U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: JASSO ARAMGURE, RAMON **A 056-333-337**

Date of this notice: 4/7/2017

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:
Pauley, Roger

Userteam: Docket

File: A056 333 337 – Detroit, MI

Date: APR - 7 2017

In re: RAMON JASSO ARANGURE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Russell R. Abrutyn, Esquire

ON BEHALF OF DHS: Sarah Shilvock
Assistant Chief Counsel

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, a native and citizen of Mexico and a lawful permanent resident of the United States, appeals from the December 1 and 6, 2016, decisions of the Immigration Judge, which found the respondent removable as charged under sections 101(a)(43)(G) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), 8 U.S.C. §§ 1101(a)(43)(G), 1227(a)(2)(A)(iii), and ordered him removed. The respondent's request for oral argument is denied. The record will be remanded to the Immigration Judge.

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 issues of law, discretion and judgment. 8 C.F.R. § 1003.1(d)(3)(ii).

This case was last before the Board on July 26, 2016, when we remanded this matter to the Immigration Judge for further consideration of the issue of whether the respondent's December 1, 2014, conviction for first-degree home invasion in violation of section 750.110a(2) of the Michigan Compiled Laws for which he was sentenced to 1.5 to 20 years of imprisonment rendered him removable as charged for having been convicted of a crime of violence aggravated felony, and entry of a new decision (I.J. at 1, 3, 5; Exh. 2).

According to the Immigration Judge, on September 13, 2016, the Immigration Judge terminated without prejudice prior removal proceedings because the respondent's criminal conviction forming the basis for the charge of removability did not categorically qualify as a crime of violence aggravated felony under sections 101(a)(43)(F) and 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1101(a)(43)(F) (I.J. at 4). The Department of Homeland Security (DHS) thereafter initiated these removal proceedings which charged the respondent with being removable because his conviction is an aggravated felony burglary offense under sections 101(a)(43)(G) and 237(a)(2)(A)(iii) of the Act (I.J. at 4, 9; Exh. 1). On December 1 and 6, 2016, the Immigration Judge found that the DHS met its burden of proof to establish by clear and

convincing evidence that the respondent is removable as charged, and ordered him removed from the United States to Mexico (I.J. at 13).

On appeal, the respondent asserts in part that the record does not include any evidence that the Immigration Judge terminated the initial removal proceedings without prejudice on September 13, 2016. The respondent also asserts on appeal that a copy of *Pablo Cabrera Cardona*, 2013 WL 260053 (BIA 2013), an unpublished Board decision relied on by the Immigration Judge in this case was not provided to the parties (I.J. at 14).

We will remand the record for several reasons. Initially, we note that certain documents are missing from the record. For example, a copy of the Notice to Appear which charged the respondent as removable for having been convicted of an aggravated felony crime of violence is not in the record of proceedings (I.J. at 1-2). Similarly, the Immigration Judge's September 13, 2016, decision terminating the prior proceedings without prejudice is also missing from the record (I.J. at 4, 14). Given that the record in the previous proceedings is not part of the current record, we find that a remand of this case is required in order to allow the Immigration Judge to consolidate the record of these proceedings with the record of the respondent's terminated removal proceedings. Upon remand, the Immigration Judge shall also include in the record and provide the parties with a copy of *Matter of Pablo Cabrera Cardona*, *supra*. The record should then be forwarded to the Board for the setting of a briefing schedule, and for our subsequent consideration of the appeal. *See* 8 C.F.R. § 3.3(c)(1).

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this opinion, and for certification to the Board by the Immigration Judge thereafter.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN

File: A056-333-337 December 6, 2016

In the Matter of

RAMON JASSO ARAMGURE	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Violation of Section 237(a)(2)(A)(iii).

APPLICATIONS: None.

