U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: WARMELS, ARNOLD

A 055-195-818

Date of this notice: 12/23/2014

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:
Holmes, David B.

Userteam: Docket

U.S. Department of Justice

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5107 Leesburg Pike, Suite 2000
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WARMELS, ARNOLD
A055-195-818
BOONE COUNTY JAIL
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525 West Van Buren Street
Chicago, IL 60607

Name: WARMELS, ARNOLD

A 055-195-818

Date of this notice: 12/23/2014

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Holmes, David B.

Userteam:

File: A055 195 818 – Chicago, IL

Date: DEC 23 2014

In re: ARNOLD MANUEL WARMELS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Wael M. Ahmad, Esquire

ON BEHALF OF DHS: Seth B. Fitter
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)] -
Convicted of crime of domestic violence, stalking, or child abuse, neglect, or abandonment

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

APPLICATION: Termination

The Department of Homeland Security appeals from the September 15, 2014, decision of the Immigration Judge granting the respondent's motion to terminate removal proceedings. The respondent opposes the appeal. The appeal will be dismissed.

We review the Immigration Judge's findings of fact only to determine whether such findings are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i). The Board may review questions of law, discretion, and judgment and all other issues in appeals de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, a native and citizen of the Netherlands, was admitted to the United States on January 23, 2003, as a lawful permanent resident (I.J. at 1). On July 15, 2013, he was convicted of assault in the fourth degree, in violation of subsection 508.030(1)(a) of the Kentucky Revised Statutes, and sentenced to 12 months' imprisonment (I.J. at 1-3). According to that statute, "A person is guilty of assault in the fourth degree when: (a) He intentionally or wantonly causes physical injury to another person." The parties have agreed that the term "wantonly," as used in the statute, corresponds to the common law definition of the term "recklessly" (I.J. at 3-4).

Based on the respondent's conviction, the DHS issued him a Notice to Appear, charging that he was removable under section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i). The DHS subsequently lodged an additional charge under section 237(a)(2)(A)(iii) of the Act, charging that the respondent was convicted of a "crime of violence,"

for which the term of imprisonment was at least one year, which is an aggravated felony under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F).[1]

In a written decision, the Immigration Judge found that the DHS had not established that the respondent had been convicted of either an "aggravated felony" or a "crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment" because the respondent's conviction was not for a "crime of violence" (as defined in section 16 of title 18 of the United States Code). *See* (I.J. at 2-9); *see also* section 237(a)(2)(A)(iii), (E)(i) of the Act. Accordingly, she ordered that these proceedings be terminated (I.J. at 9).

On appeal, the DHS argues that the Immigration Judge applied the incorrect legal standard in determining that the respondent's statute of conviction is not "divisible" (DHS Brief on Appeal, dated Nov. 20, 2014, at 3). Specifically, the DHS argues that the Immigration Judge should not have applied the divisibility analysis from our recent decision in *Matter of Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014), to a case arising within the jurisdiction of the United States Court of Appeals for the Seventh Circuit (DHS Brief on Appeal, dated Nov. 20, 2014, at 8-10). In the alternative, the DHS argues that the Immigration Judge misapplied *Matter of Chairez-Castrejon* to the facts of this case (DHS Brief on Appeal, dated Nov. 20, 2014, at 10-11).

To determine whether a particular offense qualifies as a crime of violence, we employ the "categorical approach." *Matter of Chairez-Castrejon*, *supra*, at 351. This "requires us to focus on the minimum conduct that has a realistic probability of being prosecuted [under the statute], rather than on the facts underlying the respondent's particular violation of that statute." *Id.* (citing *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013)). However, if a statute is "divisible," we employ a modified categorical approach. *See id.* at 352.

In *Matter of Chairez-Castrejon*, *supra*, at 352-53, the Board acknowledged that our earlier divisibility analysis was inconsistent with the approach announced by the United States Supreme Court in *Descamps v. United States*, 133 S. Ct. 2276 (2013). Therefore, we adopted the Court's approach to divisibility, such that

> [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

[1] The term "crime of violence" is defined in relevant part as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a) (2012). In this context, the term "use" denotes volition. *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). The parties agreed that the respondent was not convicted of a felony and, therefore, subsection 16(b) of title 18 of the United States Code does not apply to this case (I.J. at 3; Tr. at 22).

