” offense within the meaning of *Matter of Y–L–* because possession with intent to distribute a controlled substance does not necessarily entail a completed “commercial transaction.” The very

nature of the conviction implies the absence of trading or dealing. *See* N.J. Stat. § 2C:35-5(a)(1) (*separately* criminalizing the manufacture, distribution, or dispensation of a controlled substance). Moreover, possession with intent to distribute under N.J. Stat. § 2C:35-5(a)(1) is a fundamentally possessory offense; indeed, the prosecution can obtain a conviction relying on nothing more than the quantity of drugs possessed. *See State v. Vasquez*, 864 A.2d 409, 416 (N.J. Super. Ct. App. Div. 2005) (approving an instruction allowing the jury to consider the “quantity and packaging” of the drug to determine the element of intent); New Jersey Model Jury Charges (Criminal), 2C:35-5 Possession of CDS with Intent to Distribute (instructing the jury to consider quantity as evidence of intent to distribute).<sup>1</sup>

Because a conviction for possession with intent to distribute under N.J. Stat. § 2C:35-5(a)(1) does not require “unlawful trading or dealing,” it is not “unlawful trafficking in controlled substances” within the meaning of the *Matter of Y-L-*. No presumption of particular seriousness applies. Instead the Board must consider the circumstances of the offense to determine whether it is a particularly serious crime that bars Respondent from withholding of removal. *See Matter of N-A-M-*, 24 I&N Dec. at 342.

The circumstances of Respondent’s offense demonstrate that it is not a particularly serious crime. Where a conviction is not for an aggravated felony resulting in an aggregate sentence of imprisonment for five years or more, the Board looks at “the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction” to determine whether it is a particularly serious crime. *Matter of N-A-M-*, 24 I&N Dec. at 342. The Immigration Judge characterized the nature of Respondent’s conviction as “serious drug offenses”, noted the length of the sentence, and finally highlighted the shooting

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<sup>1</sup> <https://www.judiciary.state.nj.us/attorneys/assets/criminalcharges/cds003.pdf>

death of Respondent's brother to conclude that the Respondent had committed a particularly serious crime. I.J. at 7. As to the nature of the offense, Respondent's conviction under N.J. Stat. § 2C:35-5(a)(1) arose from police finding a box of baby wipes containing cocaine and some bags "scattered" on the floor. Exh. 6 at 14 (p. 8 of Pre-Sentencing Report). While the length of a sentence is not the "dominant factor" in determining the seriousness of a crime, here, Respondent received less than a year of incarceration and four years of probation—guaranteeing long-term, ongoing supervision of Respondent's activities. *Matter of N-A-M-*, 24 I&N Dec. at 343; I.J. at 7. Finally, the underlying offense supporting Respondent's conviction did not cause the shooting death of his brother. Rather, the brother died at the hands of "Dre's boys" in a violent home invasion, spurred on by possibly a number of different motivations. *See* Exh. 6 at 14 (p. 8 of Pre-Sentencing Report). As a matter of discretion, Respondent's conviction is not a particularly serious crime.

**2. Even should the Board conclude that *Matter of Y-L-* does apply to Respondent's conviction under N.J. Stat. § 2C:35-5(a)(1), the "unusual circumstances" of Respondent's offense rebut the presumption that his conviction is for a particularly serious crime.**

If the Board concludes that Respondent's conviction is subject to *Matter of Y-L-*'s presumption of particular seriousness, it must then consider whether "unusual circumstances" rebut that presumption. *See* 23 I&N Dec. at 276–77. An offense is not a particularly serious crime if: (1) it involves a small quantity of drugs; (2) "the offending transaction" involves a modest amount of money; (3) the Respondent was peripherally involved in the "activity, transaction, or conspiracy"; (4) there was no violence or threat of violence involved in the offense; (5) there was no organized-crime or terrorist involvement in the offense; (6) the offense had no harmful effect on juveniles; and, (7) other "unusual circumstances" are present. *Id.*

Here, consideration of these factors rebuts the presumption of particular seriousness. First, the offense involved a small quantity of drugs—no more than could fit in a box of baby wipes. Exh. 6 at 14 (p. 8 of Pre-Sentencing Report). Second, no “offending transaction” took place. Third, while Respondent did possess the controlled substance, Respondent was not involved in a transactional activity. Fourth, the offense itself did not involve violence. While the Respondent and his family were victims of a home invasion, the violence was not directly tied to Respondent’s offense. Fifth, there was no organized-crime or terrorist involvement in the offense. Finally, sixth, the underlying circumstances of the offense do not indicate any harmful effects on juveniles occurred. At sentencing, the New Jersey State Court dismissed the charge of possession of a controlled substance with intent to distribute within 1,000 feet of a school. Exh. 10 at 7.

**B. Respondent is eligible for deferral of removal under the Convention Against Torture, art. 3 because he has established it is more likely than not that he will be tortured by or with the acquiescence of the Government of Jamaica**

The evidence submitted and testimony offered by Respondent establishes that he is more likely than not to be tortured by Government of Jamaica, or by private actors with the acquiescence of the Government of Jamaica—which would remain willfully blind to the torture. To establish eligibility for deferral of removal under the Convention Against Torture, art. 3, Respondent must establish it is more likely than not he will be tortured if removed to Jamaica. 8 C.F.R. § 1208.17(a). Torture is defined as “(1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for an illicit or proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and, (5) not arising from lawful sanctions. *Auguste v. Ridge*, 395 F.3d 123, 151 (3rd Cir., 2005). Additionally, if a private actor perpetrated the torture,

Respondent must establish the torture took place with the acquiescence of the Government of Jamaica, where the government does not have actual knowledge of the torture but was “willfully blind” to the torture taking place. 8 C.F.R. § 1208.18(a)(1); *Myrie v. Att’y Gen. U.S.*, 855 F.3d 509, 517 (3d Cir. 2017).

