U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: S[redacted] A[redacted], M[redacted] **A [redacted]-073**

Date of this notice: 5/14/2018

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:
O'Connor, Blair
Pauley, Roger
Wendtland, Linda S.

Smith, Ci
Userteam: Docket

File: [redacted] 073 – Miami, FL

Date: MAY 14 2018

In re: M[redacted] S[redacted] A[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ian R. Ali, Esquire

ON BEHALF OF DHS: Crystal T. Lasseur
Assistant Chief Counsel

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

The respondent appeals from the Immigration Judge's November 25, 2013, decision denying her application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1) (2012). The Department of Homeland Security ("DHS") has filed a brief in opposition to the appeal. The appeal will be sustained, and the record will be remanded for completion of the requisite background checks.

We review findings of fact for clear error, including any credibility findings. *See* 8 C.F.R. § 1003.1(d)(3)(i) (2017); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, a native and citizen of Mexico, does not dispute that she is removable as charged under sections 212(a)(6)(A)(i) and 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. §§ 1182(a)(6)(A)(i), 1182(a)(7)(A)(i)(I) (IJ at 1-2, 4; Tr. at 2-3; Exh. 1). Before the Immigration Judge, the respondent, through counsel, admitted the factual allegation that, in July 2000, she had sustained a conviction for grand theft in violation of Florida Statutes § 812.014, and conceded that she was removable as charged as an alien convicted of a crime involving moral turpitude (IJ at 1-2, 5; Tr. at 2-3; Exh. 2). *See* section 212(a)(2)(A)(i)(I) of the Act. At a subsequent hearing, the respondent's current counsel sought to withdraw the concession of removability made by prior counsel, but the Immigration Judge concluded that the respondent was bound by the prior concession of removability (IJ at 5; Tr. at 25-27). Relying on the respondent's concession, the Immigration Judge found that the respondent was statutorily ineligible for cancellation of removal because she had been convicted of an offense under 212(a)(2) and, pursuant to the stop-time rule, her conviction prevented her from accruing the requisite 10 years continuous physical presence (IJ at 5-6). *See* sections 240A(b)(1)(A), (C), 240A(d)(1) of the Act. Upon de novo review, we disagree.

As an initial matter, in removal proceedings, a respondent is generally bound to his or her lawyer's admission absent "egregious circumstances." *Matter of Velasquez*, 19 I&N Dec. 377, 382 (BIA 1986). The *Velasquez* exception may apply to a concession that (1) was "the result of unreasonable professional judgment," (2) was so unfair that it produced an unjust result, or

(3) was untrue or incorrect. *Id.* at 383; *see also Hanna v. Holder*, 740 F.3d 379, 387-88 (8th Cir. 2014) ("as a threshold matter" the alien must argue "that the factual admissions or concessions of removability are untrue or incorrect," and that they came from unreasonable professional judgment or produced an unjust result); *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 831-32 (9th Cir. 2011). Given the recent developments in the law regarding the approach used for determining whether a conviction is a crime involving moral turpitude, we hold that the circumstances warrant setting aside counsel's concession of removability (*see* Resp. Br. at 3-5). *See Matter of Velasquez*, 19 I&N Dec. at 832-33. Binding the respondent to her counsel's 2012 concession—where there has been an intervening change in the law as to the divisibility of the statute, where the respondent argues that her offense is not a crime involving moral turpitude, and where her argument is supported by the record evidence (as discussed below)—would produce an unjust result. *See Hanna v. Holder*, 740 F.3d at 390.

In *Matter of Silva-Trevino III*, 26 I&N Dec. 826 (BIA 2016), we concluded that the categorical and modified categorical approaches provide the proper framework for determining whether a conviction is for a crime involving moral turpitude. *Id.* at 830-31. We further held that, unless controlling case law of the governing Federal court of appeals (here the United States Court of Appeals for the Eleventh Circuit) expressly dictates otherwise, the realistic probability test, which focuses on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, should be applied in determining whether an offense is a categorical crime involving moral turpitude. *See id.* at 831-33; *see also Walker v. U.S. Att'y Gen.*, 783 F.3d 1226, 1229 (11th Cir. 2015) (adopting the categorical approach, but not expressly addressing the realistic probability test).