ON BEHALF OF RESPONDENT: RUSSELL ABRUTYN

ON BEHALF OF DHS: JONATHAN GOULDING, Senior Attorney

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male, native and citizen of Mexico. The Department of Homeland Security initiated these removal proceedings against the respondent pursuant to authority contained in Section 240 of the Immigration and Nationality Act. The proceedings were commenced with the Court by the filing of a Notice to Appear dated September 15, 2016, marked as the first exhibit on November 17. Through counsel, the respondent admitted the factual allegations but denied the charge of removability, indicating first that he believed the Government was barred by the principle of res judicata, and second that the charge was not a categorical aggravated

felony under the law. The Court hereby incorporates the entire decision dated December 1, 2016, as the Court's decision in this matter, and the Court finds the respondent to be removable as charged, and the Court will order removal from the United States to Mexico for the reasons set forth in the December 1 decision.

Please see the next page for electronic signature

DAVID H. PARUCH
Immigration Judge

//s//

Immigration Judge DAVID H. PARUCH

paruchd on January 25, 2017 at 12:53 PM GMT

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN

File No.: A056-333-337	)	DECEMBER 1, 2016
	)	
In the Matter of:	)	
JASSO ARAMGURE, Ramon	)	**In Removal Proceedings**
Respondent	)	**DETAINED**

Charge: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act, a law relating to a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year was imposed.

Application: Motion to Pretermit.

ON BEHALF OF RESPONDENT
Russell Abrutyn
Marshal Hyman & Associates
3250 West Big Beaver
Suite 529
Troy, Michigan 48084

ON BEHALF OF THE GOVERNMENT
Sarah Shilvock, Assistant Chief Counsel
Department of Homeland Security
Immigration and Customs Enforcement
333 Mount Elliott, Second Floor
Detroit, Michigan 48207

ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Respondent, Ramon Jasso Aramgure, is a thirty-seven-year-old male, native and citizen of Mexico. Respondent was admitted to the United States on March 17, 2003, at El Paso, Texas, as an immigrant IR1. On December 1, 2014, respondent pled guilty to and was convicted of Home Invasion, first degree, in violation of MICH. COMP. LAWS ("MCL") 750.110a(2), in the 27th Judicial Circuit Court in White Cloud, Michigan. Exh. 2. On January 20, 2015, he was sentenced to eighteen months to twenty years imprisonment. Exh. 1.

The Department of Homeland Security ("DHS" or "Government") personally served respondent with a Notice to Appear ("NTA") on May 7, 2015, and initiated removal proceedings

by filing that NTA with the Detroit Immigration Court on June 8, 2015. The Government charged respondent as removable pursuant to section 237(a)(2)(A)(iii) of the Act, in that he had been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act, a crime of violence (as defined in 18 U.S.C. § 16, but not including a purely political offense) for which the term of imprisonment ordered was at least one year. At his master calendar hearing on September 22, 2015, respondent was unrepresented. He was detained at the Egeler Correctional Facility in Jackson, Michigan. The Court explained to respondent his rights during immigration proceedings, and granted him a continuance in order to find an attorney.

When respondent returned for a master calendar hearing on November 12, 2015, he was still unrepresented. Respondent indicated that he had not been able to find an attorney for his case. He spoke with one attorney, but did not have the means to pay for his services. Respondent was unsure of whether he would be able to find an attorney before his release from the custody of the Michigan Department of Corrections on April 2, 2016, and the Court decided to proceed with respondent's case to determine whether there was relief available to him. The Court went through respondent's NTA, and respondent admitted all of the allegations therein. The Court sustained the charge of removability pursuant to section 237(a)(2)(A)(iii) of the Act, and designated Mexico as the country of removability. The Court then informed respondent that due to the nature of his conviction, the only form of relief available to him would be if he feared torture if he returned to Mexico. Respondent stated that he did not have any problems with anyone in Mexico, and thus did not fear returning to the country. As there were no other forms of relief available to respondent, the Court found that he was removable as charged and ordered him removed. Order of the Immigration Judge ("IJ") (Nov. 12, 2015). Respondent reserved his right to appeal.

