U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: HEGANA, ABAYNEH ARFICHO **A 062-520-623**

Date of this notice: 1/26/2017

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Pauley, Roger
Wendtland, Linda S.

Userteam: Docket

File: A062 520 623 – Arlington, VA

Date: JAN 26 2017

In re: ABAYNEH ARFICHO HEGANA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jason Alexander Dzubow, Esquire

ON BEHALF OF DHS: Justin Leone
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

APPLICATION: Termination

This case is before us pursuant to an appeal filed by the Department of Homeland Security ("DHS") of the Immigration Judge's September 15, 2015, decision terminating removal proceedings against the respondent. The respondent has filed an opposition to the DHS's appeal. The appeal will be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent, a native and citizen of Ethiopia, was accorded lawful permanent resident status in the United States on February 24, 2013. On May 5, 2014, he was convicted of burglary in the third degree under section 6-204 of the Maryland Criminal Law and sentenced to a 364-day term of imprisonment. On May 7, 2015, after having departed the country, the respondent applied for admission to the United States as a returning lawful permanent resident. The DHS charged the respondent with inadmissibility pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an alien "seeking [] admission into the United States" who has been convicted of a crime involving moral turpitude. *Id.; see also Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011) (addressing circumstances under which returning lawful permanent resident can be regarded as applicant for admission under section 101(a)(13)(C) of the Act, and consequently charged under inadmissibility grounds set forth at section 212 of the Act). The respondent filed a motion to terminate proceedings, which the Immigration Judge granted, finding that the respondent is not inadmissible as charged. The DHS appealed that decision, arguing that the respondent's burglary offense is a categorical crime involving moral turpitude.

II. ISSUE

In this case we must decide whether a conviction for burglary of a dwelling constitutes a crime involving moral turpitude when the dwelling need not be occupied or inhabited at the time of the offense.

III. ANALYSIS

The statutory phrase "crime involving moral turpitude" is broadly descriptive of a class of offenses involving "reprehensible conduct" committed with some form of "scienter"—that is, with a culpable mental state, such as specific intent, deliberateness, willfulness, or recklessness. *Matter of Louissaint*, 24 I&N Dec. 754, 756–57 (BIA 2009). Conduct is "reprehensible" in the pertinent sense if it is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *See, e.g., Matter of E.E. Hernandez*, 26 I&N Dec. 397, 398 (BIA 2014).

The Board recently concluded in *Matter of Silva-Trevino*, 26 I&N Dec. 826, 830 (BIA 2016), that the categorical approach is the proper methodology for determining whether an offense constitutes a crime involving moral turpitude. To this end, when determining whether a conviction for a State or Federal offense involves moral turpitude, we examine the elements of the statute of conviction to determine whether they fit within or are narrower than the generic definition of a crime involving moral turpitude. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185–87 (2007); *Shepard v. United States*, 544 U.S. 13, 24 (2005); *Taylor v. United States*, 495 U.S. 575, 599–600 (1990)). In examining the statute of conviction, we do not consider the facts of a particular respondent's crime, but rather we "must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe,* 133 S. Ct. at 1680–81 (citation omitted). Nonetheless, "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." *Id.* at 1685 (quoting *Duenas-Alvarez,* 549 U.S. at 193) (internal citations omitted). Unless circuit court law dictates otherwise, we apply this realistic probability test in the context of crimes involving moral turpitude. *Matter of Silva-Trevino*, 26 I&N Dec. at 831.[1]

The respondent was convicted of burglary in the third degree under section 6-204 of the Maryland Criminal Law, which provides, in pertinent part that "[a] person may not break and enter the dwelling of another with the intent to commit a crime." The DHS argues that because the respondent was convicted of burglary of a dwelling, his crime categorically involves moral turpitude, relying on *Matter of Louissaint*, where we held that burglary of an "occupied dwelling" fits within the generic definition of a crime involving moral turpitude without regard

[1] In cases involving crimes of moral turpitude, the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, has adopted the categorical approach based on Supreme Court precedent, without expressly addressing the realistic probability test. *See Prudencio v. Holder*, 669 F.3d 472, 484 (4th Cir. 2012).

to the nature of the offense the burglar intended to commit once inside. *Id.* at 758–59. Section 6-204 of the Maryland Criminal Law is distinguishable from the statute at issue in *Matter of Louissaint*, however, because a conviction under the latter requires proof that "another person [was] in the dwelling at the time" the burglary occurred. Fla. Stat. Ann. § 810.02(3)(a). Conversely, Maryland courts have held that the term "dwelling"—which is not defined by statute but rather judicially defined by case law—includes buildings that are not inhabited, let alone occupied, at the time of the burglary. That is, an individual may be convicted of third degree burglary under Maryland law even if no one is currently residing in the pertinent dwelling. *See McKenzie v. State*, 962 A.2d 998, 999 (Md. 2008) (holding that an unoccupied apartment that is between rentals, but is suitable for occupancy, is a "dwelling" for purpose of statutory burglary); *see also Hobby v. State*, 83 A.3d 794 (Md. 2014) (holding that a dwelling did not lose its character as a dwelling simply because it was unoccupied for an 8-month period); *Herbert v. State*, 354 A.2d 449 (Md. Ct. Spec. App. 1976) (noting that a hotel is a dwelling house even if all who sleep there are transients, and the proprietor and his family and servants all sleep elsewhere).