The statute under which the respondent was convicted requires proof of the following three elements: (1) knowingly obtaining or using, or endeavoring to obtain or use, the property of another, (2) with the intent to permanently or temporarily, (3) either (a) deprive the other person of a right or benefit of the property or (b) appropriate the property to one's own use or to the use of any person not entitled to the use of the property. Fla. Stat. § 812.014(1).

We have recently held that a theft offense is a crime involving moral turpitude if it involves a taking or exercise of control over another's property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded. *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016). In so doing, we noted that when evaluating whether a theft offense involves moral turpitude, "it is appropriate to distinguish between substantial and de minimis takings." *Id.* at 851. The Florida statute does not include as a required element that the "theft" occur under circumstances where the owner's property rights are substantially eroded, but rather includes de minimis takings such as joyriding. *See* Fla. Stat. § 812.014(1); *see State v. Dunmann*, 427 So. 2d 166 (Fla. 1983) (holding that the Florida joyriding statute, Fla. Stat. § 812.041, was repealed by implication by Fla. Stat. §§ 812.014 and 812.012); *Stephens v. State*, 444 So. 2d 498 (Fla. Dist. Ct. App. 1984) (remanding the defendant's case for a new trial because he had been convicted under Florida's joyriding statute, which had been subsumed within Florida's omnibus theft statute). Thus, the offense of grand theft under Florida law is categorically broader than a generic crime involving moral turpitude.

As the statute of conviction includes some crimes that involve moral turpitude (i.e., a permanent taking or a taking that substantially erodes the owner's property rights) and some that do not (i.e., de minimis takings), the respondent's Fla. Stat. § 812.014 conviction is not for an offense under section 212(a)(2)(A)(i)(I) of the Act unless the statute is "divisible," such that the modified categorical approach can be applied. *See Descamps v. United States*, 133 S. Ct. 2276, 2282 (2013). In removal proceedings, we evaluate the divisibility of criminal statutes by employing the standards set forth in *Mathis v. United States*, 136 S. Ct. 2243 (2016), in which the Supreme Court further explained the "divisibility" analysis in *Descamps*. *See Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016).

Under *Mathis*, the divisibility of a statute depends on whether the statutory alternatives are discrete "elements" as opposed to "means" of committing an offense. *Mathis v. United States*, 136 S. Ct. at 2256. The elements of a crime are those "constituent parts" of a crime's legal definition—the things that the "prosecution must prove to sustain a conviction." *Id.* at 2248; *see also United States v. Estrella*, 758 F.3d 1239, 1246 (11th Cir. 2014) ("[W]e should ask ourselves the following question when confronted with a statute that purports to list elements in the alternative: If a defendant charged with violating the statute went to trial, would the jurors typically be required to agree that their decision to convict is based on one of the alternative elements?"). Thus, the divisibility of section 812.014 depends upon whether the taking being permanent or substantially eroding the owner's property rights as opposed to a de minimis taking is an "element" of the offense or merely a "brute fact" about which the jury can disagree while still rendering a guilty verdict. *See Mathis v. United States*, 136 S. Ct. at 2248.

On its face, the language of section 812.014 of the Florida Statutes does not specify whether a temporary de minimis taking versus a permanent taking of property is an "element" of the offense or merely a means of committing the offense. *See* Fla. Stat. § 812.014(1). We, however, find no authority suggesting that temporary (including de minimis) or permanent takings are alternative elements of grand theft about which Florida jurors must agree in order to convict. *See, e.g.*, *State v. Getz*, 435 So. 2d 789, 791 (Fla. 1983) (setting forth the elements of section 812.014); *see also* Florida Standard Jury Instructions (criminal) 14.1.

