File: (b) (6) [redacted] Batavia, NY

Date: APR 24 2019

In re: Onesta REYES a.k.a. (b) (6) [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael Z. Goldman, Esquire

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

APPLICATION: Termination

In a decision dated July 28, 2015, an Immigration Judge terminated the removal proceedings against the respondent. The Department of Homeland Security ("DHS") has appealed from that decision. The respondent opposes the appeal. The appeal will be dismissed.[1]

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Italy and a lawful permanent resident of the United States (IJ at 2; Exh. 1). On July 1, 2014, she was convicted of grand larceny in the second degree in violation of section 155.40(1) of the New York Penal Law (IJ at 2; Exhs. 1-2). Based on this conviction, the DHS placed her in removal proceedings by filing a Notice to Appear (Form I-862), charging her with being removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (2012), as an alien convicted of an aggravated felony theft offense under section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G) (IJ at 1; Exh. 1). The DHS subsequently withdrew this charge and lodged a charge against her under section 237(a)(2)(A)(iii), as an alien convicted of an aggravated felony offense involving fraud or deceit under section 101(a)(43)(M)(i) of the Act (IJ at 1; Exh. 1A). The DHS later re-lodged the original charge that the respondent had been convicted of an aggravated felony theft offense under section 101(a)(43)(G) of the Act (IJ at 1-2; Exh. 1B). This charge was re-lodged in addition to the charge under sections 101(a)(43)(M)(i) and 237(a)(2)(A)(iii) of the Act (IJ at 1-2; Exhs. 1A, 1B).

Before the Immigration Court, the respondent moved to terminate her removal proceedings, and the DHS opposed this motion. The Immigration Judge granted the motion and terminated the respondent's removal proceedings after determining that the DHS had not established that her State statute of conviction categorically defined either an aggravated felony theft offense or an aggravated felony involving fraud or deceit and that the respondent's State statute of conviction was indivisible relative to the aggravated felony definitions set forth at sections 101(a)(43)(G) and

[1] We acknowledge and have considered the arguments submitted by the parties and amici curiae in response to our request for supplemental briefing.

(M)(i) of the Act (IJ at 2-5). Whether the respondent's offense is an aggravated felony is a question of law that we review de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii) (2018).

II. ANALYSIS

A. Categorical Approach

The Act defines an aggravated felony as, among other things, either "a *theft offense* . . . for which the term of imprisonment [is] at least one year," section 101(a)(43)(G), or "an offense that . . . involves *fraud or deceit* in which the loss to the victim or victims exceeds $10,000," section 101(a)(43)(M)(i) of the Act. (Emphases added.)[2] The phrases "theft offense" and "an offense that involves fraud or deceit" are "generic labels" that necessitate the use of the categorical approach outlined by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990), and its progeny. *Torres v. Lynch*, 136 S. Ct. 1619, 1622 (2016).

This approach ignores the particular facts of the respondent's crime and focuses on whether the elements of her State statute of conviction proscribe conduct falling within the Federal generic definition of the offense. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). "'Elements' are the 'constituent parts' of a crime's legal definition the things the 'prosecution must prove to sustain a conviction.'" *Id.* (citation omitted). "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Id.*; *see also Matter of Kim*, 26 I&N Dec. 912, 913 (BIA 2017). "If the State crime is not a categorical match but the statute is divisible—that is, comprised of 'multiple alternative elements'—we may look to the relevant conviction records under a 'modified categorical approach' to determine 'what crime, with what elements, [the respondent] was convicted of.'" *Matter of Rosa*, 27 I&N Dec. 228, 230 (BIA 2018) (alteration in original) (quoting *Mathis v. United States*, 136 S. Ct. at 2249).