On December 8, 2015, respondent appealed the Court's decision to the Board of Immigration Appeals ("BIA" or "Board"). On March 15, 2016, the Board found that the Court provided insufficient analysis in its decision to support its finding that respondent was removable as charged. The Board cited to *Johnson v. United States*, 135 S. Ct. 2551 (2015), where the Supreme Court found that statutory language similar to 18 U.S.C. § 16(b) was unconstitutionally vague. Because it found that the statutory language of MCL § 750.110a(2) is divisible, the Board concluded that the Court must make further factual and legal findings concerning respondent's removability. Thus the Board remanded the record to the Court for further proceedings and entry of a new decision.

On April 27, 2016, the Court entered additional factual and legal findings concerning respondent's removability and returned the updated record to the Board. The Court found that respondent's offense categorically qualified as a crime of violence under section 101(a)(43)(F) of the Act, explaining that all degrees of home invasion under the Michigan penal code categorically qualify as crimes of violence under INA § 101(a)(43)(F) because "they are felony crimes that involve the substantial risk of physical force against the person or property of another." Order of the IJ (April 27, 2016). The Court again sustained the charge of removability and, noting that respondent had not applied for any forms of relief and that none were available to him, ordered respondent removed.

On July 26, 2016, the Board again remanded the record to the Court for further proceedings and entry of a new decision. Subsequent to the Court's decision, the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") declared 18 U.S.C. § 16(b) to be unconstitutionally vague. *Shuti v. Lynch*, 828 F.3d 440, 451 (6th Cir. 2016). The Board

instructed the Court to re-determine respondent's removability in light of this opinion. Order of the Board (July 26, 2016).

On August 31, 2016, respondent submitted a motion to reconsider. He argued that he did not clearly understand the interpreter or his options, and that the house that he allegedly invaded was actually his own residence. Thus, according to respondent, he was innocent of the home invasion charge. Respondent also argued that he received ineffective assistance of counsel during his criminal proceedings and that the plea agreement was signed due to coercion. On September 13, 2016, the Court found that, in light of the Sixth Circuit's opinion in *Shuti*, respondent's conviction did not categorically qualify as a crime of violence under INA § 101(a)(43)(F). As such, the Court did not sustain the charge of removability and terminated respondent's immigration proceedings, without prejudice. Order of the IJ (Sept. 13, 2016).

The Government did not appeal the Court's decision, however it did file a new NTA on September 20, 2016, charging respondent as removable pursuant to section 237(a)(2)(A)(iii) of the Act, in that he was convicted of an aggravated felony as defined in section 101(a)(43)(G), a law relating to a theft offense or a burglary offense, for which the term of imprisonment of at least one year was imposed. Exh. 1. At a hearing on November 17, 2016, respondent was represented. He admitted all of the allegations contained in the NTA, denied the charge of removability, and designated Mexico as the country of removability, should that become necessary. Respondent submitted a written motion to terminate, arguing that his offense did not constitute an aggravated felony and that further proceedings were barred by *res judicata*. The Court gave the Government ten days to respond, in writing, to respondent's motion, and rescheduled the hearing for December 6, 2016, at which point the Court would rule on respondent's motion to terminate.

II. POSITION OF THE PARTIES

A. RESPONDENT

Respondent asks that the Court grant his motion to terminate proceedings. First, respondent argues that the new charge of removability lodged against him is barred by *res judicata*. For *res judicata* to apply, the previous proceedings must have involved the same parties and the same issue, and the prior decision must be a final decision. The parties in these proceedings are identical: respondent and the Government. As neither party appealed, the Court's previous decision was a final decision. According to respondent, "the issue of whether [his] home invasion conviction makes him removable was decided in the prior proceedings and was litigated to finality." He cites to the Ninth and Fourth Circuits to support his claim that charges of removability regarding the same facts and conviction but a new charge of removability are barred by *res judicata*. *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007); *United States v. Akinsade*, 686 F.3d 248 (4th Cir. 2012). Respondent also cites an unpublished Board case, which found that where the Government could have appealed a prior decision or filed a motion to reopen but chose not to, it was barred by res judicata from bringing new removal charges based on the same facts as the prior removal proceeding. *Matter of Gaytan-Castro*, A078-047-050 (BIA Dec. 29, 2011). Similarly, in respondent's case, the Government could have appealed the Court's final decision or lodged additional removal charges while proceedings were still pending.