> combinations of disjunctive elements is a categorical match to the relevant generic standard.

Matter of Chairez-Castrejon, *supra*, at 353 (citing *Descamps v. United States*, 133 S Ct. at 2281, 2283). Under this approach, an element of an offense is 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.* (quoting *Descamps v. United States*, 133 S. Ct. at 2288).

In our decision, we noted that we are not given deference on this issue and, accordingly, we are "bound to apply divisibility consistently with the individual circuits' interpretation of divisibility under *Descamps*." *Matter of Chairez-Castrejon*, *supra*, at 354. However, we also stated that, if a particular circuit court has not applied divisibility under *Descamps* in a precedential decision, the Board would follow its own understanding of divisibility as set forth in *Descamps*. *Id.*

We are not aware of any precedential decision from the United States Court of Appeals for the Seventh Circuit applying divisibility under *Descamps*, particularly in the mens rea context at issue in this case. In *Groves v. United States*, 755 F.3d 588, 593 (7th Cir. 2014), the circuit court recognized that "the Supreme Court adopted the divisible/indivisible distinction as discussed [in a prior circuit court case]." *Id.* (citing *Descamps v. United States*, *supra*). However, this statement provides no clear resolution at this point as to how the circuit court will define divisibility post-*Descamps*.

The circuit court's decision makes only a brief and passing reference to *Descamps*. *Id.* Moreover, an application of *Descamps* was not the dispositive issue in *Groves*, which primarily concerned a claim of ineffective assistance of counsel. *See Groves v. United States*, 755 F.3d at 589-90. Inasmuch as the Court of Appeals for the Seventh Circuit has yet to interpret divisibility under *Descamps*, we will apply our own understanding of the Supreme Court's decision. *Chairez-Castrejon*, *supra*, at 354; *see also Descamps v. United States*, 133 S. Ct. at 2282.

Consistent with the foregoing, we will affirm the Immigration Judge's finding that the respondent's statute of conviction is not divisible. Although subsection 508.030(1)(a) lists two mental states that may support a conviction, those mental states are not separate "elements" of the offense because a jury would not necessarily have to decide between them unanimously. *Matter of Chairez-Castrejon*, *supra*, at 353; *see also Wells v. Commonwealth*, 561 S.W.2d 85, 88 (Ken. 1978) ("[A] verdict can not be successfully attacked upon the ground that the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the same offense."). The state of Kentucky "permits conviction without jury agreement as to mental state" in certain cases (DHS Brief on Appeal, dated Nov. 20, 2014, at 11). Therefore, intent and recklessness are merely alternative "means" by which a defendant can commit an assault, not alternative "elements" of the offense. *Matter of Chairez-Castrejon*, *supra*, at 354.

The respondent has not been convicted of a "crime of violence" under 18 U.S.C. § 16(a). Because subsection 508.030(1)(a) can be proven by reference to reckless conduct, it does not have as an element the deliberate "use" of violent physical force against the person or property of

another. *See Matter of Chairez-Castrejon*, *supra*, at 352. We are prohibited from considering the respondent's record of conviction to determine whether his particular conduct was intentional or reckless. *See Descamps v. United States*, 133 S. Ct. at 2293 ("A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction."). Accordingly, the Department of Homeland Security has not carried its burden of establishing by clear and convincing evidence that the respondent is deportable. *See* section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3).

The following order will be entered.

ORDER: The Department of Homeland Security's appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS

File No: A055-195-818 Date: September 15, 2014

In the Matter of:	)	
	)	
Arnold WARMELS,	)	IN REMOVAL PROCEEDINGS
	)	
Respondent.	)	

CHARGES: Section 237(a)(2)(E)(i) of the Immigration and Nationality Act ("INA" or "Act") – Alien who at any time after entry has been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.

Section 237(a)(2)(A)(iii) of the INA – Alien who at any time after admission has been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act, a crime of violence (as defined in 18 U.S.C. § 16) for which the term of imprisonment ordered is at least one year.

APPLICATION: Motion to Terminate.

ON BEHALF OF THE RESPONDENT:
Wael Ahmad, Esq.
333 West Vine Street, Suite 1220

Lexington, Kentucky 40507

ON BEHALF OF THE GOVERNMENT:
Seth Fitter, Senior Attorney
Office of the Chief Counsel
Department of Homeland Security
525 West Van Buren Street, Suite 701
Chicago, Illinois 60607

DECISION OF THE IMMIGRATION JUDGE

For the following reasons, the Court finds that the respondent is not removable under INA § 237(a)(2)(E)(i) or INA § 237(a)(2)(A)(iii). Therefore, the Court orders that removal proceedings be terminated.