We have defined a "theft offense," for purposes of section 101(a)(43)(G), as "the taking of, or exercise of control over, property *without consent* whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent." *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440-41 (BIA 2008) (emphasis added). This definition's requirement "that the stolen property be obtained from its owner 'without consent'" excludes fraudulent takings, where a property "owner has voluntarily 'surrendered' his property, because of an 'intentional perversion of truth,' or otherwise 'act[ed] upon' a false representation to his injury." *Id.* at 439-40 (alteration in original) (citation omitted). By contrast, an offense "involves fraud or deceit," for purposes of section 101(a)(43)(M)(i), if it contains elements that "necessarily entail fraudulent or deceitful conduct," such as "the act or practice of

[2] It is undisputed that the "term of imprisonment" for the respondent's State larceny offense was at least 1 year within the meaning of section 101(a)(43)(G) of the Act and that the loss to her "victim or victims exceed[ed] $10,000" as required by section 101(a)(43)(M)(i) of the Act (IJ at 2; Exh. 2).

deceiving (as by falsification, concealment, or cheating)." *Kawashima v. Holder*, 565 U.S. 478, 484 (2012).[3]

At the time of the respondent's offense, section 155.40(1) of the New York Penal Law provided that "[a] person is guilty of grand larceny in the second degree when he steals property and when . . . . [t]he value of the property exceeds fifty thousand dollars." At first blush, this statute appears to categorically define a "theft offense" within the meaning of section 101(a)(43)(G) of the Act. However, both parties concede that the term "larceny" in section 155.40(1) reaches a variety of conduct, some of which falls outside the definition of an aggravated felony "theft offense" we outlined in *Matter of Garcia-Madruga*. For purposes of section 155.40(1), the term "larceny" is defined as

> a wrongful taking, obtaining or withholding of another's property, . . . committed in any of the following ways:
>
> (a) By conduct heretofore defined or known as common law *larceny by trespassory taking*, common law *larceny by trick*, embezzlement, or obtaining property by *false pretenses*;
>
> (b) By acquiring lost property.
>
> . . . .
>
> (c) By committing the crime of issuing a bad check . . .
>
> . . . .
>
> (d) By *false promise*.
>
> . . . .
>
> (e) By *extortion*.

N.Y. Penal Law § 155.05(2)(a)-(e) (McKinney 2014) (emphases added).

Since the respondent's State statute of conviction reaches larceny offenses involving fraudulent takings (such as larceny by trick, embezzlement, issuing a bad check, false pretenses, and false promise) and takings "without consent" (such as larceny by trespassory taking, acquiring lost property, or extortion),[4] it is overbroad relative to the definition of a theft offense at section 101(a)(43)(G) of the Act. *See Matter of Garcia-Madruga*, 24 I&N Dec. at 441 (concluding that fraudulently obtaining, or attempting to obtain, public assistance to which one is not entitled under Rhode Island law is not categorically a "theft offense" under section 101(a)(43)(G)). For the same reason, the statute is overbroad relative to the definition of "fraud or deceit" at section 101(a)(43)(M)(i) of the Act. *See id.* at 439 ("The key and controlling distinction between

[3] The respondent argues that the DHS waived the argument that her State crime is an aggravated felony involving "fraud or deceit" under section 101(a)(43)(M)(i) of the Act because it did not raise it in its Notice of Appeal from a Decision of an Immigration Judge (Form EOIR-26) (Respondent's Br. at 4-5). However, this issue is properly before us because the DHS developed this argument in its appellate brief (DHS Br. at 15-19).

[4] We assume without deciding that all of the means of committing "larceny" under section 155.40(1) involve either a taking "without consent" or "fraud or deceit," as contemplated by either section 101(a)(43)(G) or (M)(i), respectively.

[aggravated felony theft and fraud] is . . . the 'consent' element theft occurs without consent, while fraud occurs with consent that has been unlawfully obtained." (quoting *Soliman v. Gonzales*, 419 F.3d 276, 282 (4th Cir. 2005))).

Moreover, recourse to the conviction record under a modified categorical approach to determine whether the respondent's offense involved generic theft or fraud is inappropriate because, under New York law, a "jury [is] not required to be unanimous as to," nor is a defendant required to admit, the method of larceny involved in her crime. *See, e.g.*, *People v. Conroy*, 861 N.Y.S.2d 46, 49 (App. Div. 2008); *see also* N.Y. Penal Law § 155.45; Criminal Jury Instructions 2d (New York) § 155.40(1), http://www.nycourts.gov/judges/cji/2-PenalLaw/155/155.30%281%29.155.35.155.40%281%29.155.42.Larceny.Revision.pdf. In other words, the various methods of committing larceny under section 155.40(1) are *not* "elements" of the respondent's crime. Rather, they are "mere means" of violating the statute that are "extraneous to the crime's legal requirements." *Mathis v. United States*, 136 S. Ct. at 2248.