Second, respondent argues that his conviction for Home Invasion, first degree, is not an aggravated felony nor is it categorically a burglary offense. Respondent was convicted for violating MCL § 750.110a(2). To obtain a conviction under that section, the prosecution can charge under multiple theories. Michigan Criminal Jury Instructions 25.2a and 25.2c distinguish between home invasion based on breaking and entering, and home invasion based on entry

without permission. Both types of home invasion also distinguish between defendants who intended to commit a crime at the time of entry and those who committed a crime but did not intend to so at the time of entry. As such, the Michigan statute is divisible and the prosecutor must choose the relevant elements. The generic burglary offense, however, is defined simply as the unlawful or unauthorized entry into a structure with the intent to commit a crime. *Taylor v. United States*, 110 S. Ct. 2143 (1990). According to respondent, entering, or breaking and entering, with intent to commit a crime therein may be a categorical match to the federal definition. However, committing a crime without having intended to do so at the time of entry is not part of the federal definition. Under the categorical approach, the Court may examine the charging document. Respondent argues that his charging document makes clear that he was not charged with or convicted of breaking and entering with intent to commit a crime at the time of entry. Rather, he was charged with breaking and entering and, while present in the dwelling, committing an additional crime. As such, he was not charged with or convicted of violating the portion of MCL § 750.110a(2) that corresponds with the federal definition of burglary. According to respondent, the Court should therefore terminate these proceedings because the Government has failed to sustain the aggravated felony charge.

B. GOVERNMENT

The Government asks the Court to deny respondent's motion to terminate proceedings. The Government first argues that the principle of *res judicata* does not bar the instant proceedings. The Court is not a court of equity, and therefore is not bound by this equitable doctrine. Moreover, respondent was initially charged under section 237(a)(2)(A)(iii) of the Act for being convicted of an aggravated felony, crime of violence. Those proceedings were terminated without prejudice after the Court found that respondent's conviction was not a crime

of violence. The Government argues that dismissal of proceedings without prejudice, by its definition, does not bar it from lodging new charges on different grounds, as it has done here. To support this proposition, the Government cites to a United States Supreme Court case, which held that dismissal "without prejudice" does not constitute a final adjudication on the merits for purposes of *res judicata*. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990). The Government also cites two Sixth Circuit cases that support the proposition that *res judicata* does not apply absent a final judgment. *Bilali v. Gonzales*, 502 F.3d 470, 474 (6th Cir. 2007) (citing *Ritchie v. Eberharat*, 11 F.3d 587, 594 (6th Cir. 1993)). Finally, the Government argues that for *res judicata* to apply, the issues raised and litigated must be the same. Here, the issues raised before the Court are "inapposite": in the prior proceedings, the issue raised was whether respondent's conviction was a crime of violence; now, the issue before the Court is whether respondent's conviction constitutes an aggravated felony burglary offense.

Second, the Government argues that respondent's conviction under MCL § 750.110a(2) is categorically an aggravated felony burglary offense under INA § 101(a)(43)(G), and therefore he is removable under INA § 237(a)(2)(A)(iii). Pursuant to the categorical approach, the Court must determine whether the elements of the crime of conviction sufficiently match, or are narrower than, the elements of generic burglary. The generic elements of burglary are "an unlawful or unprivileged entry into, *or remaining in*, a building or other structure, with intent to commit a crime." *Taylor*, 110 S. Ct. 2158 (emphasis added by Government). The *Taylor* Court recognized, in dicta, that Michigan had no formal burglary label and therefore classifies burglary into different degrees of "breaking and entering." To be convicted of Home Invasion, first degree, under Michigan law, the defendant must: (1) either break and enter a dwelling, or enter without permission; (2) intend to commit a crime therein at the time of entry, or commit a crime

while entering, present in, or exiting the dwelling; and (3) either be armed with a dangerous weapon, or another person is lawfully present in the dwelling.