I. BACKGROUND

The respondent is a 48-year-old male native and citizen of the Netherlands who was admitted to the United States on January 23, 2003, as a legal permanent resident. On July 15, 2013, he was convicted in the Bourbon County Circuit Court in Paris, Kentucky, of assault in the

fourth degree-domestic violence, in violation of KRS § 508.030. *See* Exh. 1. He was sentenced to 12 months' imprisonment for this offense. *See* Exh. 2.

The Department of Homeland Security ("DHS" or "the Government") placed the respondent in removal proceedings with the filing of a Notice to Appear ("NTA") with the Chicago Immigration Court on July 7, 2014. The NTA and subsequently filed Form I-261, Additional Charges of Inadmissibility/Deportability, allege the above facts and charge the respondent with removability under INA § 237(a)(2)(E)(i) (crime of domestic violence) and INA § 237(a)(2)(A)(iii) (aggravated felony crime of violence).

The respondent appeared for master calendar hearings before the Chicago Immigration Court on August 11 and August 14, 2014. During these hearings, the respondent, through counsel, admitted that he had the above-mentioned conviction but denied both charges of removability. The Netherlands, the respondent's country of citizenship, was designated as the country of removal pursuant to INA § 241(b)(2)(D).

II. ANALYSIS

"[T]he Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable." INA § 240(c)(3). The Government claims that the respondent's conviction for assault in the fourth degree-domestic violence renders him removable because it constitutes an aggravated felony as defined in INA § 101(a)(43)(F) (crime of violence) and a domestic crime of violence under INA § 237(a)(2)(E)(i). *See* Exh. 1; Exh. 2. The respondent has contested both charges of removability.

Under INA § 237(a)(2)(A)(iii), any alien who is convicted of an aggravated felony at any time after admission is deportable. An aggravated felony is defined in INA § 101(a)(43)(F) to include a "crime of violence," as defined in 18 U.S.C. § 16, for which the term of imprisonment is at least one year. Under INA § 237(a)(2)(E)(i), an alien is removable for having committed a "crime of domestic violence," which is defined as any offense that is a "crime of violence" under 18 U.S.C. § 16 and has a spouse or domestic partner as a victim. *See Flores v. Ashcroft,* 350 F.3d 666, 668 (7th Cir. 2003). Because both of these removability grounds turn on whether the respondent's conviction is a crime of violence under 18 U.S.C. § 16, the Court will analyze them together.

Section 16 of title 18, United States Code, 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.

With respect to section 16(a), the Supreme Court has found that the word "use" denotes volition. *See Leocal v. Ashcroft,* 543 U.S. 1, 9 (2004). The Seventh Circuit Court of Appeals has further held that the phrase "use of physical force" in section 16(a) requires that "the force be violent in nature—the sort that is intended to cause bodily injury, or at a minimum likely to do

so." *Flores,* 350 F.3d at 672; *see also Bazan-Reyes v. I.N.S.,* 256 F.3d 600, 609 (7th Cir. 2001) (finding that the definition of "crime of violence" in section 4B.1.2(a)(1) of the Federal Sentencing Guidelines, which is same as the definition at 18 U.S.C. § 16(a), requires an "intentional act rather than the mere application or exertion of force" and applying that requirement to section 16(a) as well) (internal citations omitted).

In this case, the respondent was convicted of fourth degree assault under KRS § 508.030, which provides that:

> (1) A person is guilty of assault in the fourth degree when:
> (a) He intentionally or wantonly causes physical injury to another person; or
> (b) With recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.
> (2) Assault in the fourth degree is a Class A misdemeanor.