As the Supreme Court has explained: "mere means" of violating a statute "are 'circumstance[s]' or 'event[s]' having *no* '*legal effect* [or] *consequence*': In particular, they need neither be found by a jury nor admitted by a defendant." *Id.* (alterations in original) (emphases added) (citations omitted). The respondent's State statute of conviction is therefore overbroad and indivisible relative to the generic definitions of a "theft offense" and "an offense involving fraud or deceit" under section 101(a)(43)(G) and section 101(a)(43)(M)(i), respectively. *See Mathis v. United States*, 136 S. Ct. at 2248; *see also Matter of Chairez*, 26 I&N Dec. 819, 824 (BIA 2016).

Consequently, we are unable "to satisfy '*Taylor*'s demand for certainty' when determining whether [she] was *convicted of* a generic offense" under either section 101(a)(43)(G) *or* (M)(i) of the Act. *Mathis v. United States*, 136 S. Ct. at 2257 (emphasis added) (citing *Shepard v. United States*, 544 U.S. 13, 21 (2005)).[5] Without this certainty, our inquiry must end. *See Descamps v. United States*, 570 U.S. at 261 (providing that where a State law "sweeps more broadly than the generic crime" and is indivisible relative to that crime, "a conviction under that law *cannot count*

[5] Contrary to the dissent's assertions, the categorical approach is not solely concerned with what crime an alien was "convicted of"; it is concerned with "what crime, *with what elements*, [an alien] was convicted of." *Mathis*, 136 S. Ct. at 2249 (emphasis added) (citing, inter alia, *Taylor v. United States*, 495 U.S. at 602). While a conviction for "larceny" in New York may factually involve the commission of either aggravated felony theft or fraud, neither generic crime is an *element* of that offense, and it is therefore legally irrelevant whether the respondent actually committed either generic crime. *See Descamps v. United States*, 570 U.S. 254, 261 (2013) ("The key [under the categorical approach] is *elements*, not facts." (emphasis added)); *see also id.* at 270 (holding that we may not rely on "a non-elemental fact" under this approach). We view the result in this case as analogous to one that honors an alien's plea bargain, in which the alien pleaded guilty to a crime whose elements do not match a generic offense, despite the fact that she actually committed a generic crime. *See id.* at 271. Although the dissent opines that our conclusion in this regard is less than ideal, it is the result of the requisite application of our understanding of the categorical approach, as articulated by the Supreme Court, which we are bound to follow. *See, e.g.*, *Matter of Chairez*, 26 I&N Dec. at 821-22.

as . . . predicate, even if the defendant *actually committed the offense in its generic form*" (emphases added)).

Therefore, based on a straightforward application of the categorical approach outlined in *Taylor* and its progeny, we must conclude that the DHS has not met its burden of establishing by "clear and convincing evidence" that the respondent's conviction for grand larceny in the second degree under New York law renders her removable as charged under section 237(a)(2)(A)(iii) of the Act. Section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A).

B. DHS's Alternative Methodology

The DHS (along with the dissent and one of the amici) proposes a novel methodology that would remove any uncertainty regarding the nature of the respondent's conviction. More precisely, the DHS and the dissent argue that our sole concern is whether the respondent was convicted of an "aggravated felony" under section 237(a)(2)(A)(iii) of the Act, and thus our focus should be whether *all* of the means of committing larceny under the respondent's State statute of conviction fall within one or more of the definitions of an "aggravated felony" listed under section 101(a)(43) of the Act.[6]

According to the DHS, since *all* means of committing larceny under the respondent's State statute of conviction involve either a taking "without consent" *or* "fraud or deceit," her offense must have necessarily involved either a "theft offense" within the meaning of section 101(a)(43)(G) *or* "an offense involving fraud or deceit" under section 101(a)(43)(M)(i) (DHS Br. at 5-9). Under this theory, she must have committed one or the other, and thus her conduct must be regarded as an aggravated felony under section 237(a)(2)(A)(iii) of the Act.

While the DHS's argument may have some currency in a case involving a statute that is divisible relative to *both* sections 101(a)(43)(G) and (M)(i) of the Act, respectively—where it can be confirmed by reference to the conviction record whether an offense involved either a fraudulent taking or a taking "without consent"—that is not the case here. Adopting the DHS's and the dissent's proposed method in this case would effectively elevate the "mere means" of committing larceny under New York law to the status of "elements," according them "legal effect [and] consequence" that they otherwise do not have. *Mathis v. United States*, 136 S. Ct. at 2248. This we cannot do.

