**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

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**Name: THORPE, ERIC OMARI**

**A 047-924-686**

**Date of this notice: 9/29/2017**

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

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Kelly, Edward F.
Kendall Clark, Molly

Userteam: Docket

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**THORPE, ERIC OMARI**
**A047-924-686**
**WAKULLA COUNTY**
**15 OAK STREET**
**CRAWFORDVILLE, FL 32327**

**DHS/ICE Office of Chief Counsel - KRO**
**18201 SW 12th St.**
**Miami, FL 33194**

**Name: THORPE, ERIC OMARI**

**A 047-924-686**

**Date of this notice: 9/29/2017**

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,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Kelly, Edward F.
Kendall Clark, Molly

Userteam:

File: A047 924 686 – Miami, FL

Date: SEP 29 2017

In re: Eric Omari THORPE

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Patrick G. Lyle, Esquire

APPLICATION: Reopening; reconsideration; termination

This case was last before us on December 20, 2011, when we dismissed the respondent's appeal from an Immigration Judge's decision dated September 23, 2011, which denied the respondent's application for protection under the Convention Against Torture. 8 C.F.R. §§ 1208.16(c), 1208.18. On April 7, 2017, the respondent, a native and citizen of Jamaica, filed a motion requesting that we reopen and terminate his removal proceedings. The motion will be granted and these proceedings will be terminated.

Although the respondent characterizes his filing as a motion to reopen, we will construe it as a motion to reconsider because it contests the correctness of our December 20, 2011, decision in light of additional legal arguments and a change of law, which the respondent asserts affect his removability (Respondent's Motion at 2-4). *See Matter of O-S-G-*, 24 I&N Dec. 56, 57 (BIA 2006). "A motion to reconsider challenges the Board's original decision and alleges that it is defective in some regard. [It] contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen, which seeks a new hearing based on new or previously unavailable evidence." *Id.* at 57-58 (citations omitted).

Generally, a motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal. Section 240(c)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(6). Because the respondent is moving for reconsideration approximately 6 years after we entered our order in December 2011 and about 11 years after we summarily affirmed a prior order of removal in 2004, his motion is untimely. Nevertheless, we may reconsider on our own motion any case in which we have rendered a decision. 8 C.F.R. § 1003.2(a). For the following reasons, we conclude that reconsideration of our prior decisions in 2011 and 2004 is warranted and we will exercise our sua sponte authority to grant the respondent's motion.

The respondent was admitted to the United States as a lawful permanent resident in 2001 (I.J. at 3; Exhs. 1, 3). In 2004, he was convicted of carrying a weapon in a motor vehicle, in violation of section 29-38 of the General Statutes of Connecticut (I.J. at 3; Exhs. 2, 3). Based on this conviction, the respondent was placed into removal proceedings and charged with removability pursuant to sections 101(a)(43)(C) and 237(a)(2)(A)(iii) of the Act, 8 U.S.C. §§ 1101(a)(43)(C), 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony relating to the illicit trafficking

in firearms, and section 237(a)(2)(C) of the Act, as an alien convicted of a firearms offense (I.J. at 3; Exhs. 1-3). An Immigration Judge sustained both charges, denied the respondent's motion to terminate his removal proceedings, and ordered him removed to Jamaica on July 30, 2004 (I.J. at 3; Exhs. 1-3). We summarily affirmed the Immigration Judge's order.

After he attempted to unlawfully reenter the United States in 2010, the respondent was returned to Jamaica in September 2010 pursuant to an expedited removal order (I.J. at 3; Exh. 2). Later that same year, the respondent was placed into removal proceedings after he again attempted to unlawfully reenter this country (I.J. at 3; Exhs. 1-2). During these proceedings, an Immigration Judge concluded that the respondent was removable under section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an immigrant who did not present valid entry documents, and section 212(a)(9)(A)(ii) of the Act, as an alien who sought admission within 10 years of his removal (I.J. at 1-2; Exh. 1).[1] The respondent applied for protection under the Convention Against Torture, and, in a decision dated September 23, 2011, an Immigration Judge denied that application and ordered the respondent removed (I.J. at 3-6). We affirmed this Immigration Judge's decision, and the respondent was again removed to Jamaica.

On March 30, 2015, the respondent was arrested at John F. Kennedy Airport in New York and charged with illegal reentry after removal in violation of sections 276(a) and (b)(1) of the Act, 8 U.S.C. §§ 1326(a), (b)(1). *United States v. Thorpe*, 15-CR-211 (NGG), 2016 WL 676395, at *2 (E.D.N.Y. Feb. 18, 2016). The respondent moved to dismiss this charge. On February 18, 2016, the United States District Court for the Eastern District of New York granted his motion. The court reasoned that the illegal reentry charge was not appropriate because the respondent had been improperly ordered removed in 2004. *Id.* at *10. The court held that, in light of intervening precedent construing the categorical approach, the respondent's conviction for carrying a weapon in a motor vehicle under Connecticut law did not render him removable. *Id.*[2]