The parties agree that the statute is divisible with respect to sections (1)(a) and (1)(b), and that the respondent's record of conviction establishes that he was convicted under KRS § 508.030(1)(a). *See Descamps v. United States,* 133 S.Ct. 2276, 2281-83 (2013); Respondent's Amended Motion to Terminate (August 8, 2014); DHS's Response to Respondent's Motion to Terminate (July 25, 2014). They also agree that the respondent's conviction cannot be a crime of violence under 18 U.S.C. § 16(b) because fourth degree assault in Kentucky cannot be classified as a federal felony; it is a Class A misdemeanor, punishable by a maximum sentence of twelve months' imprisonment. *See* KRS §532.090; 18 U.S.C. § 3559(a). Finally, the parties agree that the "wanton" and "reckless" *mens rea* definitions used in Kentucky do not comport with the common law definitions of these mental states. Instead, "wanton" in Kentucky corresponds to a "reckless" mental state under the common law, and "reckless" in Kentucky comports with "negligence" under the common law.[1] Thus, the Court will proceed to analyze whether the

[1] The statutory definitions for the *mens rea* elements of assault in the fourth degree in Kentucky are as follows:

> (1) "Intentionally" – A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause that result or to engage in that conduct . . .
> (3) "Wantonly" – A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.
> (4) "Recklessly" – A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. KRS §§ 501.020(1), (3), and (4).

The legislative commentary on these definitions note that "wanton conduct involves conscious risk-taking while reckless conduct involves inadvertent risk-creation." KRS §§ 501.020(1)-(4), Kentucky Crime Commission/LRC Commentary (1974). Thus, the definition of "wantonness" in the Kentucky Revised Statute is most similar to the standard definition of recklessness, while the definition of "recklessness" is most similar to the standard definition of criminal negligence.

respondent's conviction under KRS § 508.030(1)(a) is a "crime of violence" within the meaning of 18 U.S.C. § 16(a).

In *Matter of Chairez,* the BIA reiterated that when determining whether a respondent's conviction qualifies as an aggravated felony, "we employ the 'categorical approach,' which requires us to focus on the minimum conduct that has a realistic probability of being prosecuted . . . rather than on the facts underlying the respondent's particular violation of [a] statute." 26 I&N Dec. 349, 351 (BIA 2014) (citing *Moncrieffe v. Holder,* 133 S.Ct. 1678, 1684-85 (2013)). If under the categorical approach a court determines that a statute is "divisible," it can conduct a "modified categorical" inquiry, where it is permitted to look beyond the statutory elements to the record of conviction in a given case in order to determine under which subsection a respondent was convicted. In *Chairez,* the BIA adopted the definition of divisibility set forth in *Descamps,* a Supreme Court decision discussing the categorical and modified categorical approaches in the context of sentence enhancements under the Armed Career Criminal Act. The BIA stated:

> The Supreme Court explained [in *Descamps*] that 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 standard. 133 S. Ct. at 2281, 2283. The Court further explained that for purposes of the modified categorical approach, an offense's 'elements' are those facts about the 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)).

Chairez, 26 I&N Dec. at 353.

Chairez dealt with the question of whether a respondent's conviction for felony discharge of a firearm under section 76-10-508.1 of the Utah Code was a crime of violence aggravated felony.[2] Applying the "minimum conduct" test set forth in *Moncrieffe*, the Board looked at the entire range of conduct covered under the Utah statute and found that subsections (b) and (c) were categorically crimes of violence under 18 U.S.C. § 16(a) because "they have as an element the deliberate use of violent physical force against the person or property of another." *Chairez,* 26 I&N Dec. at 351 (internal quotations omitted).

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[2] The text of section 76-10-508.1 reads:

Felony discharge of a firearm—Penalties

(1) Except as [otherwise] provided . . . a person who discharges a firearm is guilty of a third degree felony punishable by imprisonment for a term of not less than three years nor more than five years if:
   (a) the actor discharges a firearm in the direction of any person or persons, knowing or having reason to believe that any person may be endangered by the discharge of the firearm;
   (b) the actor, with intent to intimidate or harass another or with intent to damage a habitable structure . . . discharges a firearm in the direction of any person or habitable structure; or
   (c) the actor, with intent to intimidate or harass another, discharges a firearm in the direction of any vehicle.