The DHS argues on appeal that the divisibility of the statute is irrelevant because the respondent's record of conviction reflects that she was convicted of retail theft, which the Board has held to categorically involve moral turpitude (DHS Br. at 6). Inasmuch as the DHS relies on our decision in *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006), that case involved a Pennsylvania statute where theft from a retail store was an element of the offense. *See* Pa. Const. Stat. § 3929(a)(1) (1991). Here, the respondent's statute of conviction contains no such requirement. To the contrary, theft under Florida law is a distinct offense from retail theft, each requiring proof of *different* elements. *See* Fla. Stat. § 812.015; *Rimondi v. State*, 89 So. 3d 1059, 1062 & n.3 (Fla. Dist. Ct. App. 2012) (explaining that retail theft requires the property to be that of "a merchant," whereas grand theft can be committed against the property of "any person").

For the foregoing reasons, we agree with the respondent that her conviction for grand theft in violation of section 812.014 of the Florida Statutes is not categorically a crime involving moral turpitude and is not divisible such that the modified categorical approach applies. Thus, the respondent's § 812.014 conviction is not an offense under section 212(a)(2) of the Act that renders

her statutorily ineligible for cancellation of removal. *See* section 240A(b)(1)(A), (C), 240A(d)(1) of the Act. Because the Immigration Judge found that the respondent was otherwise statutorily eligible for cancellation of removal, including determining that she had established the requisite exceptional and extremely unusual hardship (and determination with which the DHS agreed) (IJ at 4, 6; Tr. at 108), we will reverse the Immigration Judge's decision denying the respondent's application for cancellation of removal under section 240A(b)(1) of the Act.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The respondent is eligible for cancellation of removal under section 240A(b) of the Act.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the DHS the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

File: [redacted] 073 – Miami, FL

Date: MAY 14 2018

In re: M[redacted] S[redacted] A[redacted]

CONCURRING OPINION: Blair O'Connor

I concur with the result in this case because precedent requires me to. I write separately to express serious reservations I have over whether the divisibility and means/elements rules set forth in *Descamps v. United States*, 133 S. Ct. 2276 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016) apply, or are even manageable, in making crime involving moral turpitude (CIMT) determinations. For the reasons outlined below, I believe the Board should reconsider its decision in *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016), and hold that in all CIMT cases involving an overbroad statute of conviction, immigration judges are allowed to consider the record of conviction to determine whether the alien's crime involved moral turpitude.

The formal categorical approach, as it has evolved from *Taylor v. United States*, 495 U.S. 575 (1990) in criminal sentencing cases, and as it has been subsequently applied to immigration cases, is a matching test. It "focus[es] solely on whether the elements of the crime of conviction sufficiently match the elements of [the] generic [crime], while ignoring the particular facts of the case." *Mathis v. United States*, 136 S. Ct. at 2248. The problem in CIMT cases, however, is that "there is no federal *crime* to define," "[m]uch less . . . one to *compare* to a state crime." *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1085 (9th Cir. 2007) (en banc) (Bea, J., dissenting). Instead, there is a federal term, "crime involving moral turpitude," that is not a crime that either the states or the federal government actually prosecute. While the Board has come to generally define a CIMT as "requir[ing] two essential elements: reprehensible conduct and a culpable mental state," *Matter of Silva-Trevino*, 26 I&N Dec. at 834, this definition illustrates why the formal categorical approach is ill-suited for making CIMT determinations.

Determining whether conduct is "reprehensible," or whether it is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general," *Matter of Silva-Trevino*, 26 I&N Dec. at 833 (internal quotation marks and citation omitted), requires a subjective evaluation. It is not "objectively observable," as elements of a generic crime for which the formal categorical approach was developed are. As Judge Bea has noted:

> One cannot apply *Taylor* to compare the elements of a state statutory crime [(grand theft)] to the description ("vile, base, or depraved and violates accepted social standards") of an appellation ("crimes involving moral turpitude"). There is no objective matching as is the case when determining if both the federal definition and the state crime involve the same mens rea or the same element of risk of injury to another. Applying *Taylor* to determine whether a crime involves moral turpitude is like comparing apples (objective elements of a crime) to oranges (subjective evaluation of aspects of a crime).

