U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

Parra, Alan M
Law Offices of Alan M. Parra
1100 Wayne Avenue
Suite 720
Silver Spring, MD 20910

DHS/ICE Office of Chief Counsel - BAL
31 Hopkins Plaza, Room 1600
Baltimore, MD 21201

Name: SAMA, VERA

A 076-581-488

Date of this notice: 7/17/2015

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:
Malphrus, Garry D.
Creppy, Michael J.
Mann, Ana

Userteam: Docket

U.S. Department of Justice

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5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

SAMA, VERA
A076-581-488
FCDC
7300 MARCIES CHOICE LN
FREDERICK, MD 21704

DHS/ICE Office of Chief Counsel - BAL
31 Hopkins Plaza, Room 1600
Baltimore, MD 21201

Name: SAMA, VERA

A 076-581-488

Date of this notice: 7/17/2015

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:
Malphrus, Garry D.
Creppy, Michael J.
Mann, Ana

Userteam:

File: A076 581 488 – Baltimore, MD Date: JUL 17 2015

In re: VERA SAMA a.k.a. Vera Kasubika Sama a.k.a. Vellah Kabusika Sama

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alan M. Parra, Esquire

AMICUS CURIAE FOR RESPONDENT Maureen A. Sweeney, Esquire
University of Maryland,
Cary School of Law Immigration Clinic

Elizabeth Rossie, Esquire
Maryland Office of the Public Defender

ON BEHALF OF DHS: Carrie E. Jonston
Senior Attorney

CHARGE:

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

APPLICATION: Termination

The respondent appeals from the Immigration Judge's decisions finding him removable as charged and ordering him removed from the United States.[1] The Department of Homeland Security (the "DHS") opposes the respondent's appeal. The appeal will be sustained, and the removal proceedings will be terminated.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

[1] The Immigration Judge issued two decisions in this case. The first, dated January 16, 2015, found the respondent removable as charged. The second, dated January 28, 2015, incorporated the first decision, noted that the respondent was not seeking relief from removal, and ordered the respondent removed from the United States.

The respondent is a native and citizen of Zambia and a lawful permanent resident of the United States. In 2006, the respondent was convicted of theft in violation of section 7-104 of the Maryland Criminal Code and was sentenced to a term of imprisonment of 3 years.

The issue on appeal is whether the respondent's conviction renders him removable from the United States as an alien convicted of an "aggravated felony," namely a "theft offense" for which the term of imprisonment was at least 1 year. *See* sections 101(a)(43)(G) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(G), 1227(a)(2)(A)(iii). Upon our de novo review, we must conclude that it does not (I.J. Dec. dated January 16, 2015, at 6-14). *See* 8 C.F.R. § 1003.1(d)(3)(ii).

A crime is a "theft offense" under section 101(a)(43)(G) of the Act if it requires a taking of, or exercise of control over, another's property without consent and with the criminal intent to deprive the owner of the rights and benefits of ownership. *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440-41 (BIA 2008); *Castillo v. Holder*, 776 F.3d 262, 267 (4th Cir. 2015). To decide whether an offense fits this definition, we first employ the categorical approach, which requires us 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 of that statute. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013).

As noted, the respondent was convicted under section 7-104 of the Maryland Criminal Code (hereafter "§ 7-104"). When the respondent committed his offense and sustained his conviction, § 7-104 contained five discrete, separately titled, subsections, each of which define a different type of criminal conduct constituting "theft": (a) obtaining or exerting unauthorized control over property; (b) obtaining control of property by deception; (c) possession of stolen property; (d) obtaining control of lost, mislaid or mistakenly delivered property; and (e) obtaining services by deception or without consent. Taken at its minimum, this definition of "theft" is categorically broader than the "theft offense" concept because it includes some acts, such as those described in subsections (b) and (e), in which property is acquired *with consent* that was fraudulently obtained. *Matter of Garcia-Madruga, supra*, at 440. Thus, the Immigration Judge properly found that § 7-104 is not categorically an aggravated felony, and the parties have conceded the issue (I.J. Dec. dated January 16, 2015, at 12-13; DHS's Brief at 12-13; Respondent's Brief at 4-5).

Although § 7-104 does not define a categorical "theft offense," the Immigration Judge concluded that it is a "divisible" statute vis-à-vis "theft offense" concept, thereby warranting a modified categorical inquiry into the record of conviction (I.J. Dec. dated January 16, 2015, at 3-14). *See Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276 (2013); *Matter of Garcia-Madruga, supra*; *Castillo v. Holder, supra.*

The Immigration Judge found that "the most simple and natural reading of the text of § 7-104 supports the conclusion that the statute is divisible into five alternative sets of elements . . . It is, in fact, hard to conceive of a statute divided more clearly into alternate sets of elements than § 7-104 with its clearly delineated and separately subtitled subsections (a)-(e)" (I.J. Dec. dated January 16, 2015, at 7). Upon de novo review, however, we conclude that § 7-104 is not a divisible statute within the meaning of *Descamps*.

In *Descamps*, the Supreme Court clarified that an offense is divisible – so as to permit a modified categorical inquiry – only if it contains disjunctive sets of "elements," more than one combination of which could support a conviction. *Descamps v. United States*, *supra*, at 2281, 2283. The Court held that the modified categorical approach is inapplicable "when the crime of which the defendant was convicted has a single, indivisible set of elements." *Id.* at 2282. Thus, § 7-104 can be viewed as divisible only if each of its alternative subsections defines a discrete "element" of the offense, with the term "element" being defined as a fact about the crime that must be found by a jury, "unanimously and beyond a reasonable doubt." *Id.* at 2288-90 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)); *see also Omargharib v. Holder*, 775 F.3d 192. 198-99 (4th Cir. 2014).