However, the Board determined that subsection (a) was different because, unlike subsections (b) and (c), it does not specify a *mens rea* with which the firearm must be discharged. Under these circumstances, the Utah Code provides that "intent, knowledge, or recklessness shall suffice to establish criminal responsibility." *Id.* at 352 (citing Utah Code § 76-2-103). The Board stated that because the offense defined by section 76-10-508.1(1)(a) can be proven by reference to reckless conduct, it is not a crime of violence under 18 U.S.C. § 16(a), which requires the intentional or deliberate use of violent physical force against the person or property of another. *Id.* Thus, the Board found that section 76-10-508.1 of the Utah Code was divisible between subsections (a), (b), and (c), as divisibility is defined in *Descamps,* because at least one, but not all, of the subsections match the generic definition of a "crime of violence." *Id.*

After determining that section 76-10-508.1 was divisible among its three subsections, the BIA considered whether subsection (a) was "further divisible into several discrete offenses with distinct elements because [it] disjunctively enumerated intent, knowledge, and recklessness as alternative mental states." *Id.* Following its understanding of *Descamps,* the BIA reasoned that section 76-10-508.1(1)(a) of the Utah Code can only be "divisible" into three separate offenses with distinct *mens rea* if Utah law requires jury unanimity regarding the mental state with which the accused discharged the firearm. "If Utah does not require such jury unanimity, then it follows that intent, knowledge, and recklessness are merely alternative 'means' by which a defendant can discharge a firearm, not alternative 'elements' of the discharge offense." *Id.* at 354.

The BIA went on to state that it was "unaware" of any Utah case addressing the issue of jury unanimity in the context of a prosecution under section 76-10-508.1, and the Government did not present any evidence indicating that Utah law required jury unanimity on the *mens rea* issue. *Id.* at 355. Therefore, DHS failed to establish that the alternative mental states in section 76-10-508.1(a) were "elements" that would make subsection (a) further divisible into discrete offenses with distinct intentional, knowing, or reckless *mens rea* elements. And because subsection (a) was not further divisible, the court could not look at the respondent's record of conviction under a modified categorical inquiry. Thus, the BIA held that the Government failed to meet its burden to establish the respondent's removability for an aggravated felony crime of violence under INA § 237(a)(2)(A)(iii). *Id.*

The facts of the instant case in large part mirror those in *Chairez.*[3] As in *Chairez,* the respondent's statute of conviction is divisible between subsections (1)(a) and (1)(b), and the parties agree that the court can consult the respondent's record of conviction under a modified

[3] The Government argues that the respondent's case is clearly distinguishable from *Chairez* and more closely corresponds to the facts in *United States v. Marrero,* 743 F.3d 389 (3d Cir. 2014), a Third Circuit case addressing whether simple assault under Pennsylvania law was a crime of violence for purposes of the residual clause of section 4B1.2(a)(2) of the U.S. Sentencing Guidelines. *See* Department of Homeland Security's Supplement to its Response to the Respondent's Motion to Terminate (August 1, 2014). The defendant in Marrero was convicted of simple assault, which is defined in relevant part as an attempt to cause or intentionally, knowingly, or recklessly cause bodily injury. 18 Pa. Const. Stat. Ann. § 2701(a)(1). Relying on *Descamps,* the Third Circuit held that the Pennsylvania statute is divisible because it "lists potential offense elements in the alternative." *Marrero,* 743 F.3d at 396. While the Third Circuit may have a different understanding of divisibility than that outlined by the Board in *Chairez, Marrero* is not binding precedent on this Court, which sits in the Seventh Circuit. Absent a contrary ruling on this issue from the Seventh Circuit, this Court is bound to follow the precedent outlined in the *Chairez* decision.

categorical inquiry to find that the respondent was convicted under subsection (1)(a). Also like *Chairez,* subsection (1)(a) of the respondent's statute of conviction contains more than one *mens rea*; here, assault in the fourth degree can be committed intentionally or wantonly (i.e., recklessly).[4] The Government argues that subsection (1)(a) is further divisible into discrete offenses because the alternative mental states are distinct elements. The respondent contends that subsection (1)(a) is not further divisible because Kentucky case law does not require jury unanimity as to the mental state used to commit assault in the fourth degree; thus, "intentionally" and "wantonly" are not elements but merely different "means" of committing the offense. *See Chairez,* 26 I&N Dec. at 354. As *Chairez* instructs, the Court will examine Kentucky case law and standard jury instructions to determine whether jury unanimity is required on the issue of *mens rea* in fourth-degree assault prosecutions.