Here, based on the active threat to his life, the widespread knowledge of his sexual orientation, and Jamaican officials’ hostility to members of the LGBT community, Respondent can establish it is more likely than not he will be tortured if returned to Jamaica. Physical violence against members of the LGBT community is routine. According to the United States Department of State’s Jamaica 2017 Human Rights Report, a Jamaican NGO reported, “19 incidents of physical assault [and] five mob attacks.” Exh. 12 at 6. Furthermore, same sex relations are criminalized in Jamaica, which can result in the imposition of a sentence of up to ten years of hard labor. The Offences Against the Person Act § 79 (1864)<sup>2</sup>; see *Bromfield v. Mukasey*, 543 F.3d 1071, 1074 (9th Cir., 2008). Article 76 even penalizes non-sexual displays of affection between men with up to two years of imprisonment, affording Jamaican Courts the discretion to impose the condition of hard labor. The Offences Against the Person Act § 76 (1864). The Department of State warns travelers to Jamaica of “assault, ‘corrective rape’ of women accused of being lesbians, arbitrary detention, mob attacks, stabbings, harassment of LGBTI patients by hospital and prison staff, [and] blackmail.” Local Laws & Special Circumstances, Jamaica International Travel Information, U.S. Dep’t. of State (Jan. 10, 2018).<sup>3</sup> Combined with the “sense of impunity with respect to suspected unlawful killings” by police

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<sup>2</sup> <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/73502/104126/F639019451/JAM73502%202010.pdf>

<sup>3</sup> <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Jamaica.html>

officers and the inhuman conditions of prison and detention centers, it is more likely than not that Respondent will be tortured. Exh. 12 at 3, 5, 13.

Respondent testified he was abducted by armed masked men, pulled into a van, and severely beaten on his face and stomach. Tr. at 51. During this ordeal Respondent's assailants repeatedly asked if he was a "batty boy", Jamaican slang for a gay man. Respondent testified the entire conversation during the beating focused on his sexual orientation. Tr. at 52. After the masked men threatened to kill Respondent, he offered his cell phone and money in exchange for his freedom. Tr. at 51. After being released, the masked men threatened to kill Respondent if they should ever come across him again. Tr. at 52. Taking their threat seriously, Respondent gathered his belongings and fled to his sister's home—avoiding being seen by not seeking medical attention at the hospital or reporting it to police. Tr. at 53-54. Respondent was not only severely beaten, the torture took a mental toll as well. Respondent still suffers from post-traumatic stress disorder because of the incident. Exh. 11 at 2 (Entry on April 24, 2018).

If returned to Jamaica, Respondent will face torture again. It is now known among his neighbors and childhood friends that Respondent is bisexual. *See* Tr. at 46. The Immigration Judge downplayed the threat to Respondent's life, noting that Respondent's attackers have neither "targeted [Respondent's] family," nor, "continued to search for him since he left Jamaica." I.J. at 9. Respondent's attackers would not necessarily target Respondent's family. Unlike gang violence attendant to extortion, for example, the assailants targeted Respondent for his known sexual orientation. It does not follow they would then target Respondent's family. It is also unnecessary to demonstrate that they continue to look for Respondent to this day. The threat stands on its own terms. If they see him again, they will kill him. *See* Tr. at 52; I.J. at 4.

The Government of Jamaica is willfully blind to the torture of members of the LGBT community. Police officers have failed to “respond adequately” to at least six cases of discrimination, including violent attacks, against members of the LGBT community. Exh. 12 at 13. Respondent testified that a classmate’s gay uncle reported that he had been tortured, but that police officers had better things to do than address, “homosexual affairs.” Tr. at 37. The Immigration Judge noted that Respondent had failed to report any of the incidents of discrimination or violence that he endured to the police. I.J. at 9. Aside from Respondent’s testimony that he did not do so in order to maintain a low profile because he did not want to exacerbate the harassment and wanted to avoid a second encounter with the masked men, reporting these incidents to police could subject him to legal and physical jeopardy because of Jamaica’s criminalization of homosexuality. Tr. 48, 53-54; The Offences Against the Person Act §§ 76, 79 (1864).

## **VII. CONCLUSION**

For the foregoing reasons, Respondent respectfully submits that he is not barred from withholding of removal under INA § 241(b)(3) or the Convention Against Torture, art. 3, and that even if he is not eligible for these forms of relief, he is entitled to deferral of removal under the Convention Against Torture, art. 3. Respondent requests the Board remand these proceedings for consideration of his applications for withholding of removal under INA § 241(b)(3) or the Convention Against Torture, art. 3, or, in the alternative, that it grant him deferral of removal under the Convention Against Torture, art. 3.

November 27, 2018

Respectfully submitted,

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**PROOF OF SERVICE**

On November 27, 2018, I, Geoffrey M. Loudon mailed by overnight courier a copy of this brief and any attached pages to DHS Assistant Chief Counsel at the following address:

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