In § 7-104, the State of Maryland brought various theft-related offenses together under one statutory umbrella in an effort to "avoid the subtle distinctions that existed and had to be alleged and proved to establish the separate crimes under the former law." *State v. Manion*, 442 Md. 419, 432 (Md., 2015). Each of § 7-104's subsections describes a different and alternative version of the theft offense. *United States v. Cabrera–Umanzor, supra*. However, the respondent's conviction is not specifically for one of the five offenses. For example, the conviction record does not specify a section, such as § 7-104(a).

The Maryland courts have held that § 7-104 does not define multiple autonomous offenses with discrete elements; rather, it defines a single offense that may be committed several ways. *E.g., Crispino v. State*, 7 A.3d 1092, 1102 (Md. 2010) (discussing *Rice v. State*, 532 A.2d 1357, 1367 (Md. 1987)).). Thus, a Maryland jury is permitted to enter a guilty verdict against a defendant charged with theft so long as all jurors agree that theft in *some* form was committed; the jurors need not unanimously agree upon *which* form of theft the defendant committed. *Cardin v. State*, 533 A.2d 928, 933-34 (Md. Ct. Spec. App. 1987).

As a person can be convicted under § 7-104 even if the jurors disagree as to the manner in which he committed the offense, it follows that the statute's various subsections do not define alternative "elements" of a § 7-104 offense; rather, they merely describe alternative "means" by which such an offense may be committed. *See Schad v. Arizona*, 501 U.S. 624, 636 (1991) (plurality opinion) ("[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes."); *Richardson v. United States, supra*, at 817 ("[A] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime."). That is not sufficient to make the statute divisible. *See Matter of Chairez,* 26 I&N Dec. 349, 353 (BIA 2014); *Rendon v. Holder*, 764 F.3d 1077, 1085, 1089 (9th Cir. 2014) (finding that the California burglary state was indivisible because the "jury need not agree on which of the substantive offenses [, grand or petit larceny or any felony,] the defendant intended to commit," when he entered the locked vehicle). Thus, § 7-104 is indivisible and the Immigration Judge is precluded from conducting a modified categorical inquiry in this matter.

In conclusion, we are required to conclude that the offense defined by § 7-104 is neither a categorical "theft offense" under section 101(a)(43)(G) of the Act nor divisible vis-à-vis the theft offense concept. Accordingly, the DHS has not established by clear and convincing

evidence that the respondent's conviction renders him removable as an alien convicted of an aggravated felony. No other removal charges are pending against the respondent, and therefore the proceedings will be terminated.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated, and the removal proceedings are terminated.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

File: A076-581-488 January 28, 2015

In the Matter of

VERA SAMA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES:

APPLICATIONS:

ON BEHALF OF RESPONDENT: Allen Para

ON BEHALF OF DHS: Kelly Santos-De Jesus

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent was issued a Notice to Appear on October 17th, 2014. Following a consideration of all the evidence in the record, and the arguments of both sides on removability, the court did issue a written decision on January 16th, 2015, finding that the respondent was removable as charged under the aggravated felony charge. That decision is incorporated herein. The respondent may be seeking to reduce this sentence on her theft conviction. However, the respondent's counsel was not sure when any action on that might be completed. No continuance was requested. The respondent is not seeking any relief from removal today. The respondent does

plan to appeal the court's finding on the aggravated felony. The court hereby orders the respondent removed from the United States to Zambia. This is the end of the court's oral decision.

Please see the next page for electronic signature

ELIZABETH A. KESSLER
Immigration Judge

//s//

Immigration Judge ELIZABETH A. KESSLER

kesslere on March 16, 2015 at 11:35 AM GMT

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
31 HOPKINS PLAZA, ROOM 440
BALTIMORE, MD 21201

Law Offices of Alan M. Parra
Parra, Alan M
1100 Wayne Avenue
Suite 720
Silver Spring, MD 20910

IN THE MATTER OF
SAMA, VERA

FILE A 076-581-488 DATE: Jan 16, 2015

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 20530

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
31 HOPKINS PLAZA, ROOM 440
BALTIMORE, MD 21201

__ OTHER: **COPY OF IJ WRITTEN DECISION MAILED.cy**

COURT CLERK
IMMIGRATION COURT FF

CC: DHS, ICE, OFFICE OF THE CHIEF COUNSEL
31 HOPKINS PLAZA 16TH FLOOR
BALTIMORE, MD, 212010000

United States Department of Justice
Executive Office for Immigration Review
Immigration Court
Baltimore, Maryland

In the Matter of	:	**In Removal Proceedings**
Vera SAMA	:	**Case A# 076-581-488**
Respondent	:	

Charges: Immigration and Nationality Act ("INA") § 237(a)(2)(A)(iii)

Issues: Removability, and Respondent's Motion to Terminate

Appearances: Alan M. Parra, on behalf of the Respondent;
Carrie E. Johnston and Jennifer Piateski, on behalf of the Department of Homeland Security

Decision and Order of the Immigration Judge on Removability

The Respondent is a native and citizen of Zambia and a lawful permanent resident of the United States. On October 17, 2014, the Department of Homeland Security ("DHS") issued the Respondent a Notice to Appear ("NTA"), which alleges that: (1) the Respondent is not a citizen or national of the United States; (2) the Respondent is a native and citizen of Zambia; (3) the Respondent was admitted to the United States at New York, NY, on or about December 19, 1989, as a Visitor; (4) the Respondent's status was adjusted to that of a lawful permanent resident on April 30, 2002; (5) the Respondent was convicted on August 18, 2006 of Theft: $500 plus value, in violation of CR.7.104 of the Annotated Code of Maryland, in the Circuit Court of Maryland for Baltimore County, MD; and (6) the Respondent was sentenced to a term of three years in jail. The NTA charged the Respondent with removability pursuant to INA § 237(a)(2)(A)(iii) as convicted of an aggravated felony as defined at INA § 101(a0943)(G), a law relating to Theft: $500 plus value. Exh. 1.