It appears that Kentucky uses three separate sets of jury instructions in fourth-degree assault prosecutions. However, the government has not presented evidence in this case as to which actual jury instructions were given. This is a critical missing element in this case. Therefore the court must review all of the jury instructions which could have been given in order to determine whether jury unanimity is required in this case. One set instructs the jury to find the defendant guilty of the offense "if, and only if, you believe from the evidence beyond a reasonable doubt that . . . he *wantonly* caused physical injury to [the victim] by [method]." 1-3 Cooper & Cetrulo, Kentucky Jury Instructions § 3.51 (emphasis added). A comment to this jury instruction states that it should only be given if the evidence supports a verdict that the defendant wantonly, but not intentionally, caused physical injury to the victim. *Id.* The second set instructs the jury to find the defendant guilty "if, and only if, you believe from the evidence beyond a reasonable doubt" that the defendant "*intentionally* caused physical injury to [the victim] by [method]." 1-3 Cooper & Cetrulo, Kentucky Jury Instructions § 3.50 (emphasis added). A comment to this instruction states that it should only be given when the evidence supports a finding that the defendant intentionally, but not wantonly, caused physical injury to the victim. *Id.*

The final set of jury instructions directs the jury to find the defendant guilty "if, and only if, you believe from the evidence beyond a reasonable doubt . . . [that] he caused physical injury to [the victim] by [method] AND that in so doing; (1) The Defendant was acting intentionally OR (2) The Defendant was acting wantonly." 1-3 Cooper & Cetrulo, Kentucky Jury Instructions § 3.55. The comment to this instruction states that it is "a combination of the elements of the instructions at §§ 3.50 and 3.51" and cross references the comment to a similar combined jury instruction for first-degree assault "for a discussion of how this type of instruction affects the

[4] In its Supplement to its Response to the Respondent's Motion to Terminate, the Government argues that the statute at issue in *Chairez* can be distinguished from KRS § 508.030(1)(a) because section 508.030(1)(a) includes alternative mental states within the text of the statute, whereas the text of section 76-10-508.1(1)(a) of the Utah Code incorporates its alternative mental states by reference to the general *mens rea* provision set forth in another section of the Utah Code. *See* Department of Homeland Security's Supplement to its Response to the Respondent's Motion to Terminate (August 1, 2014). The Court finds that this is not a meaningful distinction. The format in which a state legislature chooses to set forth mental states for a given offense—either within the text of a specific statute or by reference to a general *mens rea* provision within the criminal code—has no bearing on an immigration court's analysis of a statute's divisibility for the purposes of implementing the modified categorical approach. *Chairez* does not confine its holding to state statutes that incorporate mental states by reference to a general *mens rea* provision.

requirement of unanimity of the verdict." *Id.; see also* 1-3 Cooper & Cetrulo, Kentucky Jury Instructions § 3.36.

The combined jury instruction for first degree assault at section 3.36 also directs a jury to find a defendant guilty if they believe beyond a reasonable doubt that the defendant committed the offense with either an intentional or wanton mental state. 1-3 Cooper & Certrulo, Kentucky Jury Instructions § 3.36. The comment to this jury instruction says that it can be used "when the evidence would support a verdict of either intentional or wanton First-Degree Assault." *Id.* The comment also cites to *Wells v. Commonwealth,* a Kentucky Supreme Court case finding that a defendant's due process right to a unanimous verdict and proof beyond a reasonable doubt on each element of his offense was not violated when the jury instructions given during his first-degree assault prosecution permitted a conviction if some jurors believed that he acted intentionally and others believed that he acted wantonly. 561 S.W.2d 85 (Ken. 1978). The Kentucky Supreme Court reasoned:

> KRS 508.010 [Kentucky's first-degree assault statute] brings together two distinct culpable mental states (intent and wantonness manifesting extreme indifference to the value of human life) and punishes them equally under specified circumstances. Either mental state will support a conviction of assault in the first degree and punishment for such crime. The legal effect of the alternative conclusions is identical. There was ample evidence to support a verdict on either theory of the case. We hold that a verdict can not [sic] be successfully attacked upon the ground that the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the same offense.

Id. at p. 88.

The Cooper & Cetrulo treatise on Kentucky jury instructions further indicates that jury unanimity is satisfied even if "the jury is instructed that they can find the defendant guilty on either of two theories." 1-1 Cooper & Cetrulo, Kentucky Jury Instructions § 1.26.