The Government argues that the generic definition of burglary in *Taylor* is broader than respondent contends. Specifically, respondent omits the "remaining in" portion highlighted by the Government, which encompasses Michigan's formulation of the crime. This language, according to the Government, "anticipates" a situation in which a defendant did not intend to commit a crime at the time of entry, but nonetheless committed a crime within the dwelling. As such, respondent's conviction is a categorical match to the generic burglary offense. Even if the Court applied the modified categorical approach and examined the relevant documents, the generic definition of burglary would still encompass respondent's conviction. Finally, the Government argues that the other alternative elements in MCL § 750.110a(2) either match or are narrower than the generic definition of burglary.

III. LEGAL STANDARDS

A. RES JUDICATA

The doctrine of *res judicata* is presumed to apply in administrative proceedings. *Astoria Federal Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991); *cf. Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703-04 (6th Cir. 2005) (finding that collateral estoppel applies in administrative hearings, and that other circuit courts "have given preclusive effect to determinations made by immigration judges in immigration hearings.") (citing *Medina v. INS*, 993 F.2d 499, 504 (5th Cir. 1993); *Ramon-Sepulveda v. INS*, 824 F.2d 749, 750-51 (9th Cir. 1987)). For the doctrine of *res judicata* to apply:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
> (2) determination of the issue must have been necessary to the outcome of the prior proceeding;

(3) the prior proceeding must have resulted in a final judgment on the merits; and
(4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Bilali v. Gonzales, 502 F.3d 470, 474 (6th Cir. 2007) (quoting *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 583 (6th Cir. 2003) (quoting *Aircraft Braking Sys. Corp. v. Local 856, Int' Union*, 97 F.3d 155, 161 (6th Cir. 1996))).

"A final judgment on a claim is res judicata and bars relitigation between the same parties or their privies on the same claim." *Westwood Chemical Co., Inc. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981) (internal citations omitted). The Supreme Court has held that dismissal "without prejudice" does not constitute an adjudication upon the merits for purposes of *res judicata*. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 396 (1990); *see also Bilali*, 502 F.3d at 474 (citing *Ritchie v. Eberhart*, 11 F.3d 587, 594 (6th Cir. 1993) (*res judicata* "has no application in the absence of a final judgment")).

B. AGGRAVATED FELONY – BURGLARY OFFENSE

The Government bears the burden of proving an admitted alien's deportability by clear and convincing evidence. INA § 240(c)(3)(A). Once the Government "has established its *prima facie* case, the burden of going forward to produce evidence of non-deportability then shifts to the [alien]." *Pickering v. Gonzales*, 465 F.3d 263, 269 (6th Cir. 2009) (internal citations and quotation marks omitted). "Any alien who is convicted of an aggravated felony at any time after admission is deportable." INA § 237(a)(2)(A)(iii). An official record of judgment and conviction (or a certified copy thereof), *inter alia*, "shall constitute proof of a criminal conviction." *See* INA § 240(c)(3)(B). Specifically, the Government charges that respondent was convicted of an aggravated felony defined at INA § 101(a)(43)(G), a law relating to a theft offense or burglary offense for which the term of imprisonment at least one year was imposed. Exh. 1.