At a master calendar hearing on November 10, 2014, the Respondent admitted factual allegations 1 through 4, and denied allegations 5 and 6. The Court then scheduled an individual hearing on removability on December 11, 2014. At the individual hearing, the DHS objected to the admission into the record of Exhibit 4, Tab A. The Court noted the DHS's objection, but admitted the evidence, subject to evaluation of its appropriate weight and relevance by the Court. The parties did not offer any further arguments, objections, or witness testimony at the individual hearing. The Court thereupon reserved decision on the issue of removability.

At issue before the Court is whether the DHS has met its burden to establish by clear and convincing evidence that the Respondent's theft conviction under Md. Code Ann., Crim. Law § 7-104 constitutes an aggravated felony. If so, the conviction would render the Respondent removable pursuant to INA § 237(a)(2)(A)(iii).

Statement of the Case

The following evidence has been admitted into the record and considered by the Court: Exhibit 1, the Notice to Appear; Exhibit 2, the DHS's Brief in Support of Removability; Group Exhibit 3, the DHS's Submission of Immigration and Criminal Records Pertaining to the Respondent; and Group Exhibit 4, the Respondent's Reply Brief in Support of Termination of Removal Proceedings, Tabbed A–B.

The DHS argues that the Respondent's theft conviction constitutes an aggravated felony under the modified categorical approach rendering her removable pursuant to INA § 237(a)(2)(A)(iii). The DHS acknowledges that the U.S. Supreme Court in *Descamps v. United States*, 133 S. Ct. 2276 (2013), held that the categorical approach should be applied when the crime in question has a single set of indivisible elements. The DHS also notes that the Board of Immigration Appeals ("BIA") acknowledged this approach extends to the immigration context. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014). However, the DHS asserts that the Respondent's conviction under § 7-104 should be analyzed utilizing the modified categorical approach. The DHS contends that the Court should apply the divisibility analysis set forth by the BIA in *Matter of Sweetser*, 22 I&N Dec. 709, 715 (BIA 1999), because of the breadth of the statute of conviction and its coverage of a range of distinct alternative offenses, which would permit the Court to apply the modified categorical approach. Exh. 2 at 3. The DHS posits that § 7-104 contains separate and discrete alternative variations of theft offenses. Accordingly, the DHS asserts that a modified categorical approach should be applied to determine whether the Respondent's conviction falls under either § 7-104(a) or (b), which the DHS argues would mean it qualifies as an aggravated felony based on a claimed match between these two subsections of the statute and the generic definition of theft. Exh. 2 at 7. Further, the DHS asserts that the Maryland statute does require, as an element under subsections (a) and (b), that the unauthorized control over property be without the owner's consent. The DHS maintains this distinguishes subsections (a) and (b) of the Maryland theft statute from the Virginia credit card fraud statute analyzed in *Soliman v. Gonzales*, 419 F.3d 276, 285 (4th Cir. 2005), which did not require that the taking be without consent, and which the Fourth Circuit accordingly held did not qualify as an aggravated felony.[1] Exh. 2 at 8.

The Respondent argues that her theft conviction categorically does not constitute an aggravated felony. First, the Respondent asserts that her theft offense is not an aggravated felony because the statute of conviction is indivisible and includes conduct that is not penalized under

[1] After the conclusion of the individual hearing and submission of evidence, the Fourth Circuit issued a decision in *Omargharib v. Holder*, holding that the Virginia crime of larceny is indivisible between theft and fraud offenses, and therefore, does not constitute aggravated felony theft for purposes of INA § 101(a)(43)(G). The Fourth Circuit's analysis in *Omargharib* will be discussed *infra*.

the generic federal definition of theft. Exh. 4, Resp't's Br. 3. The Respondent asserts that the generic federal definition of theft requires the element of a non-consensual taking and does not include theft of services. *Id.* at 7–8. By contrast, the Maryland statute includes theft by deception in subsection (b), which the Respondent argues does not require lack of consent, and also includes theft of services in subsection (e). *Id.* at 13–14. According to the Respondent, the Maryland statute is indivisible under *Descamps* because it contains what the Respondent views as alternative means of committing theft, as opposed to alternative elements. The Respondent cites the interpretation of the Maryland Court of Appeals in *Rice v. State* to argue that the Maryland theft statute is a consolidated, indivisible statute to which only a categorical analysis may be applied. In that case, the Maryland Court of Appeals found that a jury does not have to unanimously agree on which of § 7-104's elements has been proven, so long as the jury agrees that the overall offense of theft was committed. *Rice v. State*, 532 A.2d 1357, 1358–62 (Md. 1987). For these reasons, the Respondent contends, the statute of conviction encompasses conduct that may or may not constitute an aggravated felony, and therefore her conviction does not categorically constitute a removable offense pursuant to INA § 237(a)(2)(A)(iii). Exh. 4, Resp't's Br. 15–16.

Applicable Law

Removability Pursuant to INA § 237(a)(2)(A)(iii). INA § 237(a)(2)(A)(iii) provides for the removability of an alien who is convicted of an aggravated felony at any time after admission. The term "aggravated felony" is defined in INA § 101(a)(43) and includes, among other crimes, theft. *See* INA § 101(a)(43)(G). The definition of aggravated felony includes a conspiracy or attempt to commit any crime described in that section. INA § 101(a)(43)(U); 8 C.F.R. § 1001.1(t). Section 101(a)(43)(G) of the Act includes in the definition of aggravated felony "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." To determine whether the term of imprisonment is at least one year, the period of confinement ordered by the criminal court is dispositive, regardless of any suspension of that sentence in whole or in part. INA § 101(a)(48)(B).