Because there is no requirement that the dwelling be occupied or even inhabited under Maryland law, the minimum conduct that has a realistic probability of being prosecuted under section 6-204 of the Maryland Criminal Law does not present the same interests and risks as those emphasized in *Matter of Louissaint*. For example, an offender can be convicted of burglary in the third degree even if the dwelling has been uninhabited—with no one living in it—for 8 months. *See Hobby*, 83 A.3d at 812. In such a circumstance, it would be difficult to conclude that a "burglar tears away the resident's justifiable expectation of privacy and personal security." *Matter of Louissaint*, 24 I&N Dec. at 758. Indeed, no "resident" would exist in that scenario. Similarly, it would be difficult to conclude that a conviction under section 6-204 of the Maryland Criminal Law necessarily invites a "violent defensive response from [a] resident," when Maryland courts do not require that there be an actual resident in the dwelling capable of responding violently. *Id.* at 758–59. Although we recognize that certain privacy and property interests can remain with a dwelling irrespective of whether it is occupied or inhabited, the minimum conduct that has a realistic probability of being prosecuted under section 6-204 of the Maryland Criminal Law is not conduct that is inherently base, vile, or depraved, or contrary to the accepted rules of morality. *See Matter of E.E. Hernandez*, 26 I&N Dec. at 398. As a result, we conclude that a conviction under section 6-204 of the Maryland Criminal Law is not a crime in which moral turpitude necessarily inheres.

There are cases, however, where conduct prosecuted under section 6-204 of the Maryland Criminal Law could involve moral turpitude, such as when a burglar entered a dwelling that was, at that particular time, occupied by another person. *See, e.g.*, *Matter of Louissaint*, 24 I&N Dec. at 758. Accordingly, we must determine whether the statute is "divisible" and thus susceptible to a modified categorical analysis. *Descamps v. United States*, 133 S. Ct. 2281, 2283 (2013); *see also Mathis v. United States*, 136 S. Ct. 2243, 2248–49 (2016); *Matter of Chairez*, 26 I&N Dec. 819, 819–20 (BIA 2016) (clarifying that the understanding of statutory "divisibility" embodied in *Descamps* applies in immigration proceedings nationwide to the same extent that it applies in criminal sentencing proceedings). A criminal statute is divisible 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 standard." *Matter of Silva-Trevino*, 26 I&N Dec. at 833 (citing *Matter of Chairez*, 26 I&N Dec. at 822).

If Maryland law were to require jury unanimity as to whether the dwelling was occupied or unoccupied at the time the burglary occurred, then section 6-204 of the Maryland Criminal Law could be construed as divisible in that regard. *See Mathis*, 136 S. Ct. at 2248-49, 2256-57; *Descamps*, 133 S. Ct. at 2290; *see also Taylor*, 495 U.S. at 602 (noting that the modified categorical approach may be employed only to determine whether "a jury necessarily had to find" each element of generic burglary). Plainly, however, Maryland courts do not differentiate between occupied and unoccupied dwellings and the State is not required to prove that a dwelling was occupied at the time of the burglary to obtain a conviction under section 6-204 of the Maryland Criminal Law. *See e.g.*, *McKenzie*, 962 A.2d at 999; *Hobby*, 83 A.3d at 812. As a result, we conclude that section 6-204 of the Maryland Criminal Law is not a divisible statute as it relates to the "occupancy" of a dwelling.

We acknowledge that, traditionally, when analyzing varying burglary statutes, we have determined whether an offense is a crime involving moral turpitude by focusing upon the crime the accused intended to commit (i.e., the "target offense") after entering a building, structure, or conveyance; if the target offense is morally turpitudinous (for instance, larceny) then so too is the burglary, regardless of whether the burglar was able to successfully consummate the target offense. *See Matter of M-*, 2 I&N Dec. 721, 723 (BIA; A.G. 1946). However, pursuant to *Matter of Silva-Trevino*, we are required to focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the respondent's particular violation under section 6-204 of the Maryland Criminal Law. 26 I&N Dec. at 831. In this case, it is apparent that Maryland does not solely prosecute burglaries in the third degree where the crime the accused intended to commit necessarily involves moral turpitude.[2] As a result, we are permitted to focus on the target offense only if the burglary statute is divisible, such that each separate target offense is an alternative element of the crime. *See Descamps*, 133 S. Ct. at 2281.