The Court applies the categorical approach to determine whether the respondent's conviction constitutes a removable offense under INA § 237(a)(2)(A)(iii), in this case an aggravated felony theft offense or burglary. *See Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v United States*, 133 S. Ct. 2276 (2013); *Taylor v. United States*, 495 U.S. 575 (1990). First, under the categorical approach, the Court compares the elements of the statute of conviction with the elements of the offense referenced in the Act to determine if the statute of conviction categorically fits within the generic definition of the offense listed in the Act. *Mathis*, 136 S. Ct. at 2248-49. If the statute of conviction has the same elements as the generic offense or if the minimum conduct prohibited by the statute fits within the generic offense, the prior conviction is a categorical match for immigration purposes. *Descamps*, 133 S. Ct. at 2283. In order to determine the minimum conduct, there must be a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013); *see also Gonzales v Duenas-Alvarez*, 549 U.S. 183, 193 (2007).[1] If, on the other hand, the statute of conviction "sweeps more broadly than the generic crime," the respondent's conviction categorically cannot serve as a predicate offense. *Descamps*, 134.Ct. at 2283.

[1] The Court may look to the elements of the respondent's own conviction. *See Duenas-Alvarez*, 549 U.S. at 186, 193 ("To show that realistic probability, an offender, of course may show that the statute was so applied in his own case"); *see also Matter of Ferreira*, 26 I&N Dec. 415, 419 (BIA 2014). Additionally, the Court may look to state court decisions interpreting the conduct proscribed in the statute. *Duenas-Alvarez*, 549 U.S. at 193 (allowing for consideration of "other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which [the respondent] argues"). However, the full range of what can be relied on to demonstrate the minimum conduct varies by circuit. *Compare, United State v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (holding that "no legal imagination" is necessary to determine the minimum conduct with a realistic probability of prosecution when the "state statute explicitly defines a crime more broadly than the generic definition"), *with Ferreira*, 26 I&N Dec. at 420-21 (requiring the respondent to present evidence demonstrating a realistic probability of prosecution even though the state drug code "on its face covers a type of object or substance not included in a Federal Statute's generic definition"). The Sixth Circuit, whose decisions are binding on this Court, has not explicitly addressed the question of what evidentiary minimum is needed to pass the "legal imagination" threshold. *See, e.g., U.S. v. McGrattan*, 504 F.3d 608, 614-15 (6th Cir. 2007) (looking to both statutory text and nonbinding state court decisions to determine whether "there is a 'realistic probability' that someone could be prosecuted and a conviction upheld for conduct which falls outside the definition under federal law"). In the absence of contrary controlling precedent, the Court must rely on the standard set forth by the Board in *Ferreira*.

In a "narrow range of cases," where a statute that is not a categorical match to the relevant crime is nevertheless divisible, the Court may proceed to the modified categorical approach. *Id.* (citing *Taylor*, 495 U.S. at 602); *see also Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (stating that the modified categorical approach applies to a statute that contains "different crimes, each described separately"). A statute is divisible if it "sets out one or more elements of the offense in the alternative" and at least one of those alternatives is a match to the generic offense. *Descamps*, 133 S. Ct. at 2281. The Supreme Court explained that an "element" is a substantive component of the statute on which the jury must unanimously agree, whereas "brute facts" are the means or method of committing an offense on which a jury need not agree before reaching a guilty verdict. *See Mathis*, 136 S. Ct. at 2248 (discussing the difference between elements and "brute facts" or means); *see also Almanza-Arenas v. Lynch*, 815 F.3d at 477 (explaining that "a single element must be part of a charged offense with which a jury necessarily found the defendant guilty"); *Matter of Chariez*, 26 I&N Dec. 819 (BIA 2016) (clarifying that "the understanding of statutory 'divisibility' embodied in *Descamps* and *Mathis* applies in immigration proceedings nationwide").

In order to determine whether a statute is made up of alternative elements or alternative means, the Court reviews (1) the statutory language itself, (2) authoritative state court interpretations of the statute, and (3) the respondent's conviction records "if state law fails to provide clear answers." *Mathis*, 136 S. Ct. at 2256-57. If a statute is divisible, the Court may consider certain reliable documents in the record beyond the statutory text to determine which elements of the statute of conviction formed the basis of the respondent's conviction. *See id.* at 2249; *see also Shepard v. United States*, 544 U.S. 13, 16 (2005) (holding that the sentencing court may review "the statutory definition, charging document, written plea agreement, transcript

of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented" to determine whether defendant necessarily admitted the elements of the generic offense). However, the Court cannot apply the modified categorical approach when the underlying crime "has a single, indivisible set of elements." *Descamps*, 133 S. Ct. at 2282.

