



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Falls Church, Virginia 22041

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DHS/ICE Office of Chief Counsel - CLE
925 Keynote Circle, Room 201
Brooklyn Heights, OH 44131

Name: S [REDACTED], D [REDACTED]

A [REDACTED] -230

Date of this notice: 4/26/2017

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

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Creppy, Michael J.
Liebowitz, Ellen C
Mullane, Hugh G.

USCIS
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Falls Church, Virginia 22041

File: [REDACTED] 230 – Cleveland, OH

Date: APR 26 2017

In re: S [REDACTED] D [REDACTED] a.k.a. [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Margaret W. Wong, Esquire

ON BEHALF OF DHS: Kaitlin A. DeStigter
Assistant Legal Advisor

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; withholding of removal; Convention Against Torture

The respondent, a native and citizen of India, who was admitted to the United States as an immigrant in 1976, appeals from an Immigration Judge's decision dated June 26, 2015, denying his application for withholding of removal and protection under the Convention Against Torture ("CAT"). See section 241(b)(3)(A) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1208.16(c). The respondent also argues that he is no longer removable as charged. The appeal will be sustained and the proceedings will be terminated.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent argues that, based on recent case law, his 1999 conviction for grand theft by embezzlement in violation of Cal. Penal Code § 487 is not for an aggravated felony and he is no longer removable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii). He further argues that he has demonstrated his eligibility for withholding of removal and protection under the CAT. The respondent was first found removable for having been convicted of an aggravated felony in an Immigration Judge's decision dated March 1, 2001. This Board summarily affirmed this decision on June 22, 2001, and denied the respondent's motion to reconsider whether his crime was an aggravated felony in a decision dated

¹ The respondent's name appears throughout the record with Srinivasan as his family name. Our heading reflects the name as it appears on the Notice to Appear (Exh. 1).

September 19, 2001. A California Federal District Court granted the respondent's habeas petition to allow him to apply for relief, but on December 12, 2004, the United States Court of Appeals for the Ninth Circuit vacated the decision. *Srinivasan v. Fasano*, 68 F. App'x. 127 (9th Cir. 2003). On June 2, 2005, we remanded the record to the Immigration Judge for further fact finding and for the respondent to apply for relief. At the remanded hearing, the respondent indicated that the only relief for which he was applying was withholding of removal and protection under the CAT (Tr. at 8-9). He conceded that he had been convicted of an aggravated felony at hearings held in both 2011 and 2015 (Tr. at 22, 29, 107). In her June 26, 2015, decision the Immigration Judge found the respondent removable as charged and ineligible for relief from removal.

We first address the status of the respondent's conviction for grand theft by embezzlement under Cal. Penal Code § 487, as an aggravated felony.² Although the respondent conceded his conviction was for an aggravated felony theft crime under section 101(a)(43)(G) of the Act, there has significant intervening precedent. In particular, in *Lopez-Valencia v. Lynch*, 798 F.3d 863 (9th Cir. 2015), the court found that Cal. Penal Code § 484, which defines theft for purposes of Cal. Penal Code § 487, is overbroad as it includes crimes that are and are not theft crimes for aggravated felony purposes. *Lopez-Valencia v. Lynch, supra*, at 868-70. The court further found that the statute is not divisible, as it lists various means of committing the crime, but not different elements. *Id.* Also, since the time of the respondent's concessions and earlier decisions in this case, the Supreme Court has provided additional guidance on what constitutes a divisible statute. See *Mathis v. United States*, 136 S.Ct. 2243 (2016). Based on the reasoning of the Ninth Circuit, we agree the statute is overbroad and not divisible. Therefore the crime cannot be found to be an aggravated felony and the proceedings will be terminated.

The respondent was convicted of grand theft by embezzlement under Cal. Penal Code § 487, which provides:

Grand theft is theft committed in any of the following cases:(a) When the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars (\$950), except as provided in subdivision (b).

Cal. Penal Code § 487 (1999).

Cal. Penal Code § 484, defining theft provides:

(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to

² On November 22, 2016, we requested supplemental briefing on this issue and both parties have responded.

report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud

Cal. Penal Code § 484 (1999).