Recognizing this, the DHS and the dissent argue that it is irrelevant that the respondent's statute is comprised of alternative means, rather than elements, of committing larceny—some of which reach conduct falling outside the definitions of aggravated felony theft and fraud, when each

[6] To avoid any due process concerns, the DHS concedes that, under this approach, it would have the duty to provide an alien with notice of, and an opportunity to respond to, the specific aggravated felony definition, or definitions, under section 101(a)(43) that support a charge of removability under section 237(a)(2)(A)(iii) of the Act, as it did in this case (IJ at 1-2; Exhs. 1-1B; DHS Br. at 6 n.3). *See Nolasco v. Holder*, 637 F.3d 159, 163 (2d Cir. 2011) ("At the core of due process is the right to notice of the nature of the charges and a meaningful opportunity to be heard." (citation omitted)).

definition is considered in turn—because the conduct proscribed by the respondent's statute is *categorically* an "aggravated felony" under section 237(a)(2)(A)(iii) of the Act (DHS Br. at 5-8). *Cf. Matter of Chairez*, 26 I&N Dec. at 822-23 (discerning whether an aspect of a statute is an "element" or "means" only when a State crime does not define a "categorical" aggravated felony). The DHS and the dissent contend that any conduct proscribed by section 155.40(1) that falls outside the generic definition of a "theft offense" under section 101(a)(43)(G) will necessarily fall within the definition of an offense involving "fraud or deceit" under section 101(a)(43)(M)(i), and vice versa. However, we believe that there is only one way to reconcile this argument with our understanding of the categorical approach as articulated by the Supreme Court. Namely, we would have to consider the generic definitions outlined under sections 101(a)(43)(G) and (M)(i) of the Act *in combination*, effectively creating an entirely new, broader generic crime, the contours of which would categorically encompass the conduct proscribed by the respondent's State statute of conviction. Citing *United States v. Becerril-Lopez*, 541 F.3d 881 (9th Cir. 2008), *superseded by regulation as stated in United States v. Bankston*, 901 F.3d 1100 (9th Cir. 2018), the DHS asserts that such an approach is permissible (DHS Br. at 7-8).

The issue in *Becerril-Lopez* was whether, under the categorical approach, a conviction for robbery under section 211 of the California Penal Code is one for a "crime of violence" under the Federal sentencing guidelines. The court noted that the guidelines define a "crime of violence" as, inter alia, "robbery" or "extortion." *Id.* at 890 (citing U.S. Sentencing Guidelines Manual § 2L1.2 cmt. n.2 (U.S. Sentencing Comm'n 2005)). The court recognized that an offense under section 211 is not categorically a "robbery" because, in addition to proscribing "larceny. . . under circumstances involving immediate danger to the *person*," it also "encompasses mere threats to *property*." *Id.* at 891 (second emphasis added) (citation omitted). The court nevertheless found that a conviction under section 211 is categorically a "crime of violence" under the guidelines because the threats to property proscribed by the statute would qualify as "extortion." *Id.* ("Takings through threats to property and other threats of unlawful injury fall within generic extortion, which is also defined as a 'crime of violence.'" (citation omitted)). Thus, although the court did not explicitly say so, in reaching its holding, it appears to have determined that robbery under section 211 of the California Penal Code is categorically a "crime of violence" under the Federal sentencing guidelines because this State offense categorically fits within a generic crime that *combines* two generic definitions listed under the guidelines—namely, "robbery" and "extortion." The DHS asks us to adopt a similar method here. However, we conclude that *Becerril-Lopez* is distinguishable.