Ceron v. Holder, 747 F.,3d 773, 786 (9th Cir. 2014) (en banc) (Bea, J., dissenting). In my view, using *Taylor* to make CIMT determinations is like using a square methodology to make a circular determination. It just doesn't fit.

All of this is not to say that the Board has not engaged in its own form of a categorical analysis in making CIMT determinations. *Matter of Silva-Trevino*, 26 I&N Dec. at 830-31 (noting that the use of a categorical framework "has an extensive history in the immigration context"). But the Board's categorical analysis for CIMT determinations and the formal categorical approach announced in *Taylor* are not the same thing, nor were they ever meant to be. In determining whether a crime involves moral turpitude, the Board has "historically looked to 'the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct.'" *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011) (quoting *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002), and citing *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 513 (BIA 2008)). If the statutory definition of the crime encompasses conduct that both would and would not involve moral turpitude, then the record of conviction may be considered. *Id.* (citing *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)). The importance of this second step cannot be understated, because historically whenever it has been faced with an overbroad statute in the CIMT context, the Board has *always, without exception,* considered the conviction record to determine whether the respondent was, in fact, convicted of a CIMT.

But now *Descamps* and *Mathis* call into question our ability to consult the conviction record in CIMT cases involving an overbroad statute. These cases hold that only if a statute is divisible, insofar as it contains alternative elements, as opposed to factual means, that a jury must find beyond a reasonable doubt in order to convict, can a modified categorical analysis be conducted by considering the conviction record. *Matter of Chairez*, 26 I&N Dec. 819, 822-24 (BIA 2016). We held that we would apply these rules in making CIMT determinations in *Matter of Silva-Trevino*, 26 I&N Dec. at 827, 831-33, but I question whether we were required to do so, and I believe the Board should reconsider that holding in a future precedential decision.

When you consider the three reasons the Supreme Court has provided for adhering to the formal categorical approach's "elements-only inquiry" in criminal sentencing cases, they all lack force in the CIMT context. *See Mathis v. United States*, 136 S. Ct. at 2252-53. One of the reasons, which is based on a criminal defendant's Sixth Amendment right to a jury trial, is a non-starter in a civil immigration case, where the Sixth Amendment does not apply. *Id.* at 2252. Another reason, which is that the Act refers to an alien having been "convicted of" a CIMT, as opposed to having committed it,[1] *id.*, lacks force when one considers that that the alien's actual conviction is for a state or federal offense that satisfies the adjudicatory-created requirements of the federal term "crime involving moral turpitude," including reprehensible conduct. The use of the words "convicted of" in the CIMT statute is linked to a generic term, "moral turpitude," not an actual crime that the states or the federal government prosecute. Given that it is legally impossible for

[1] Actually, the ground of inadmissibility the respondent was charged with, and initially conceded to, includes both "any alien convicted of, *or who admits having committed* . . . a crime involving moral turpitude." INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (emphasis added). This language is significant given that the respondent admitted to the Immigration Judge that his grand theft conviction involved "taking things from a shop," as will be discussed (Tr. at 84). Nevertheless, the parties and the Immigration Judge only analyzed the statute in terms of the respondent having been "convicted of" a CIMT.

an alien to have an actual conviction for "moral turpitude," the use of the "convicted of" language lacks the same force it carries in the criminal sentencing context.

The final reason offered for applying an elements-only inquiry is that it "avoids unfairness" to aliens. *Mathis v. United States*, 136 S. Ct. at 2253. Under this rationale, it is unfair to hold aliens to statements of "non-elemental facts" that are unnecessary to a criminal conviction in subsequent immigration proceedings. *Id.* But here the element of the generic term in question is whether the respondent's conduct was reprehensible, which was not in this case, nor ever will be, an element, mean, or fact of the statutory definition of the crime of conviction. Moreover, after the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), criminal defense attorneys are duty bound to advise their clients of the immigration consequences of their criminal convictions. Given this mandate, it is difficult to imagine alien defendants routinely admitting to extraneous facts in criminal cases that would unknowingly jeopardize their future immigration status. Thus, all of the reasons provided for applying the formal categorical approach and its elements-only inquiry are either inapplicable or lack force in the context of making CIMT determinations, and I would reconsider our decision in *Matter of Silva-Trevino* by holding that immigration judges may always consider a respondent's conviction record when confronted with an overbroad statute of conviction.