In *Lopez-Valencia v. Lynch*, *supra*, the Ninth Circuit held that Cal. Penal Code § 484 includes both crimes that are aggravated felony theft crimes under a generic definition of theft and those that are not. For example, the court noted the California statute criminalizes theft of labor and services, as well as theft by false pretenses, which do not meet the generic definition. *Id.* at 868. Generic theft is generally considered to require: 1) a taking of property or an exercise of control over property; 2) without consent; and 3) with the criminal intent to deprive the owner of rights and benefits of ownership, even if less than total or permanent. *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815, 820 (2007); *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 438 (BIA 2008). The Ninth Circuit further observed that although the statute provides various means of committing theft, it is not divisible into various elements. *Lopez-Valencia v. Lynch*, *supra*, at 869. The respondent argues that this assessment should control the outcome of his case.

While the Department of Homeland Security (“DHS”) does not argue the statute is not divisible, it notes that this case arises within the jurisdiction of the Sixth Circuit Court of Appeals and we are not bound by the precedent decision *Lopez-Valencia v. Lynch*, *supra*, concerning the breadth of the statute. It further argues that the Board has been using too broad a definition of “consent” in our interpretation of theft and that under a more modern and appropriate definition of theft all of the acts listed in Cal. Penal Code § 484 are theft crimes.

The Board has held that a fraud crime is distinguishable from a theft crime. *Matter of Garcia-Madruga*, *supra*. We found that, while both crimes require the taking of property with the intent to deprive the owner of the rights and benefits of ownership, theft requires the lack of consent on the part of the victim. *Id.* at 438. The DHS argues that we should define consent more narrowly to include only “knowing and voluntary consent” (DHS Supp. Br. at 15), as, under this definition, fraud crimes would be considered theft. In support of its argument, the DHS discusses the history of theft at common law and, in particular, notes that, in 1927, California joined other states in combining crimes such as larceny, false pretenses and

embezzlement into the theft definition (DHS Supp. Br. at 11-12). The DHS notes that these changes are also part of the Model Penal Code (*Id.* at 12-13) and that without limiting the definition of consent to include only *knowing and voluntary* consent, many state theft crimes would not be considered aggravated felonies under section 101(a)(43)(G) of the Act.

While we share the DHS's concerns regarding the possible limiting of the application of the aggravated felony definition after *Mathis*, *supra*, this and the other arguments raised do not provide a sufficient basis to follow or otherwise withdraw from our previous holdings both requiring consent and defining it within the generic definition of theft used for section 101(a)(43)(G) of the Act. In *Matter of Garcia-Madruga*, *supra*, we listed cases from almost every circuit that finding a lack of consent as a requirement for a theft crime, as did the Supreme Court in *Gonzales v. Duenas-Alvarez*, *supra*, at 189. *Matter of Garcia-Madruga*, *supra*, at 438-39. We further reiterated that the difference between fraud and theft crimes is that theft crimes involve a lack of consent and fraud crimes do not. *Id.* at 439-40 (holding section 101(a)(43)(G) (theft) and 101(a)(43)(M)(i) (fraud) of the Act are distinct crimes). In *Matter of Cardiel*, 25 I&N Dec. 12 (BIA 2009), we did hold that consent under extreme duress, as in cases of extortion, does not constitute consent as considered under the definition of theft. *Id.* at 20-21; *see also Matter of Ibarra*, 26 I&N Dec. 809 (BIA 2016) (a theft offense, which requires the taking of property "without consent" includes extortionate takings, in which consent is coerced by the wrongful use of force, fear or threats). However, we noted that, due to this duress, the use of the term consent in the laws of extortion "does not connote voluntary or elective conferral of property." *Id.* at 20. In cases of fraud or embezzlement, the transfer of the property is with consent. *Matter of Garcia-Madruga*, *supra*. With the exception of the need for a lack of duress discussed in *Matter of Cardiel*, *supra*, we decline narrowing the definition of consent any further.