The court in *Becerril-Lopez* was interpreting whether a defendant had been convicted of a "crime of violence" under the Federal sentencing guidelines—not an "aggravated felony" under the Act.[7] This distinction is important because, to our knowledge, neither the Supreme Court nor the circuit courts have used the categorical approach to determine whether an alien has been convicted of an "aggravated felony" by looking to multiple definitions listed in section 101(a)(43)

[7] Indeed, following material revisions to the sentencing guidelines, the Ninth Circuit has concluded that *Beceril-Lopez* is no longer good law, suggesting that the holding in that case is limited to a prior version of the Federal sentencing guidelines and has no applicability outside that context. *See United States v. Bankston*, 901 F.3d at 1104.

in combination. Instead, they have indicated that we must determine "whether '"the state statute defining the crime of conviction" categorically fits within the "generic" federal definition of *a corresponding aggravated felony*.'" *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (emphasis added) (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013)). *But see Nugent v. Ashcroft*, 367 F.3d 162, 174-79 (3d Cir. 2004), *overruled by Al-Sharif v. USCIS*, 734 F.3d 207, 210 (3d Cir. 2013) (en banc) ("Although some of these categories of aggravated felonies can overlap, each category is *separate from the others* . . . .").

In *Al-Sharif* the United States Court of Appeals for the Third Circuit overruled its prior decision in *Nugent*, which held that certain State theft offenses that punish both fraudulent takings and takings "without consent"—which the court later described as a "hybrid offense"—require the Government "to prove the elements of both subsection (G) *and* subsection (M)(i)." *Bobb v. Att'y Gen. of U.S.*, 458 F.3d 213, 215, 225 (3d Cir. 2006) (emphasis added). As far as we are aware, the Third Circuit is the only circuit to have adopted (and rejected) such an approach.[8]

More importantly, in the years following *Nugent*, the Third Circuit never identified another "hybrid" aggravated felony, and we are unaware of any other circuit that has done so. *See Al-Sharif v. USCIS*, 734 F.3d at 210-11 (citing *Matter of Garcia-Madruga*, 24 I&N Dec. at 439 n.4). However, we do not discount the possibility that other State crimes may fall within the scope of a "hybrid" definition formed by combining two or more definitions set out in section 101(a)(43) of the Act, besides those at sections 101(a)(43)(G) and (M)(i). Nevertheless, an approach allowing us to compare a State offense to a generic definition formed by combining multiple definitions at section 101(a)(43) would be fundamentally unworkable. Countless combinations could be assembled in this fashion and would render any determination regarding an alien's removability under section 237(a)(2)(A)(iii) exceedingly laborious and complex.[9] This approach would also be inconsistent with the Supreme Court's articulation of the categorical approach and the plain language of the Act. *See id.* at 212 ("The language of [section 101(a)(43)] is plain. Each of its subparagraphs lays out *a separate aggravated felony* . . . ." (emphasis added)).

We therefore hold that, in determining whether a State offense is categorically an aggravated felony under section 237(a)(2)(A)(iii) of the Act, neither an Immigration Judge nor the Board may compare the crime defined by the elements of the State offense to a generic definition formed by combining multiple definitions listed in section 101(a)(43) of the Act. Instead, we may only compare the State crime to *one* of the generic crimes listed in that section at a time, even if the State crime may fit within multiple definitions in section 101(a)(43).

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[8] For our part, although we recognized that "certain crimes, like the theft by deception offense at issue in *Nugent* . . . may constitute both a theft offense and one 'involv[ing] fraud[,]'" we ultimately declined to "subscribe to the *Nugent* court's holding that in such an instance the elements of *both* aggravated felony branches must be demonstrated." *Matter of Garcia-Madruga*, 24 I&N Dec. at 440 n.5 (citations omitted).

[9] Such an approach would also render it nearly impossible for an alien to establish his or her eligibility for relief from removal, where the alien has the burden of establishing that he or she has not been convicted of an aggravated felony. *See, e.g.*, section 240A(a)(3) of the Act, 8 U.S.C. § 1229b(a)(3); *see also* section 240(c)(4) of the Act; 8 C.F.R. § 1240.8(d).

C. *Matter of Garcia-Madruga*

Finally, the DHS argues that we should reconsider the definition of a "theft offense" we outlined in *Matter of Garcia-Madruga* and hold that the "without consent" element of that definition necessarily encompasses fraudulent takings (DHS Br. at 19-36). The DHS argues that holding otherwise may render the majority of State theft statutes categorically overbroad relative to section 101(a)(43)(G) of the Act because—like the respondent's State statute of conviction—most State theft statutes criminalize fraudulent takings. We have previously recognized that "by 1994 when section 101(a)(43)(G) was added to the Act, most States had . . . consolidat[ed] the various common law offenses of larceny, embezzlement and *false pretenses*, receiving stolen property, and blackmail or extortion into a unitary 'theft' offense." *Matter of Cardiel*, 25 I&N Dec. 12, 21 (BIA 2009) (emphasis added) (citation omitted).