To determine whether an alien's conviction constitutes an aggravated felony, courts generally apply the "categorical" approach to analyze a respondent's prior conviction. *See Descamps*, 133 S. Ct. at 2281. Under the categorical approach, the court looks "only to the statutory definition of the state crime and the fact of conviction to determine whether the conduct criminalized by the statute" qualifies as a removable offense. *United States v. Royal*, 731 F.3d 333, 341–42 (4th Cir. 2013); *see also Descamps*, 133 S. Ct. at 2283. However, even where a state statute facially covers conduct not encompassed by a removable offense, the categorical approach "requires a focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction." *Matter of Chairez-Castrejon*, 26 I&N Dec. at 349; *see also Matter of Ferreira*, 26 I&N Dec. 415, 420-21 (BIA 2014).

Only where a statute is "divisible" may a court utilize a modified categorical approach. In such circumstances, the court may look to the record of conviction, including the charging document, the plea agreement, the plea colloquy, and any explicit findings of fact made by the trial judge. *Prudencio v. Holder*, 669 F.3d 472, 485 (4th Cir. 2012); *see also Shepard v. United*

States, 544 U.S. 13, 15 (2005). A divisible statute is one that "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile." *Descamps*, 133 S. Ct. at 2281. If one alternative matches an element in the generic offense of the crime, but the other does not, the court may apply the modified categorical approach to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the Respondent's prior conviction. *Id.*

In *Matter of Chairez-Castrejon*, the BIA expressly adopted the Supreme Court's decision in *Descamps*. *Matter of Chairez-Castrejon*, 26 I&N Dec. at 354. The BIA further held that for a statute to be divisible it must include alternative elements of the offense and cited *Descamps* for the proposition that an offense's elements are the facts about a crime that a jury will find unanimously and beyond a reasonable doubt. *See id.* at 353-355. In *Omargharib v. Holder*, the Fourth Circuit considered the divisibility of the crime of larceny under Virginia law, the elements of which are defined by common law. --- F.3d ---, 2014 WL 7272786, at *11-17 (4th Cir. Dec. 23, 2014). The Fourth Circuit held that the use of the disjunctive in the definition of a crime does not automatically render the crime divisible; rather, it is the use of multiple alternative elements that establishes the divisibility of a crime. To distinguish alternative *elements* of a crime from alternative *means* of committing the same crime, the Fourth Circuit stated that "elements" are "factual circumstances of the offense the jury must find 'unanimously and beyond a reasonable doubt.'" *Omargharib*, 2014 WL 7272786, at *14.

Relevant to this matter, the Supreme Court, citing the BIA and several Circuit courts, has accepted as a generic definition of theft the "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007) (quoting *Penuliar v. Gonzales*, 435 F.3d 961, 969 (2006)); *see also Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440–41 (BIA 2008).

Maryland General Theft Provisions. The Maryland consolidated theft statute combines what were seven separate larceny offenses—at one time referred to as larceny, larceny by trick, larceny after trust, embezzlement, false pretenses, shoplifting, and receiving stolen property—into the crime of theft. *Hobby v. State*, 83 A.3d 794, 804 n.3 (Md. 2014). Section 7-104 (entitled "General theft provisions") provides, in pertinent part, several alternative sets of elements that comprise distinct types of theft offenses:[2]

> Unauthorized control over property
>
> (a) A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:
>
> (1) intends to deprive the owner of the property;
>
> (2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
>
> (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the

[2] N.B. In 2002, the Maryland General Assembly reorganized the Maryland criminal code. Theft, and in particular Md. Code Ann., Crim. Law § 7-104, formerly was codified under Md. Ann. Code, art. 27, §§ 340–344.

property.

Unauthorized control over property--By deception

(b) A person may not obtain control over property by willfully or knowingly using deception, if the person:

(1) intends to deprive the owner of the property;

(2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

Possessing stolen personal property

(c)(1) A person may not possess stolen personal property knowing that it has been stolen, or believing that it probably has been stolen, if the person:

(i) intends to deprive the owner of the property;

(ii) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(iii) uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property.

(2) In the case of a person in the business of buying or selling goods, the knowledge required under this subsection may be inferred if:

(i) the person possesses or exerts control over property stolen from more than one person on separate occasions;

(ii) during the year preceding the criminal possession charged, the person has acquired stolen property in a separate transaction; or

(iii) being in the business of buying or selling property of the sort possessed, the person acquired it for a consideration that the person knew was far below a reasonable value.

(3) In a prosecution for theft by possession of stolen property under this subsection, it is not a defense that:

(i) the person who stole the property has not been convicted, apprehended, or identified;

(ii) the defendant stole or participated in the stealing of the property;

(iii) the property was provided by law enforcement as part of an investigation, if the property was described to the defendant as being obtained through the commission of theft; or

(iv) the stealing of the property did not occur in the State.

(4) Unless the person who criminally possesses stolen property participated in the stealing, the person who criminally possesses stolen property and a person who has stolen the property are not accomplices in theft for the purpose of any rule of evidence requiring corroboration of the testimony of an accomplice.

Control over property lost, mislaid, or delivered by mistake

(d) A person may not obtain control over property knowing that the property was lost, mislaid, or was delivered under a mistake as to the identity of the recipient or nature or amount of the property, if the person:

(1) knows or learns the identity of the owner or knows, is aware of, or learns of a reasonable method of identifying the owner;

(2) fails to take reasonable measures to restore the property to the owner; and

(3) intends to deprive the owner permanently of the use or benefit of the property when the person obtains the property or at a later time.