> If the evidence would support conviction under both theories, the requirement of unanimity is satisfied. Moreover, it must be borne in mind that the nature of mens rea in the penal code gives rise to certain instances wherein it should be unnecessary for the jury to decide between, for instance, intentional conduct and wanton conduct (with extreme indifference to human life). Whether the defendant intended the death of the murder victim or acted wantonly in the victim's death may not be an issue that can be resolved by the jury one way or the other. A reasonable doubt as to whether the defendant acted intentionally as opposed to wantonly and *vice versa* is not a reasonable doubt as to murder so long as the jury is convinced that the defendant acted *either* intentionally or wantonly, regardless of its doubt as to which. Otherwise, a verdict of not guilty would be called for if the jury was not convinced of which mental state pertained, even though it was convinced beyond a reasonable doubt that the defendant acted with one mental state or the other.

Id.

In sum, Kentucky jury instructions, Kentucky Supreme Court precedent, and a Kentucky treatise on jury instructions indicate that when a defendant is convicted under a statute such as KRS § 508.030(1)(a) with multiple mental states, and the evidence would support a jury finding of either mental state, jury unanimity is not required as to the particular *mens rea* used to commit the offense. In these instances, alternative mental states in a statute are not distinct elements; they are "means" by which a crime is committed. *Chairez,* 26 I&N Dec. at 254. Therefore, under these circumstances, statutes containing alternative mental states are not divisible as that term is defined in *Descamps.*

As explained above, with respect to Kentucky fourth-degree assault specifically, there are three separate jury instructions that could be given depending on the circumstances of a given case: one requiring a jury to find an intentional mental state, one requiring a jury to find a wanton mental state, and one allowing a jury to find either an intentional or wanton mental state. *See* 1-3 Cooper & Certolo, Kentucky Jury Instructions, §§ 3.50, 3.51, 3.55. In cases such as the respondent's, where we do not know which jury instruction would be given, *Chairez* instructs that the Court must focus on the "minimum conduct that has a realistic probability of being prosecuted . . . rather than on the facts underlying the respondent's particular violation of [a] statute." *Chairez,* 26 I&N Dec. 349, 351 (BIA 2014) (citing *Moncrieffe v. Holder,* 133 S.Ct. 1678, 1684-85 (2013)).

Because one of the possible jury instructions does not require jury unanimity as to the defendant's mental state, the Court must find that "intentional" and "wanton" are not distinct elements that render KRS § 508.030(1)(a) further divisible into two discrete offenses with different mental states. And because KRS § 508.030(1)(a) is not further divisible under the *Descamps* and *Chairez* definition of that term, the Court cannot conduct an inquiry into the respondent's record of conviction under the modified categorical approach.[5] The Court must look categorically at KRS §508.030(1)(a), and such an inquiry reveals that the respondent could have committed fourth degree assault with only a wanton (i.e., reckless) mental state. A reckless *mens rea* is insufficient to meet the definition of "crime of violence" set forth in 18 U.S.C. § 16(a), which requires an intentional application or exertion of force against the person or property of another. *See Flores,* 350 F.3d at 672; *Bazan-Reyes,* 256 F.3d at 609. Thus, the respondent's conviction is not a "crime of violence" under the categorical approach, and the Government has failed to establish removability under either INA § 237(a)(2)(A)(iii) or INA § 237(a)(2)(E)(i).

[5] The Court notes that the Board in *Chairez* does not seem to contemplate a situation such as that arising with respect to KRS § 508.030, where multiple different sets of jury instructions could be given, some of which require jury unanimity as to mental state and some of which do not. The *Chairez* decision also does not specifically address how a court should handle plea agreements such as the one in the respondent's case, that include a guilty plea as to a specific *mens rea*, when the hypothetical jury instructions may or may not have required a finding as to the specific *mens rea* used to commit the offense. Despite the lack of clarity on these issues, and because the *Chairez* decision did not set out any exceptions to address the issues raised here, the Court has attempted to apply the general legal framework set forth in that decision to the facts of this case.

III. CONCLUSION

For the above reasons, the Court finds that the respondent's conviction for assault in the fourth degree under KRS § 508.030(1)(a) does not render him removable under either INA § 237(a)(2)(A)(iii) or INA § 237(a)(2)(E)(i), pursuant to the Board's recent precedent decision in *Chairez,* which this Court is required to follow. The Government does not allege that the respondent is removable under any other ground. Therefore, the following order will be entered:

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that proceedings be TERMINATED.

SHEILA MCNULTY
IMMIGRATION JUDGE