**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
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**Name: NGUYEN, NGHIA HOANG**

**A 087-687-659**

**Date of this notice: 2/22/2018**

Enclosed is a courtesy copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Kendall Clark, Molly
Malphrus, Garry D.
Guendelsberger, John

Userteam: Docket

File: A087 687 659 – Kansas City, MO

Date: FEB 22 2018

In re: Nghia Hoang NGUYEN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: Melissa L. Castillo
Assistant Chief Counsel

APPLICATION: Termination

The respondent's case is before the Board upon remand from the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit, in a November 10, 2014, order granted the Government's motion to remand to the Board to consider the effect, if any, of the Board's decision in *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014), on the respondent's removability. In response to this remand order, the Department of Homeland Security (DHS) has filed a brief and amended brief. The respondent has not filed a brief for our consideration.

In a decision entered on October 31, 2013, the Immigration Judge found the respondent, a lawful permanent resident, removable under section 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) of the Immigration and Nationality Act (two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct). Removability was based on the respondent's conviction for the offense of grand theft, $300 or more, but less than $5,000 under Fla. Stat. § 812.014(1) and a second conviction for the offense of stealing under Mo. Rev. Stat. § 570.030.1 (IJ at 3; Exh. 2, Tabs A, B). The respondent appealed to this Board, contending that the DHS did not establish that his conviction for grand theft under Florida law is, in fact, for a crime involving moral turpitude. On appeal, we affirmed the decision of the Immigration Judge in a decision entered on April 11, 2014. The respondent thereafter filed a Petition for Review in the Eighth Circuit. This remand follows.

Since the circuit court's remand, three subsequent decisions have issued in *Matter of Chairez*. *See Matter of Chairez, (Chairez II),* 26 I&N Dec. 478 (BIA 2015); *see also Matter of Chairez and Sama,* 26 I&N Dec. 686 (A.G. 2015); *see also Matter of Chairez (Chairez III),* 26 I&N Dec. 819 (BIA 2016). During this same intervening period of time, the Supreme Court issued *Mathis v.*

[1] Attorney James McNabb filed the respondent's petition for review in the Eighth Circuit but has not filed a Form EOIR-26, indicating that he is currently the respondent's representative at this time. A courtesy copy of this decision will be sent to attorney McNabb in light of information in the record indicating that the respondent was removed from the United States on June 24, 2014 (DHS Br. at 1 n.1; Tab G (Form I-205 Warrant of Removal/ Deportation).

*United States,* 136 S.Ct. 2243 (2016), which addresses the methodology for determining whether a criminal statute is "divisible." *See Chairez III,* 26 I&N Dec. at 819.

We have applied the most recent precedential authority to the facts of this case to determine whether an offense under Fla. Stat. § 812.014(1) constitutes a crime involving moral turpitude. In *Matter of Silva-Trevino III*, 26 I&N Dec. 826 (BIA 2016), we concluded that the categorical and modified categorical approaches provide the proper framework for determining whether a conviction is for a crime involving moral turpitude. *Id.* at 830-31. We further held that, unless controlling case law of the governing Federal court of appeals (here, the United States Court of Appeals for the Eighth Circuit) expressly dictates otherwise, the realistic probability test, which focuses on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, should be applied in determining whether an offense is a categorical crime involving moral turpitude. *See id.* at 831-33; *see also Bobadilla v. Holder.*, 679 F.3d 1052 (8th Cir. 2012) (adopting the *Silva-Trevino* framework).

The statute under which the respondent was convicted requires proof of the following three elements: (1) knowingly obtaining or using, or endeavoring to obtain or use, the property of another, (2) with the intent to permanently or temporarily, (3) either (a) deprive the other person of a right or benefit of the property or (b) appropriate the property to one's own use or to the use of any person not entitled to the use of the property. Fla. Stat. § 812.014(1).