Services available only for compensation

(e) A person may not obtain the services of another that are available only for compensation:

(1) by deception; or

(2) with knowledge that the services are provided without the consent of the person providing them.

Analysis and Findings

Removability Pursuant to INA § 237(a)(2)(A)(iii).

A. Aggravated Felony Theft Offense. In this case, the Respondent has been convicted of theft under Md. Code Ann., Crim. Law § 7-104. The first issue to address is whether the Respondent's theft offense constitutes an aggravated felony. The DHS asserts that the Maryland statute is divisible because of the breadth of the statute of conviction and its coverage of a range of alternative offenses. By applying the modified categorical approach, the DHS asserts that the Respondent may be found to have committed a theft offense under § 7-104(a), which the DHS argues fits within the generic federal definition of theft. Exh. 2 at 11. The Respondent asserts, by contrast, that the statute is indivisible. The Respondent posits that the Maryland statute is overbroad and categorically is not a match to the generic federal definition of theft because the Maryland statute includes what the Respondent describes as alternative *means* of committing theft—including theft by deception and theft of services—which are not included within the generic federal definition. The Respondent argues that the generic federal definition requires the theft to occur without the owner's consent and that the theft must be of property, not of services, and that for this reason the Maryland theft statute is overbroad. Exh. 4, Resp't's Br. 13–14. The Respondent argues that because Maryland courts interpret § 7-104 to not require jury unanimity as to which subsection or subsections of § 7-104 might have been violated in a particular case the entire statute is indivisible, and therefore does not categorically constitute an aggravated felony theft offense under INA § 101(a)(43)(G). *Id.* at 10–11.

1. Is § 7-104 divisible at all?

The Respondent asserts that § 7-104 is indivisible because a conviction under § 7-104

does not meet the requirement of jury unanimity under her reading of *Matter of Chairez-Castrejon*. The Respondent cites to *Rice v. State* to show that the Maryland Court of Appeals has interpreted § 7-104 to not require jury unanimity with respect to the specific subsection of the offense committed. *Rice v. State*, 311 Md. at 1361. Arguing that because Maryland does not require jury unanimity as to which of § 7-104's subsections have been proven, so long as each juror agrees that at least one of § 7-104's subsections was violated, the Respondent claims that the statute is indivisible between alternative sets of elements, but rather is divided into alternative means of committing the offense of theft. Therefore, the Respondent contends that it cannot be proven under a categorical analysis whether or not the Respondent was convicted of an aggravated felony. Exh. 4, Resp't's Br. 11. In contrast, the DHS argues that the statute contains separate and distinct alternative types of theft, each of which contains its own set of elements, and that for that reason the statute is divisible.

The most simple and natural reading of the text of § 7-104 supports the conclusion that the statute is divisible into five alternative sets of elements. Section 7-104 is entitled "General theft provisions," and it lists five verbally and analytically separate and independently labelled subsections (a)–(e). The only natural reading of § 7-104 is that it is a divisible statute and that it is divisible into five alternative offenses, each of which represents one of the "General theft provisions." It is, in fact, hard to conceive of a statute divided more clearly into alternate sets of elements than § 7-104 with its clearly delineated and separately subtitled subsections (a)–(e).

The Respondent makes much of the fact that the Maryland Court of Appeals has determined that jury unanimity is not required as to which particular subsection of § 7-104 was violated in order for a defendant to be convicted under § 7-104. It does appear from Maryland case law that Maryland courts have concluded that, in order to support a conviction under § 7-104, jury unanimity is not required as to which of the very distinct subsections may have been violated. *Rice v. State*, 532 A.2d at 1361. Given that the subsections (a)–(e) are so distinct and varied (including, for example, theft of services and receipt of stolen property), it stands to reason that a jury would still have to make a finding that could be supported by the particular evidence presented in a case and that actual jury instructions in a case would make clear to a jury which subsection or subsections were viable in a particular case.[3] In a given case, it may be that a jury would be instructed that it convict under a theory, say, of either theft of property or theft of services. In such a case, it may very well be impossible to tell which theory, if any, prevailed, and the record of conviction might be inconclusive with respect to which of the "General theft provisions" was violated. That does not mean, however, that the statute itself is not divisible.

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[3] The Maryland State Bar Standing Committee on Pattern Jury Instructions, composed of Maryland judges, lawyers, and law professors, has compiled model criminal jury instructions, which set forth separate sets of elements for subsections (a) through (e). *See, e.g.*, MPJI-CR 4:32 § 7-104(a): Theft – Unauthorized Control; MPJI-CR 4:32.1 § 7-104(b): Theft – Obtaining Control by Deception; MPJI-CR 4:32.2 § 7-104(c): Theft – Possession of Stolen Property; *see also* David E. Aaronson, *Maryland Criminal Jury Instructions and Commentary* § 6.70A-E (3d ed. 2013 cumulative supplement). Moreover, the instructions for each subsection contain the following phrase, "If you conclude beyond a reasonable doubt that the State has proved each of the elements of the offense," thereby implying that each subsection contains its own separate set of elements. *Maryland Criminal Jury Instructions and Commentary* § 6.70A-E. Accordingly, it does not appear that a jury could convict a defendant of a violation of the "General theft provisions" under § 7-104 without considering any one of these sets of instructions pertinent to the specific subsection(s) presented as a basis for a violation.

