



**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 - LOS**  
**606 S. Olive Street, 8th Floor**  
**Los Angeles, CA 90014**

**Name:** V [REDACTED] R [REDACTED], J. F [REDACTED] A [REDACTED]-388

**Date of this notice: 6/25/2018**

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

Sincerely,

*Donna Carr*

Donna Carr  
Chief Clerk

Enclosure

Panel Members:  
Pauley, Roger  
Adkins-Blanch, Charles K.  
Snow, Thomas G

Userteam: Docket

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Falls Church, Virginia 22041

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File: [REDACTED] 388- Los Angeles, CA

Date: JUN 25 2018

In re: J. F. [REDACTED] V. [REDACTED] [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Cancellation of removal under section 240A(b) of the Act; voluntary departure

On September 28, 2017, we dismissed the respondent's appeal from the Immigration Judge's August 28, 2015, decision denying his applications for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b), and voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b), and ordering his removal from this country. This case is presently before us pursuant to a March 16, 2018, order of the United States Court of Appeals for the Ninth Circuit granting the Government's unopposed motion to remand. The respondent's appeal will be sustained, and the record will be remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Government sought remand in this case for the Board to consider the impact, if any, of *United States v. Mathis*, 136 S. Ct. 2243 (2016), and *People v. Newman*, 238 Cal. App. 4th 103 (2d Dist. Cal. 2015) on our determination that California Penal Code (Cal. Penal Code) §§ 236 and 237 are divisible for the purposes of the modified categorical approach.

Upon review, we conclude that felony false imprisonment under Cal. Penal Code §§ 236 and 237 is not divisible. Disjunctive statutory language does not render a criminal statute divisible unless each 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. *See Matter of Chairez*, 26 I&N Dec. 819, 822 (BIA 2016). The test to distinguish means from elements is whether a jury must agree. *See Mathis v. United States*, 136 S. Ct. 2243 (2016).

In *People v. Newman*, the court found that Cal. Penal Code § 237 proscribes one felony, not four separate felonies, depending upon the means by which false imprisonment is effected. *Id.* at 108. In so finding, the court relied on the California Supreme Court's analysis in *People v. Henderson*, 19 Cal. 3d 86, 560 P.2d 1180 (1977) *overruled on other grounds by People v. Flood*, 18 Cal. 4th 470, 957 P.2d 869 (1998). In that case, the California Supreme Court found "no basis for severing false imprisonment by violence or menace from the offense of felony false imprisonment. The Legislature has not drawn any relevant distinction between violence, menace, fraud, or deceit. These types of conduct are specified only as a basis for distinguishing between false imprisonment punishable as a misdemeanor and false imprisonment punishable as a felony." *Id.* at 1185. Thus, as the terms "violence, menace, fraud, or deceit," as set forth in

Cal. Penal Code § 237, are merely means to commit a single offense, the modified categorical approach is not applicable to the respondent's offense. Therefore, as felony false imprisonment under Cal. Penal Code §§ 236 and 237 is not divisible, and does not qualify as a categorical aggravated felony crime of violence, the respondent is not ineligible for cancellation of removal on this ground. See *U.S. v. Hernandez-Hernandez*, 431 F.3d 1212, 1217 n.5 (9th Cir. 2005) (false imprisonment is overbroad under the formal categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990)). We further note that the Ninth Circuit has held that a conviction for felony false imprisonment under Cal. Penal Code §§ 236 and 237 is not a categorical crime involving moral turpitude. See *Turijan v. Holder*, 744 F.3d 617 (9th Cir. 2014).

Accordingly, we will sustain the respondent's appeal, and remand the record for further proceedings to determine whether the respondent is otherwise eligible for cancellation of removal and voluntary departure, and whether he merits such relief in discretion.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and the entry of a new decision.

  
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FOR THE BOARD