C. CRIME OF BURGLARY

Pursuant to section 237(a)(2)(A)(iii) of the Act, any alien who at any time after admission is convicted of an aggravated felony is deportable. Pursuant to section 101(a)(43)(G), the term 'aggravated felony' means a theft offense, including the receipt of stolen property, or burglary offense for which the term of imprisonment imposed is at least one year. The United States Supreme Court has defined the general elements of burglary as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 599. The Supreme Court announced that a person is convicted of burglary "if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 598-99. These elements can be found in either the State's statutory definition of the conviction, or the charging documents or jury instructions, which must show that the aforementioned elements of generic burglary were necessary for the conviction. *Id.* at 602.

D. MICH. COMP. LAWS § 750.100A(2): HOME INVASION

Section 750.110a of the MICH. COMP. LAWS sets forth three degrees of the offense known as "home invasion" of "breaking and entering a dwelling." The statute is therefore divisible because it contains several different crimes, each described separately. *See generally Descamps*, 133 S. Ct. 2276; *Moncrieffe*, 133 S. Ct. 1678. All three degrees of home invasion require, at a

minimum, that the perpetrator "breaks and enters" a dwelling or enters a dwelling without permission. MCL §§ 750.110a(1)-(4). A dwelling is defined as "a structure or shelter that is used permanently or temporarily as a place of abode." MCL § 750.110a(1)(a).

Any degree of force used against another's property will constitute breaking into a dwelling. *See People v. Wise*, 351 N.W.2d 255, 259 (Mich. Ct. App. 1984) ("In Michigan, any amount of force used to open a door or window to enter the building, no matter how slight, is sufficient to constitute the breaking." (citing *People v. White*, 117 N.W. 161 (Mich. 1908); *People v. Clark*, 276 N.W.2d 527 (Mich. 1979))). All degrees of home invasion via breaking have three basic elements: (1) a breaking, (2) an entry, and (3) an intent to commit a named offense therein (or alternatively, that the entry violates a protection order).[2] *See* MCL §§ 750.110a(2)-(4). Home invasion in the first degree, the most severe version of the offense an individual can commit, adds one additional element: (a) that the perpetrator was armed with a dangerous weapon at the time of the offense, or (b) that another individual was lawfully present in the dwelling at the time of the offense. *See* MCL § 750.110a(2); MICH. MODEL CRIM. JURY INSTR. 25.2a (Oct. 2002) (specifying "the elements of home invasion in the first degree committed by means of breaking and entering").

IV. DISCUSSION AND ANALYSIS

The Court finds that the Government has met its burden to establish that respondent has been convicted of an aggravated felony as defined in INA § 101(a)(43)(G). Consequently, the Court will sustain that charge of removability, and respondent's motion to terminate will be denied.

[2] Alternatively, a defendant could be convicted under the statute for entering without permission. *See generally* MICH. COMP. LAWS §§ 750.110a(2)-(4). In those instances, breaking would not be an element of the offense. *See* MICH. MODEL CRIM. JURY INSTR. 25.2c (Oct. 2002); MICH. MODEL CRIM. JURY INSTR. 25.2d (Oct. 2002).

A. RES JUDICATA

The doctrine of *res judicata* does not bar the instant removal proceedings. At respondent's hearing on September 13, 2016, the Court explicitly noted that the prior removal proceedings were terminated without prejudice. As noted above, the Supreme Court has held that a dismissal "without prejudice" "does not operate as an adjudication upon the merits, and thus does not have a res judicata effect." *Cooter & Gell*, 496 US at 396 (internal citations and quotations omitted). As such, the Court's decision of September 13, 2016, does not constitute a final judgment and does not preclude the instant proceedings.