Section 7-104 is a classic divisible statute, notwithstanding that it may not be clear in a particular case under which section a jury convicted a particular individual and notwithstanding that a jury in Maryland need not return a unanimous verdict with respect to one of the five subsections of the "General theft provisions." A careful examination of precedent concerning the application of the categorical and modified categorical approaches reveals that jury unanimity has never been adopted as the defining test for whether a statute is divisible into alternate offenses. A close examination of *Taylor v. United States*, 495 U.S. 575 (1990), *Shepard*, and *Descamps* reveals that the Supreme Court has focused not on jury unanimity, which receives scant mention in the Supreme Court jurisprudence on the categorical and modified categorical approaches, but rather on whether a statute contains alternate elements. Neither *Taylor* nor *Shepard* raises the issue of jury unanimity or suggests that jury unanimity would help determine whether a particular statutory offense was broader than the generic equivalent. *Descamps*' emphasis throughout is on the elements of an offense and, in particular, on divisible statutes, which are defined as those with alternative elements. *See Descamps*, 133 S. Ct. at 2284 ("[In *Taylor*,] we hypothesized a statute with alternative elements—more particularly, a burglary statute (otherwise conforming to the generic crime) that prohibits 'entry of an automobile as well as a building.'"); *Id.* at 2285 ("That is the job, as we have always understood it, of the modified approach: to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense."); *Id.* at 2286 ("Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines burglary not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not."); *Id.* at 2293 ("Because generic unlawful entry is not an element, or an alternative element . . . , a conviction under that statute is never for generic burglary."); *Id.* ("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.").

The brief reference to jury unanimity in *Descamps*, in contrast, is made in dicta in passing to emphasize that the Ninth Circuit in that case had "authorize[d] the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct . . . The Sixth Amendment ***contemplates*** that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." *Id.* at 2288 (emphasis added). The more important part of the passage is the reference to what we can be sure the jury found, which emphasizes the working of the categorical and modified categorical approaches. As noted, in some instances of violations of § 7-104, depending on what instructions a jury was given it may be impossible to determine under which subsection a defendant was convicted in a given case. That would render the record of conviction inclusive, but would not render the offense to be without elements. Notably, the Supreme Court chose carefully the word "contemplates" in this brief passage and does not suggest that the Sixth Amendment always requires jury unanimity or that its comments in this short passage were its definitive views on jury unanimity in this context.

Significantly, non-unanimous jury verdicts are constitutionally permissible in state court criminal trials. *See Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S.

404 (1972). As a state jury may permissibly convict without unanimity, jury unanimity simply cannot be what defines the elements of an offense. Jury unanimity cannot serve as the delimiting factor in whether something is or is not an element of a state crime because jury unanimity, while now typically provided for by most states in criminal cases, is not constitutionally required; state criminal convictions will pass Sixth Amendment scrutiny even if less than jury unanimity is required to convict. In those cases, the lack of jury unanimity would not render a crime without elements.

To be sure, the BIA emphasized jury unanimity in *Matter of Chairez*, but what may have made sense to discuss in the context of the Utah statute at issue in that case (which the BIA concluded was divisible between subsections (a), (b), and (c), but not divisible within (a) into offenses carrying different levels of mens rea) does not make sense in the context of the Maryland theft statute. *Matter of Chairez*'s more lengthy discussion of jury unanimity is not necessary to its holding and extends more broadly than the Supreme Court's jurisprudence on the categorical approach.

The Utah statute in *Matter of Chairez* was found divisible into subsections (a), (b), and (c), but not divisible within (a) based on conceivable violations of (a) involving differing levels of mens rea. The Utah statute provided in key part as follows:

> (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.

Matter of Chairez, 26 I&N Dec. at 351.

The BIA concluded based on the text that the Utah statute was divisible between (a), (b), and (c), and that (b) and (c) were each categorically crimes of violence. *Id.* To the extent the Utah statute is divisible into separately delineated subsections, it certainly resembles the Maryland statute in its construction. In analyzing the Utah statute, the BIA concluded that subsection (a) was not further divisible into different elements based on mens rea requirements, in part because jury unanimity was not required as to which particular mens rea was involved in a violation of subsection (a), which could be proven by reckless conduct as well as more intentional standards. The BIA could have reached the same conclusion by examining simply the statutory text and concluding that a violation of subsection (a) could be broader than a crime of violence.

Moreover, the elements of the Utah subsections can be easily identified under the BIA's analysis but the elements of a theft violation in Maryland are impossible to identify under the Respondent's interpretation of § 7-104, which would render it a crime without elements. With respect to the Utah statute, it is quite simple to state the elements of a violation of subsection (a), for example, by stating that a person must (i) discharge a firearm, (ii) in the direction of any person or persons, and (iii) knowing or having reason to believe that any person may be endangered by the discharge. That (iii) may include recklessness is what makes subsection (a) overbroad, and the proper reading of the statute is not that recklessness is an alternate element but that the mens rea element is broad.

In contrast, § 7-104 ("General theft provisions") does not lend itself to being read as one indivisible but broad offense in the same way that subsection (a) of the Utah statute could be read as one offense which is too broad to be an aggravated felony. Nowhere in the Respondent's brief or argument does the Respondent state, whether succinctly or otherwise, what the elements are of the "Generalized theft provisions" in Maryland. The Respondent refers repeatedly to § 7-104 as a "consolidated" theft statute, but that only obfuscates the issue. It certainly could be that the "General theft provisions" consolidate five distinct theft offenses in a divisible manner: "Unauthorized control over property"; "Unauthorized control over property – by deception"; "Possessing stolen personal property"; "Control over property lost, mislaid, or delivered by mistake"; and "Services available only for compensation." Calling the statute a consolidated statute does not answer the question as to whether or not it is divisible, and much less along what lines it might be divisible.[4]

The fundamental problem with the Respondent's reading of § 7-104 is that it renders the statute without any elements whatsoever. If, as the Respondent claims, only particular items that must be found by a jury unanimously to convict under § 7-104 under any circumstances count as "elements" of a theft offense in Maryland, then § 7-104 in fact has no elements whatsoever. In straining to view the statute in the Respondent's optic as a unified, single theft offense, the Court is unable to identify what the elements of theft might possibly be without resorting to a list of wholly separate alternative elements (a), (b), (c), (d), or (e). Significantly, the various "General theft provisions" contain no single common element among subsections (a)–(e): some involve property, one involves services, some require a lack of consent, and some may be committed through deception. It is simply impossible to provide the elements of a violation of § 7-104 in Maryland without resorting to some iteration of "it is either (a) or (b) or (c) or (d) or (e)." That is what makes the statute divisible into alternative elements.