Here, unfortunately, the sole conviction document in the record that may be considered under a modified categorical analysis sheds no light on the question of whether the respondent stole with the intent to deprive the owner of his property permanently or under circumstances where the owner's property rights were substantially eroded (Exh. 2). While the Department of Homeland Security (DHS) argues that the respondent committed retail theft, which we have held categorically involves moral turpitude, *see Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006), it relies on the respondent's statement to the Immigration Judge that she was convicted of "taking things from a shop," and that she was ordered "not to go to [the] Treasure Coast Mall" as a condition of her probation in making its argument. DHS Br. at 6 (citing Tr. at 84; Exh. 2). Regrettably, a respondent's statements to an immigration judge may not be considered in a modified categorical analysis, *see Matter of Pichardo-Sufren*, 21 I&N Dec. 330 (BIA 1996),[2] and the stay away order from a shopping mall does not, by itself, conclusively establish whether the respondent stole with the intent to permanently deprive the owner of its property or under circumstances where the property rights were substantially eroded.

[2] This is another decision that I would urge the Board to reconsider in light of the increasingly absurd results that the formal categorical approach is leading to in immigration cases. *See Matter of Chairez*, 27 I&N Dec. 21, 25-16 (BIA 2017) (Malprhus, concurring); *Matter of Rosa*, 27 I&N Dec. 228, 234-37 (BIA 2018) (O'Connor, concurring). There is no conceivable reason for the respondent to have lied when she told the immigration judge that she was convicted of "taking things from a shop" (Tr. at 84), particularly in a case where she bore the burden of proving that she was not inadmissible. The fact that she is able to escape the immigration consequences of her conviction makes little to no sense, and I fail to see how this could be what Congress intended when it made CIMTs a removable offense.

Nevertheless, if the Immigration Judge were permitted to consider an alien's conviction record to determine whether a conviction under an overbroad statute did, in fact, involve moral turpitude, I would remand to allow the judge to do so in this case for two reasons. First, by initially conceding the CIMT charge before the Immigration Judge, the respondent effectively relieved the DHS of any burden it may have had to establish removability. Given that the Immigration Judge held the respondent to her concession, the DHS was never afforded the opportunity to submit additional conviction records, such as an indictment or complaint, that may more accurately reflect what the respondent was convicted of. If the law permitted a modified categorical analysis, I would provide DHS with that opportunity. Second, because she is an applicant for admission, the respondent bears the burden of establishing that she is not inadmissible. INA § 240(c)(2)(A), 8 U.S.C. § 1229a(c)(2)(A). Based on this record, it does not appear that she has satisfied this burden, but given the changes in the law noted above, if we were permitted to do so, I would remand to allow her another opportunity to satisfy this burden.

All of this, unfortunately, is beside the point, because here we have concluded that the Florida statute is indivisible, and that is the end of the matter. So even though there is no serious dispute that the respondent was convicted of retail theft, which is categorically a crime involving moral turpitude, "we must close our eyes as judges to what we know as men and women" and "go down the rabbit hole again." *United States v. Davis*, 875 F.3d 592 (11th Cir. 2017). As a member of this Board, I have no choice but to follow my colleagues down this hole, and can only hope that either Congress or the Supreme Court will one day find a fix to this mess. *Cf. Sessions v. Dimaya*, 138 S. Ct. 1204, 1259 (Thomas, J., dissenting) ("Because I cannot follow the Court down any of these rabbit holes, I respectfully dissent.").

Blair O'Connor
Board Member