Even if respondent's prior removal proceedings were terminated with prejudice, respondent's current removal proceedings would still not be barred by the doctrine of *res judicata.* Respondent relies on two out-of-circuit cases holding that charges of removability regarding the same facts and conviction but a new charge or removability are barred by *res judicata. Bravo-Pedtroza*, 475 F.3d 1358; *United States v. Akinsade*, 686 F.3d 248. The Court is not bound by nor persuaded by the reasoning in those cases. Moreover, the Board has most recently held that the Government "is not required, in a single proceeding, to present all possible bases for removal." *Matter of Pablo Cabrera Cardona*, 2013 WL 260053, *4 (BIA 2013). As such, the Board declined to follow *Bravo-Pedroza.* The Board case that respondent relies on, from 2011, found that those proceedings were barred by *res judicata* because "the central question underlying the charge is the same as that which was decided in the prior proceedings, *viz.* whether the respondent was eligible for adjustment of status pursuant to his father's visa petition." Respondent's Motion to Terminate, Tab A. That is not the case here. The issue in respondent's prior removal proceedings was whether his conviction under MCL § 750.110a(2) constituted a crime of violence under section 101(a)(43)(F) of the Act, as defined in 18 U.S.C.

§ 16. The issue currently before the Court is whether respondent's conviction constitutes an aggravated felony burglary offense under section 101(a)(43)(G) of the Act. The underlying issue in the two proceedings is not the same, nor has it previously been adjudicated by the Court; thus *res judicata* does not preclude its adjudication now.

B. AGGRAVATED FELONY – BURGLARY OFFENSE

Respondent was convicted of violating MCL § 750.110a(2), which prohibits individuals from breaking and entering a dwelling, or entering a dwelling without permission, either with the intent to commit a crime therein or without such intent but actually committing a crime therein. To determine whether this conviction constitutes a burglary offense under section 101(a)(43)(G) of the Act, the Court must use the categorical approach.

Respondent argues that his statute of conviction cannot be a categorical match because it contains additional elements that are not found in the generic definition of burglary set forth in *Taylor*. The Government argues that respondent mischaracterized *Taylor*'s definition of burglary: respondent's definition leaves out the element of "remaining in" a dwelling "with intent to commit a crime," thus creating the impression that the definition of generic burglary is "the unlawful or unauthorized entry into a structure with the intent to commit a crime." Respondent's Motion to Terminate (Nov. 17, 2016). The Government is correct in that the *Taylor* Court explicitly defined generic burglary as "an unlawful or unprivileged entry into, *or remaining in*, a building or other structure, with intent to commit a crime." *Taylor*, 110 S. Ct. at 2158 (emphasis added). The *Taylor* Court further stated that where the statute of conviction varies from the generic burglary definition, "If the state statute is narrower than the generic view, *e.g.*, in cases of . . . convictions of first-degree or aggravated burglary, there is no problem, because the conviction necessarily implies that the defendant has been found guilty of all the

elements of generic burglary." *Id.* The additional elements found in MCL § 750.110a(2) that respondent points to narrow the Michigan definition as compared to the generic definition. The *Taylor* Court clarified that a State's burglary statute is broader than the generic burglary definition, and therefore is not a categorical match, where it eliminates certain requirements or includes places other than buildings. *Id.* The statute of conviction is therefore a categorical match to the generic burglary definition. The Court will not apply the modified categorical approach nor examine the record of conviction, and will deny respondent's motion to terminate.

V. ORDER

IT IS HEREBY ORDERED that the charge of removability pursuant to INA § 237(a)(2)(A)(iii) is **SUSTAINED**.

IT IS FURTHER ORDERED that respondent's motion to terminate be **DENIED**.

Hon. David H. Paruch
U.S. Immigration Judge

12/1/2016
Date

APPEAL DUE DATE: JANUARY 3, 2017