As we continue to apply these precedent decisions and, in line with their interpretation of theft, we agree with the Ninth Circuit, that Cal. Penal Code § 484 is overbroad, such that it can be violated both by crimes that are considered theft and those that are not.³ Furthermore, the statute is not divisible as it defines various means by which theft can be committed, but does not provide separate elements that must be found by a jury. *See Mathis*, *supra*; *Descamps*, *supra*; *Lopez-Valencia*, *supra*, at 869, *citing, inter alia*, *People v. Nor Woods*, 223 P.2d 897, 898 (Ca. 1951) (determination of which "pidgeonhole" the theft crime fell into is not material to jury). Accordingly, the following order will be entered.

³ The DHS further argues that the taking of intangible items, like labor or services, included under the California law, should also be considered theft under the generic definition. *See Lopez-Valencia*, *supra*, at 868. As we find Cal Penal Code § 484 overbroad concerning the consent issue discussed above, we need not address this issue at this time. *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (as a general rule, courts and agencies are not required to make findings on issues the decision of which is unnecessary to the result they reach).

ORDER: The appeal is sustained and the proceedings are terminated.



FOR THE BOARD

Board Member Hugh G. Mullane dissents without opinion.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
801 W. SUPERIOR AVE, STE13-100
CLEVELAND, OH 44113

BRATTON, SCOTT E.
3150 CHESTER AVE.
CLEVELAND, OH 44114

IN THE MATTER OF
S [REDACTED], D [REDACTED]
P77663

FILE A [REDACTED]-230

DATE: Jun 26, 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
801 W. SUPERIOR AVE, STE13-100
CLEVELAND, OH 44113

OTHER: _____


COURT CLERK
IMMIGRATION COURT

FF

CC: Tripi, Esq., Michael
1240 East Ninth St., Ste 519
Cleveland, OH, 44199

IMMIGRATION COURT
801 W. SUPERIOR AVE, STE13-100
CLEVELAND, OH 44113

In the Matter of

S [REDACTED], D [REDACTED]
Respondent

Case No.: A [REDACTED]-230

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the ~~oral~~ decision entered on 6/26/15.
This memorandum is solely for the convenience of the parties. If the
proceedings should be appealed or reopened, the oral decision will become
the official opinion in the case.

- ☒ The respondent was ordered removed from the United States to
INDIA or in the alternative to .
- ☐ Respondent's application for voluntary departure was denied and
respondent was ordered removed to INDIA or in the
alternative to .
- ☐ Respondent's application for voluntary departure was granted until
upon posting a bond in the amount of \$ _____
with an alternate order of removal to INDIA.

Respondent's application for:

- ☐ Asylum was () granted () denied () withdrawn.
- ☒ Withholding of removal was () granted (X) denied () withdrawn.
- ☒ A Waiver under Section _____ was () granted () denied () withdrawn.
- ☐ Cancellation of removal under section 240A(a) was () granted () denied
() withdrawn.

Respondent's application for:

- ☐ Cancellation under section 240A(b)(1) was () granted () denied
() withdrawn. If granted, it is ordered that the respondent be issued
all appropriate documents necessary to give effect to this order.
- ☐ Cancellation under section 240A(b)(2) was () granted () denied
() withdrawn. If granted it is ordered that the respondent be issued
all appropriated documents necessary to give effect to this order.
- ☐ Adjustment of Status under Section _____ was () granted () denied
() withdrawn. If granted it is ordered that the respondent be issued
all appropriated documents necessary to give effect to this order.
- ☒ Respondent's application of (Y) withholding of removal () deferral of
removal under Article III of the Convention Against Torture was
() granted (Y) denied () withdrawn.
- ☐ Respondent's status was rescinded under section 246.
- ☐ Respondent is admitted to the United States as a _____ until _____.
- ☐ As a condition of admission, respondent is to post a \$ _____ bond.
- ☐ Respondent knowingly filed a frivolous asylum application after proper
notice.
- ☐ Respondent was advised of the limitation on discretionary relief for
failure to appear as ordered in the Immigration Judge's oral decision.
- ☐ Proceedings were terminated.
- ☐ Other:

Date: Apr 17, 2015

ALISON M. BROWN
Immigration Judge

Appeal: Waived Reserved Appeal Due By:

7/27/15