While the court's legal analysis in this regard is instructive, we conclude that it does not properly resolve whether the respondent was lawfully ordered removed in 2004 because the court appears to have employed a method for discerning the divisibility of the respondent's statute of conviction that has since been rejected by the Supreme Court. *See id.* at *6 & n.5 (using an approach to divisibility rejected in *Mathis v. United States*, 136 S. Ct. 2243 (2016)). We will therefore independently analyze whether the respondent was properly ordered removed in 2004 in light of *Mathis* and other intervening precedents. If we conclude that the respondent's 2004 removal order was improper, we must also find that our decisions to affirm the Immigration Judges' removal orders in 2004 and 2011 were incorrect. The charges of removability in the latter proceedings could only be sustained if the 2004 order was proper and the respondent had lost his lawful permanent resident status as a result. As we explain below, we agree with the respondent

[1] Although the respondent was also charged with being removable under section 212(a)(2)(A)(i)(II) of the Act, as an alien convicted of a controlled substance violation, the Immigration Judge did not sustain that charge because the respondent's conviction did not involve controlled substances (*see* Tr. at 11).

[2] In its decision, the court only discussed the respondent's removability under section 237(a)(2)(C), not sections 101(a)(43)(C) and 237(a)(2)(A)(iii) of the Act. We will address the respondent's removability under both grounds of removability.

that he was improperly ordered removed in 2004 because his Connecticut conviction for carrying a weapon in a vehicle does not render him removable under sections 101(a)(43)(C), 237(a)(2)(A)(iii), or (C) of the Act.

To determine whether the respondent's conviction under section 29-38 of the General Statutes of Connecticut renders him removable under these provisions, we employ the categorical approach by asking whether the conduct proscribed under section 29-38 of the General Statutes of Connecticut categorically falls within the Federal generic definitions of illicit trafficking in firearms and a firearms offense, respectively. *See Esquivel-Quintana v. Sessions*, No. 16-54, 2017 WL 2322840, at *4 (U.S. May 30, 2017). Under this approach, "we presume that the state conviction 'rested upon . . . the least of th[e] acts' criminalized by the statute, and then we determine whether that conduct would fall within the federal definition of the crime." *Id.* (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

At all relevant times, the respondent's statute of conviction provided, in relevant part, as follows:

> Any person who knowingly has, in any vehicle owned, operated or occupied by such person, any *weapon*, any *pistol or revolver* for which a proper permit has not been issued . . . [,] or . . . any *machine gun* which has not been registered . . . shall be fined not more than one thousand dollars or imprisoned not more than five years or both, and the presence of any such weapon.

Conn. Gen. Stat. § 29-38(a) (West 2004) (emphases added); *see also* 1999 Conn. Legis. Serv. P.A. 99-212 (West 1999).

As an initial matter, we note that a violation of section 29-38 can never qualify as an aggravated felony involving illicit trafficking under section 101(a)(43)(C) of the Act because the Connecticut statute lacks an element relating to "unlawful trading or dealing" in firearms or destructive devices. *Matter of Flores-Aguirre*, 26 I&N Dec. 155, 157 & n.2 (BIA 2013) (citation omitted) (noting that most courts have deferred to our interpretation of the phrase "illicit trafficking" in section 101(a)(43)(B) as connoting the "unlawful trading or dealing" in Federally controlled substances and indicating that this interpretation is equally applicable to the phrase "illicit trafficking" in firearms section 101(a)(43)(C) of the Act); *see also Descamps v. United States*, 133 S. Ct. 2276, 2292 (2013) (holding that where "the statute of conviction has [a] missing element [of the generic offense] . . . a person convicted under that statute is never convicted of the generic crime").

The critical inquiry then becomes whether the respondent's offense is categorically a firearm offense under section 237(a)(2)(C) of the Act. To qualify as a categorical firearms offense, all violations of the respondent's statute of conviction must involve, at a minimum, a firearm or a

destructive device as defined by Federal law.[3] *See Matter of Mendez-Orellana*, 25 I&N Dec. 254, 255 (BIA 2010); *see also Esquivel-Quintana v. Sessions*, *supra*. A plain reading of section 29-38 indicates that this is not the case. A violation of the statute may involve carrying either a "weapon," a "pistol or revolver," or a "machine gun." For purposes of this provision, the word "weapon" is defined as

> any BB. gun, any blackjack, any metal or brass knuckles, any police baton or nightstick, any dirk knife or switch knife, any knife having an automatic spring release device by which a blade is released from the handle, having a blade of over one and one-half inches in length, any stiletto, any knife the edged portion of the blade of which is four inches or over in length, any martial arts weapon or electronic defense weapon, as defined in section 53a-3, *or any other dangerous or deadly weapon or instrument*.

Conn. Gen. Stat. § 29-38(a) (emphasis added). Most of the items listed above do not fall within the Federal definition of a firearm or a destructive device under 18 U.S.C. §§ 921(a)(3), (4). Because a violation of section 29-38 may involve, at a minimum, a "weapon" that does not fit within these Federal definitions, we conclude that a conviction under this provision is not categorically a firearms offense under section 237(a)(2)(C) of the Act.