We have recently held that a theft offense is a crime involving moral turpitude if it involves a taking or exercise of control over another's property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded. *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016). *See also Matter of Grazley,* 14 I&N Dec. 330, 333 (BIA 1973) (holding that temporary takings of property do not constitute crimes involving moral turpitude). In so doing, we noted that when evaluating whether a theft offense involves moral turpitude, "it is appropriate to distinguish between substantial and de minimis takings." *Id.* at 851.

The Florida statute does not include as a required element that the "theft" occur under circumstances where the owner's property rights are substantially eroded, but rather includes de minimis takings such as joyriding. *See* Fla. Stat. § 812.014(1); *see State v. Dunmann*, 427 So. 2d 166 (Fla. 1983) (holding that the Florida joyriding statute, Fla. Stat. § 812.041, was repealed by implication by Fla. Stat. §§ 812.014 and 812.012); *Stephens v. State*, 444 So. 2d 498 (Fla. Dist. Ct. App. 1984) (remanding the defendant's case for a new trial because he had been convicted under Florida's joyriding statute, which had been subsumed within Florida's omnibus theft statute). Thus, the offense of grand theft under Florida law is categorically broader than a generic crime involving moral turpitude.

As the statute of conviction includes some crimes that involve moral turpitude (i.e., a permanent taking or a taking that substantially erodes the owner's property rights) and some that do not (i.e., de minimis takings), the respondent's Fla. Stat. § 812.014 conviction is not for an offense under section 237(a)(2)(A)(ii) of the Act unless the statute is "divisible," such that the modified categorical approach can be applied. *See Descamps v. United States*, 133 S. Ct. 2276, 2282 (2013).

In removal proceedings, we evaluate the divisibility of criminal statutes by employing the standards set forth in *Mathis v. United States*, in which the Supreme Court further explained the "divisibility" analysis in *Descamps*. *See Chairez III,* 26 I&N Dec. at 819. Under *Mathis*, the divisibility of a statute depends on whether the statutory alternatives are discrete "elements" as opposed to "means" of committing an offense. *Mathis v. United States*, 136 S. Ct. at 2256. The elements of a crime are those "constituent parts" of a crime's legal definition—the things that the "prosecution must prove to sustain a conviction." *Id.* at 2248. Thus, the divisibility of section 812.014 depends upon whether the taking being temporary or permanent is an "element" of the offense or merely a "brute fact" about which the jury can disagree while still rendering a guilty verdict. *See Mathis v. United States*, 136 S. Ct. at 2248.

On its face, the language of section 812.014 of the Florida Statutes does not specify whether temporarily or permanently taking property is an "element" of the offense or merely a means of committing the offense. *See* Fla. Stat. § 812.014(1). We find that contrary to the government's position on remand, permanent and temporary takings simply comprise alternative means of committing grand theft in Florida. We find no authority suggesting that permanent or temporary takings are alternative elements of grand theft about which Florida jurors must agree in order to convict. *See, e.g.*, *State v. Getz*, 435 So. 2d 789, 791 (Fla. 1983) (setting forth the elements of section 812.014); *see also* Florida Standard Jury Instructions (criminal) 14.1. This renders the statute indivisible and thus, outside the "narrow range of cases" in which the modified categorical approach can be employed. *Descamps v. United States*, 133 S.Ct. at 2283 (*quoting Taylor v. United States*, 495 U.S. at 575, 602 (1990)).

For the foregoing reasons, the respondent's conviction for grand theft in violation of section 812.014 of the Florida Statutes is not categorically a crime involving moral turpitude and is not divisible such that the modified categorical approach applies. Consequently, as a matter of law, the sole charge of removability under section 237(a)(2)(A)(ii) of the Act (two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct), cannot be sustained. Termination of these proceedings is warranted.[2]

Accordingly, the following order will be entered.

ORDER: The removal proceedings are terminated.

FOR THE BOARD

[2] We dismiss as meritless the government's contention that we lacked jurisdiction over the original appeal because it was untimely, particularly in view of the procedural posture of this case. The government concedes, moreover, that it failed to raise this issue previous to the Eighth Circuit's remand (DHS Br. at 4).