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[4] Notably, the majority of states have enacted some form of "consolidated" theft statute in an effort to avoid the troublesome scenario in which a defendant, convicted of one type of theft crime, on appeal claims that his crime was one of the other types of theft crimes, and subsequently the defendant's conviction is reversed. *See* 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.8 (2d ed. 2014). Consolidated theft statutes allow a prosecutor to lodge one type of theft charge in the information or indictment and later, upon discovery and submission of all evidence, prove that another type of theft crime was actually committed and still obtain a conviction. *See, e.g.*, Md. Code Ann., Crim. Law § 7-109 ("a charge of theft may be proved by evidence that the theft was committed in a manner that is theft under this part, even if a different manner is specified in the information, indictment, warrant, or other charging document."). Notwithstanding such consolidation for prosecution purposes, a "consolidated" theft statute, such as § 7-104 still encompasses several alternative types of theft crimes with entirely distinct and separate alternative sets of elements. *See* Section 7-104(a)–(e).

Finally, it must be noted that the Fourth Circuit's decision in *Omargharib* does not significantly impact this case because the crime of larceny in Virginia is defined differently than the crime of theft in Maryland under § 7-104. In *Omargharib*, the Fourth Circuit held that the respondent's Virginia larceny conviction did not constitute an aggravated felony theft offense under INA § 101(a)(43)(G) because "Virginia law treats fraud and theft as the same for larceny purposes, but the INA treats them differently." 2014 WL 7272786, at *11. The Fourth Circuit found that larceny in Virginia did not contain divisible sets of alternative elements and that larceny in Virginia "'sweeps more broadly' than the INA's theft offense." *Id.* (citing *Descamps*, 133 S. Ct. at 2283).

In Virginia, larceny is punished by statute, but its elements are defined by common law. Larceny is defined in Virginia as "the wrongful or fraudulent taking of another's property without his permission and with the intent to permanently deprive the owner of that property." *Britt v. Commonwealth*, 667 S.E.2d 763, 765 (Va. 2008); *Omargharib*, 2014 WL 7272786, at *10 (quoting *Britt*). Thus, the elements of larceny in Virginia may be broken down as follows: 1) the wrongful or fraudulent taking; 2) of another's property; 3) without permission; and 4) with the intent to permanently deprive the owner of that property.

In its analysis of whether larceny in Virginia is divisible between wrongful and fraudulent takings, and therefore between takings that are with or without consent, the Fourth Circuit noted that "[e]lements, as distinguished from means, are factual circumstances of the offense the jury must find 'unanimously and beyond a reasonable doubt.'" *Omargharib*, 2014 WL 7272786, at *14 (quoting *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013) and *Descamps*, 133 S. Ct. at 2288). Finding that Virginia law has used both wrongful and fraudulent takings as two different means of satisfying the "without consent" element, the Fourth Circuit concluded that "wrongful or fraudulent takings are alternative means of committing larceny, not alternative elements." *Id.* at *15-16. Citing Virginia model jury instructions, the Fourth Circuit also found that jurors in Virginia are not required to agree unanimously on whether a taking was wrongful or fraudulent. *Id.* at 15.

The divisibility analysis with respect to the Maryland crime of theft should not be governed by the analysis of the Virginia crime of larceny because Maryland has defined theft by statute and has set forth very deliberately a distinct set of entirely alternative elements for different types of theft offenses.[5] Moreover, as with the analysis of the Utah statute considered above, even considering requirements concerning jury unanimity, the Virginia statute still

[5] Of note, *Black's Law Dictionary* 520 (6th ed. 1990) defines "elements of crime" as "[t]hose constituent parts of a crime which must be proved by the prosecution to sustain a conviction. A term used by the common law to refer to each component of the actus reus, causation, and the mens rea that must be proved in order to establish that a given offense has occurred." (internal citation omitted). It may simply be that elements of a crime are what a legislature has defined them as. Where there is uncertainty in a statutory text as to what the elements are or how broadly an element or elements should be evaluated, looking at jury unanimity requirements may help clarify how broadly or narrowly an element or elements should be understood. In this case, an analysis of the statutory language of § 7-104, which sets forth the constituent parts of several types of theft crimes, reveals that the statute contains separate and distinct alternate elements in its subsections.

contains elements, one of which is overbroad for the statute to be categorically a theft offense. In contrast, if jury unanimity were the sole touchstone of whether something in a statute is an element, then § 7-104 would have no elements at all. There simply cannot be a crime without elements. Rather, § 7-104 is best understood as containing alternate sets of elements, on which a jury need not agree unanimously. The lack of unanimity may mean that in a particular case the record of conviction will be inconclusive, but it does not mean that § 7-104 is not divisible.

Based on the above, the Court concludes that § 7-104 is divisible into alternate sets of elements as defined by the legislature.

2. *Into what alternative elements is § 7-104 divisible, are any of those an aggravated felony theft offense, and has the Respondent been convicted of an aggravated felony in this particular case?*

As § 7-104 is divisible, the statute of conviction must be analyzed under the modified categorical approach. This entails a comparison of the elements of the crime of conviction with the elements of the generic crime. *Descamps*, 133 S. Ct. at 2281. As stated previously, *Gonzales v. Duenas-Alvarez* sets forth the generic federal definition of "theft" as a "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." 549 U.S. at 189. Examining the straightforward text of the statute reveals that it is divisible into subsections (a), (b), (c), (d), and (e)—some of which match the generic definition of theft and some of which do not.