Section 6-204 of the Maryland Criminal Law could be regarded as divisible in relation to the target offense if Maryland law were to require a unanimous jury verdict as to the particular crime the accused intended to commit inside the victim's dwelling. *See id.* at 2290; *see also Taylor*, 495 U.S. at 602. According to the Maryland State Bar Standing Committee on Pattern Jury Instructions, in order to convict a defendant for burglary in the third degree, the State must prove, among other things, that "the breaking and entry was done with the intent to commit a crime inside." Maryland Criminal Pattern Jury Instructions 4:06.2. Clearly, a Maryland jury cannot lawfully convict a defendant under section 6-204 of the Maryland Criminal Law without finding that he or she intended to commit a crime. Nevertheless, if the jury can find a defendant guilty without having to agree on the particular crime the accused intended to commit, then the intended crime is not an alternative element of burglary in the third degree.

[2] Our independent research indicates that Maryland has prosecuted burglaries where the accused broke and entered into a dwelling with the intent to commit a trespass, a crime which does not necessarily involve moral turpitude.

There are no Maryland cases directly addressing whether the target offense operates as an alternative element or as an alternative means in the context of burglary in the third degree under section 6-204 of the Maryland Criminal Law, but the foregoing jury instructions—referencing only "a crime"—support a reasonable inference that Maryland courts do not require a unanimous jury verdict with respect to the identity of the target offense. This reasonable inference is not refuted by any other source of authoritative state law or by the respondent's record of conviction, at which we have "peek[ed] . . . for 'the sole and limited purpose of determining whether [the intended crime is an] element of the offense." *Mathis*, 136 S. Ct. at 2256 (citation omitted); *see also* 8 C.F.R. § 1003.1(d)(3)(iv) (authorizing the Board to take administrative notice of the contents of official documents). The record of conviction does not contain any allegation of an intended "target" crime relating to the charge of burglary in the third degree. Given these circumstances, it is evident that the particular intended crime is not an alternative element of section 6-204 of the Maryland Criminal Law. Instead, it is an alternative means by which the intent element of the statute can be proven, and we consequently are prohibited from focusing on whether the target offense involves moral turpitude.

Because section 6-204 of the Maryland Criminal Law does not categorically cover turpitudinous conduct and is not a divisible statute with respect to any of the facts upon which the moral turpitude inquiry depends, we conclude that the respondent was not convicted of a crime involving moral turpitude and is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Therefore, the DHS's appeal of the Immigration Judge's decision to terminate removal proceedings will be dismissed.

ORDER: The appeal is dismissed.

Linda S. Wendtland

FOR THE BOARD

File: A062520623 – Arlington, VA

Date: JAN 26 2017

In re: ABAYNEH ARFICHO HEGANA

DISSENTING OPINION: Roger A. Pauley

I respectfully dissent. While under Maryland law a dwelling need not be occupied at the time the burglary occurs, the offender often will not know or care whether the structure is occupied, and even if he believes that the dwelling is unoccupied he may be mistaken. Thus, the conduct is not rendered less morally reprehensible simply because the dwelling is not occupied. A dwelling is a place designed for persons to sleep. *McKenzie v. State,* 962 A.2d 998, 1007 (Md. 2008). As such, apart from privacy concerns which exist from the fact of an uninvited stranger being able to observe one's private possessions, it also differs from other structures in terms of the likelihood that, notwithstanding its lack of occupancy at the time of the offense, a substantial risk remains that the offense will result in a violent confrontation occasioned by the return of its occupant or with police, summoned by a neighbor or caretaker who observes the unlawful entry.

In short, I would hold that burglary of a dwelling, whether or not occupied, is a crime involving moral turpitude because it requires engaging in reprehensible conduct, without regard to the nature of the crime intended to be committed within. Such a conclusion is squarely in accord with the framework we recently established in *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016).

BOARD MEMBER

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
1901 South Bell Street, Suite 200
Arlington, VA 22202

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
	)	
Abayneh Arficho HEGANA	)	A# 062 – 520 – 623
	)	
Respondent.	)	
	)	

CHARGE: Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act ("INA" or "Act"), as amended, as an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.

APPLICATION: Motion to Terminate Removal Proceedings.