However, the fact that most States structured their theft statutes in this manner when Congress enacted section 101(a)(43)(G) is not dispositive of that provision's scope, particularly where adopting the approach of the majority of the States would be inconsistent with the plain language of that section. *Cf. Martinez-Cedillo v. Sessions*, 896 F.3d 979, 990 (9th Cir. 2018) ("Nothing in *Taylor* requires that the [Board] conduct a fifty-state survey and agree with the majority approach among the states every time it interprets an ambiguous generic offense in the [Act]." (citing *Esquivel-Quintana*, 137 S. Ct. at 1571 n.3 (concluding that these surveys only "aid our interpretation . . . by offering useful context"))).

Significantly, Congress used the phrase "fraud or deceit" at section 101(a)(43)(M)(i), but it declined to include this phrase in section 101(a)(43)(G).[10] *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citation omitted)). Thus, "the plain text of section 101(a)(43) shows that Congress specifically distinguished fraud from theft, and that it meant for the two offenses to be treated differently." *Matter of Garcia-Madruga*, 24 I&N Dec. at 439; *see also Sebelius v. Cloer*, 569 U.S. 369, 380 (2013) ("Our 'inquiry ceases [in a statutory construction case] if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" (alteration in original) (citation omitted)). Therefore, even if most States chose to label fraudulent takings as "theft" when section 101(a)(43)(G) was enacted, that choice cannot override Congress' decision to treat "theft offenses" and offenses involving "fraud or deceit" as different generic crimes for purposes of an alien's removability under section 237(a)(2)(A)(iii) of the Act. *See Taylor v. United States*, 495 U.S. at 589 (providing that the focus of the categorical

[10] Both provisions were added to the Act at the same time by section 222(a) of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305, 4320-22, indicating that Congress intended that these provisions be interpreted consistently with one another.

approach is to identify "crimes having certain common characteristics . . . regardless of how they were labeled by state law").[11]

We additionally find it significant that including fraudulent takings within the "without consent" element of the generic theft would render the inclusion of the $10,000 threshold for fraud offenses at section 101(a)(43)(M)(i) superfluous. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (stating that courts should be "'reluctan[t] to treat statutory terms as surplusage' in any setting" (alternation in original) (citation omitted)). In other words, an alien convicted of a fraudulent taking for which the term of imprisonment was at least 1 year, but which resulted in a loss to her victim of $10,000 or less, would be an aggravated felon under section 101(a)(43)(G), even though she would not be removable pursuant to section 101(a)(43)(M)(i) of the Act. There is no indication that Congress would have intended this result. For the foregoing reasons, we therefore decline to revisit the definition of an aggravated felony "theft offense" we outlined in *Matter of Garcia-Madruga* and we reaffirm our holding in that case.

III. CONCLUSION

We therefore conclude that the respondent's conviction of grand larceny in the second degree under New York Law is not one for an aggravated felony under either section 101(a)(43)(G) or (M)(i) of the Act, and thus she is not removable under section 237(a)(2)(A)(iii) of the Act, the sole ground of removability charged. Because the DHS cannot establish by clear and convincing evidence that the respondent is removable from the United States, we will affirm the Immigration Judge's decision to terminate her removal proceedings. *See Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 44 (BIA 2012) (providing that termination of proceedings is appropriate where the DHS cannot establish an alien's removability). Accordingly, the DHS's appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD

[11] We note that the circuit courts that have considered the issue have found, in line with *Matter of Garcia-Madruga*, that the "without consent" element of generic theft under section 101(a)(43)(G) excludes fraudulent takings. *See, e.g.*, *Vassell v. U.S. Attorney Gen.*, 839 F.3d 1352, 1357 (11th Cir. 2016) (collecting cases).

File: (b) (6) – Batavia, NY

Date: APR 2 4 2019

In re: Onesta REYES a.k.a. (b) (6)

DISSENTING OPINION: Blair O'Connor, Board Member

The majority decision assumes that all violations of N.Y. Penal Law §§ 155.40(1) and 155.05(2) involve either an aggravated felony theft offense or an aggravated felony fraud offense. This naturally begs the question, then, how the respondent cannot be an "alien who is convicted of an aggravated felony" offense, which is the ground of removability with which she has been charged. Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii). Because the statute in question categorically encompasses aggravated felony offenses, and only aggravated felony offenses, I would find the respondent removable as charged and sustain the DHS's appeal.