Analyzing § 7-104 in light of the elements of the generic offense, the Court finds that § 7-104(a), (c), and (d) fall within the scope of generic theft, whereas § 7-104(b) and (e) do not. Each of § 7-104(a), (c), and (d) involves the taking or exercise of control over the property of another without consent and with the intent to deprive the owner of the rights and benefits of ownership. First, all three subsections require the defendant to obtain or exercise control over the property of another. Additionally, the defendant must exercise control without the owner's consent. This is the case under § 7-104(a) because the defendant's control of the property is unauthorized, under § 7-104(c) because the possession is of property the defendant knows or believes to be stolen, and under § 7-104(d) because the defendant must know the owner lost, mislaid, or delivered the property by mistake. Furthermore, such exercise of control involves criminal intent because each subsection requires intentional or knowing deprivation of the owner of the property. Finally, all three subsections involve depriving the owner of the property, or of at least some of the rights and benefits of ownership, to a degree that is permanent. A close reading of the provisions of § 7-104 and its definitions, particularly the definition of "deprive" at § 7-101(c), indicates that "deprive" under the Maryland general theft provisions requires an intent that at least some of the rights and benefits of ownership are likely to be withheld from the victim on a permanent basis. For the above reasons, § 7-104(a), (c), and (d) fit within the generic federal definition of theft.

By contrast, § 7-104(b) does not qualify under the generic definition of theft because it does not require a lack of consent. While § 7-104(b) does involve the exercise of unauthorized control over property, such control must be obtained by deception. In *Soliman v. Gonzales*, the

Fourth Circuit held that a theft offense which does *not* involve the lack of consent does not qualify as a "theft offense" under the generic federal definition, because it is more akin to fraud than theft. *Soliman*, 419 F.3d at 283. In that decision, the Court concluded that "an offense that involves fraud or deceit" falls more appropriately within the definition of fraud at INA § 101(a)(43)(M) than it does under the theft provision at INA § 101(a)(43)(G). The Court noted that the crime of fraud involves "a false representation of a material fact . . . which deceives and is intended to deceive another so that he shall act upon it to his injury." *Id.* at 282. Moreover, in *Omargharib*, the Fourth Circuit held that larceny in Virginia, which includes both fraudulent and wrongful takings, does not constitute a generic theft offense for purposes of INA § 101(a)(43)(G). *See* 2014 WL 7272786, at *11. Accordingly, § 7-104(b), which depends upon the element of deception or deceiving to obtain unauthorized control, does not fall within the generic federal definition of theft. Similarly, § 7-104(e) also does not fall within the generic federal definition of theft because § 7-104(e) involves obtaining the services of another either by deception or without consent. Given that the generic federal definition of theft involves only the taking or exercise of control over *property*, not services, § 7-104(e) is outside the scope of a generic theft offense. *See also Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003) (finding that theft of services is not a generic theft offense).

Having determined that only § 7-104(a), (c), and (d) qualify under the generic federal definition of theft, the Court must consider whether the Respondent was convicted under one of these subsections by analyzing the limited class of documents permitted under *Shepard v. United States*, 544 U.S. 13 (2005). These documents generally include the statutory definition of the offense, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented. *Id.* at 16. In this case, the statement of charges from the District Court of Maryland for Baltimore County provides that the Respondent was charged with "steal[ing] groceries of Royal Farm Store having a value of $500.00 or greater in the violation of CR 7-104 of the Annotated Code of Maryland." Exh. 3, Tab B at 12.[6]

Given that the statement of charges specifies that the Respondent was convicted of stealing groceries belonging to Royal Farm Store, the Respondent was not convicted under § 7-104(c), (d), or (e), which involve possession of stolen property, control over lost or mislaid property, and theft of services, respectively. The only remaining provisions to govern the conviction are § 7-104(a), which qualifies as generic theft, and § 7-104(b), which does not due to the absence of any requirement of lack of consent. Examining the statement of charges, there is nothing to indicate that the Respondent's taking of groceries involved the use of deception, as would be required under § 7-104(b). By contrast, the Respondent's charge for stealing groceries falls squarely within § 7-104(a). The Respondent was convicted of a conspiracy to take the property of another (in this case, groceries) without the owner's consent (by stealing).[7] Based on

[6] The Court notes that the statement of charges in Maryland District Court was used as the charging document prior to the Respondent's appeal to, and conviction by, the Circuit Court of Maryland.

[7] *Black's Law Dictionary* 1413 (6th ed. 1990) defines "steal" as follows:

> This term is commonly used in indictments for larceny ('take, *steal*, and carry away'), and denotes the commission of theft, that is, the felonious taking and carrying away of the personal property of another, and without right and without leave or consent of owner, and with intent to keep or make use wrongfully.

the definition of "deprive" at § 7-101(c), this taking involved the intent to deprive the owner of his property on a permanent basis. Accordingly, the Respondent was convicted of theft under a provision of § 7-104 that qualifies as generic theft and thus as an aggravated felony. The DHS therefore has met its burden to demonstrate by clear and convincing evidence that the Respondent is removable as charged.

Order

The Respondent's Motion to Terminate proceedings is denied.

The removal charge under INA § 237(a)(2)(A)(iii) is sustained.

The case will remain scheduled for a master calendar hearing for the filing of any and all applications for relief. Any applications not filed at the next master calendar hearing will be deemed abandoned.

Date: January 16, 2015

Elizabeth A. Kessler
Immigration Judge

(internal citation omitted).