APPEARANCES

ON BEHALF OF RESPONDENT:
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ON BEHALF OF DHS:
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Arlington, Virginia 22202

DECISION AND ORDER

I. PROCEDURAL HISTORY

The Respondent is a native and citizen of Ethiopia. He became a lawful permanent resident on or about February 24, 2013. On May 5, 2014, the Respondent was convicted of third degree burglary, in violation of Maryland Criminal Code section 6-204. He was sentenced to 364 days incarceration, all of which was suspended. The Respondent left the United States on January 10, 2015. On May 7, 2015, he applied for admission at the Washington-Dulles International Airport as a returning lawful permanent resident. The Respondent was detained at the airport and on June 4, 2015, the Department of Homeland Security ("DHS") issued a Notice to Appear ("NTA") charging him with removability under Section 212(a)(2)(A)(i)(I) of the Act. At a hearing on August 25, 2015, the Respondent denied the charge and filed a Motion to

Terminate. For the reasons discussed below, the Immigration Court finds the Respondent not removable as charged. It will grant the Respondent's motion and terminate removal proceedings.

II. DISCUSSION

DHS charged the Respondent with removability under Section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude ("CIMT"). A crime involves moral turpitude if it is "inherently base, vile, or depraved and contrary to accepted rules of morality and the duties owed between persons or to society in general." Matter of Olquin-Rufino, 23 I&N Dec. 896, 896 (BIA 2006); see Matter of Flores, 17 I&N Dec. 225, 227 (BIA 1980) ("An evil or malicious intent is said to be the essence of moral turpitude."). To determine whether moral turpitude "necessarily inheres" in a violation of Virginia Code section 18.2-186.3, the Immigration Court must apply the categorical approach and look first to the statute of conviction. See Prudencio v. Holder, 669 F.3d 472, 484–85 (4th Cir. 2012).

The Board of Immigration Appeals ("BIA" or "Board") has held that breaking and entering a building with the intent to commit a crime is not inherently a CIMT; whether the crime involves moral turpitude depends on whether the crime the respondent intended to commit while inside the building is a CIMT. Matter of M-, 2 I&N Dec. 721, 722–23 (BIA, A.G. 1946); see also Matter of R-, 1 I&N Dec. 540 (BIA 1940) (holding that burglary was a CIMT when the indictment upon which the respondent was convicted indicated that he intended to commit larceny). The Board has subsequently held that "the conscious and overt act of unlawfully entering or remaining in an *occupied* dwelling with the intent to commit a crime is inherently reprehensible conduct committed with some form of scienter." Matter of Louissaint, 24 I&N Dec. 754, 758 (BIA 2009) (internal quotation marks omitted) (emphasis added). This is true regardless of whether the crime the individual intended to commit is a CIMT.

Maryland Criminal Code section 6-204 criminalizes "break[ing] and enter[ing] the dwelling of another with the intent to commit a crime." Md. Code, Crim. Law § 6-204(a). A "dwelling" is a place of human habitation. McKenzie v. State, 962 A.2d 998, 1002 (Md. 2008). Maryland law does not require that a person be present at the time of an offense for the building to constitute a dwelling. Id. Therefore, the offense criminalized under section 6-204 would not be inherently reprehensible and thus a CIMT under the Board's holding in Louissant. Additionally, because the Maryland statute broadly defines third degree burglary to include an intent to commit any crime punishable under Maryland law, it is possible for an individual to be convicted under section 6-204 for breaking and entering a dwelling with the intent to commit a crime that does not constitute a CIMT. Therefore, a conviction under section 6-204 is not categorically a CIMT.

The modified categorical approach only operates when a statute lists multiple, alternative elements, thus effectively creating "several different ... crimes." Nijhawan v. Holder, 557 U.S. 29, 41 (2009). The Supreme Court further clarified in Descamps that the modified categorical approach can only be used in cases where the statute in question is divisible, "listing potential elements in the alternative, [thus] rendering opaque which elements played a part in the defendant's conviction." Descamps v. United States, 133 S.Ct. 2276, 2283 (2013); see also Omargharib v. Holder, 775 F.3d 192, 194 (4th Cir. 2014) ("The mere use of the disjunctive 'or'

in the definition of a crime does not automatically render it divisible."). Although any offense criminalized in Maryland can satisfy the "intent to commit a crime" element for third degree burglary, these different offenses are merely different means of satisfying the one element; they are not each different elements. Thus, section 6-204 is not divisible and the modified categorical approach does not apply.

Having found that the Respondent's conviction for third degree burglary is not categorically a CIMT and the statute is not divisible, the Immigration Court finds that the Respondent is not removable under Section 212(a)(2)(A)(i)(I) of the Act. Because this is the only charge of removability, the Immigration Court concludes that the Respondent is not removable and will grant the Respondent's motion to terminate.

Accordingly, the Immigration Court enters the following orders:

ORDERS

It is Ordered that:	The Respondent's charge of removability under Section 212(a)(2)(A)(i)(I) of the Act be **DISMISSED**.
It is Further Ordered that:	The Respondent's motion to terminate be **GRANTED**.
It is Further Ordered that:	The hearing scheduled for September 24, 2015, be **CANCELLED**.

SEPTEMBER 15, 2015
Date

Rodger C. Harris
Rodger C. Harris
U.S. Immigration Judge