However, our conclusion in this regard does not end the inquiry. We must next determine whether the respondent's statute of conviction is divisible relative to the generic definition of a generic firearms offense and thus susceptible to a modified categorical analysis. *See Descamps v. United States*, *supra*, at 2281, 2283.[4] A criminal statute is divisible only if it (1) lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction, and (2) at least one (but not all) of those listed offenses or combinations of disjunctive elements is a 'categorical match' to the relevant generic standard. *Matter of Chairez*, 26 I&N Dec. 819, 822 (BIA 2016) (citing *Descamps v. United States*, *supra*). The fact that section 29-38 lists the items that can underlie a violation of the statute—namely, a weapon, pistol, revolver, or machine gun—in the disjunctive is not dispositive of the statute's divisibility. *Matter of Chairez*, *supra* (holding that "disjunctive statutory language does not render a criminal statute divisible unless each

[3] Federal law defines a firearm as "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device." 18 U.S.C. § 921(a)(3). It defines, in relevant part, a "destructive device" as any "explosive, incendiary, or poison gas," or "any type of weapon . . . which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant." 18 U.S.C. § 921(a)(4).

[4] We held in *Matter of Teixeira*, 21 I&N Dec. 316, 318 (BIA 1996), that a prior version of section 29-38 was divisible. However, our holding in *Teixeira* is not applicable here because it was rendered prior to the Supreme Court's more recent decisions, which elucidate the meaning of divisibility. *See Mathis v. United States*, *supra*; *Descamps v. United States*, *supra*. Moreover, the alien in *Teixeira* was convicted under a version of section 29-38 that is materially different from the one at issue here. *See United States v. Thorpe*, *supra*, at *7.

statutory alternative defines an independent 'element' of the offense, as opposed to a mere 'brute fact' describing various means or methods by which the offense can be committed" (quoting *Mathis v. United States*, *supra*, at 2256-57)).

To discern whether the terms "weapon," "pistol or revolver," and "machine gun" are alternative elements of the offense, rather than mere means of violating section 29-38, we must first look to State case law, jury instructions, or the plain text of the statute. *Matter of Chairez*, *supra*, at 823 (citing *Mathis v. United States*, *supra*). The 2015 version of the jury instructions, which are applicable to the most recent version of section 29-38, indicate that, to convict a defendant of carrying a weapon in a motor vehicle, a jury need only agree that the "weapon" carried was a "dangerous or deadly weapon or instrument," without identifying the specific weapon used. *See* Connecticut Criminal Jury Instructions 8.2-12 (modified Nov. 2015). These instructions additionally provide that the elements of the respondent's offense are set forth in *State v. Delossantos*, 559 A.2d 164, 171 (Conn.), *cert. denied*, 493 U.S. 866 (1989), in which the Connecticut Supreme Court held that a jury need only find that a defendant was carrying "a weapon in the vehicle," without identifying the specific weapon used.

Further, at the time of the respondent's conviction, State case law indicated that a "weapon"—specifically, a "dangerous or deadly weapon or instrument"—under section 29-38 could be a hammer *or* a shotgun. *See State v. Ramos*, 860 A.2d 249, 258 (Conn. 2004) (finding a hammer to be a "dangerous or deadly weapon or instrument" under section 29-38); *State v. Peterson*, 534 A.2d 1237, 1243 (App. Ct. Conn. 1987) (holding that a "sawed-off shotgun" was "beyond any question a dangerous or deadly weapon or instrument"). Thus, even if we assume without deciding that the respondent's statute is divisible and that the terms "weapon," "pistol or revolver," and "machine gun" are alternative elements of section 29-38, a conviction under the statute implicating the alternative "weapon" element does not categorically involve a firearm or destructive device under Federal law. Therefore, pursuant to *Descamps* and *Mathis*, the Department of Homeland Security is unable to meet its burden of establishing that the respondent's statute of conviction renders him removable for a firearms offense under section 237(a)(2)(C) of the Act. *See* section 240(c)(3)(A) of the Act; 8 C.F.R. § 1240.8(a).[5]

Because the respondent's conviction is not a predicate for removal under either this provision or sections 101(a)(43)(C) and 237(a)(2)(A)(iii) of the Act, he was improperly ordered removed in 2004 and 2011. We will therefore grant the respondent's motion to reconsider, we will reopen his 2004 and 2011 proceedings, we will vacate the 2004 and 2011 removal orders, and we will terminate the respondent's removal proceedings. Accordingly, the following orders will be entered.

ORDER: The motion to reconsider is granted.

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[5] The fact that the respondent's conviction record indicates that he was charged with "Weapon in a Motor Vehicle (Firearm)," does not alter our conclusion in this regard (Exh. 3 at Tab D). Because a shotgun qualifies as both a firearm under Federal law and a "weapon"—specifically, a "dangerous or deadly weapon or instrument"—under section 29-38, *see State v. Peterson*, *supra*, it is possible that a jury may have unanimously found that the respondent violated the "weapon" element of section 29-38 without deciding whether the weapon underlying his offense was, in fact, a "firearm" under Federal law.

FURTHER ORDER: The respondent's 2004 and 2011 removal proceedings are reopened, the 2004 and 2011 removal orders are vacated, and the 2004 and 2011 removal proceedings are terminated.

FOR THE BOARD