The categorical approach is a tool for discerning what crime an alien was necessarily "'*convicted of*'" and then deciding whether that crime "'fall[s] within certain categories'" enumerated in the Act that render an alien removable from the United States. *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) (emphasis added) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)); *see also Matter of Chairez*, 26 I&N Dec. 819, 821 (BIA 2016). One of those categories is a conviction for an aggravated felony, which the Act defines as encompassing certain "theft offense[s]" under section 101(a)(43)(G) of the Act, and offenses involving "fraud or deceit" under section 101(a)(43)(M)(i) of the Act.[1]

Here it is assumed that all violations of the New York statute the respondent was convicted of involve either a theft offense or a fraud offense as defined in section 101(a)(43) of the Act. Therefore, by necessity, the respondent was convicted of an aggravated felony offense, and therefore is removable under section 237(a)(2)(A)(iii). Given this, I fail to see how we are dealing with an overbroad statute, or how "*Taylor*'s demand for certainty" has not been satisfied. While there may be uncertainty over whether the respondent was convicted of a theft offense or a fraud offense, there can be no uncertainty that she was convicted of an aggravated felony offense.

The issue of divisibility and whether a statute's "listed items are elements or means," *Mathis v. United States*, 136 S. Ct. at 2256, is only relevant when the statute in question is overbroad -- that is where it encompasses conduct that both does and does not fit within the definition of the generic offense. Here it is assumed that the statute of conviction is categorically an aggravated felony under one of two subsections of the definition of aggravated felony in section 101(a)(43) of the Act. So I fail to see how the issues of divisibility or means versus elements comes into play. Regardless of whether the respondent's conviction satisfies the elements of a generic theft offense

[1] I agree with the majority that, in order to avoid any due process concerns, the DHS must, as it did in this case, provide an alien with notice of, and an opportunity to respond to, the specific aggravated felony definition, or definitions, under section 101(a)(43) that serve as the basis of a charge of removability under section 237(a)(2)(A)(iii) of the Act (IJ at 1-2; Exhs. 1-1B; DHS Br. at 6 n.3).

or the elements a generic fraud offense, it has to be one or the other, and therefore has to satisfy the elements of the generic definition of an aggravated felony offense.

Consider it from another perspective. Those who are courageous enough to teach the categorical approach commonly use Venn diagrams to illustrate when a state statute of conviction is overbroad with respect to the generic federal definition. Here the circle for the statute of conviction would encompass conduct that would fall outside the circles for the generic offenses of fraud and theft, respectively, but there is no question that all three circles would fit entirely within the circle that represents the aggravated felony definition at section 101(a)(43) of the Act, which in turn is the basis for the ground of removability at section 237(a)(2)(A)(iii) of the Act. Therefore, the statute of conviction is a categorical match for the aggravated felony definition, and that ends the analysis.

I do not view the DHS's argument as "effectively creating an entirely new, broader generic crime" that combines two generic definitions. Nor do I view it as proposing a new "hybrid offense" similar to what the U.S. Court of Appeals for the Third Circuit did in *Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004), *overruled by Al-Sharif v. U.S. Citizenship & Immigration Servs.*, 734 F.3d 207 (3d Cir. 2013) (en banc). Instead, the DHS is simply noting that the generic definition that is in play here is that of an "aggravated felony" offense, and that the respondent's conviction *necessarily involved* either a generic theft offense or a generic fraud offense as defined in section 101(a)(43) of the Act. I submit that this is wholly in accord with the categorical approach.

Significantly, neither the majority decision, the respondent, nor any of the supportive amici have cited any authority that precludes consideration of more than one generic offense in conducting a categorical analysis.[2] To be sure, the vast majority of cases that apply the categorical approach to aggravated felony determinations only involve a single subsection of the aggravated felony definition. But this is a rare case where the state statute of conviction encompasses conduct that falls under multiple subsections of section 101(a)(43) of the Act. The majority decision, in essence, holds that in cases such as this, where the statute in question is indivisible, the alien automatically wins. I simply cannot accept that this is what Congress would have intended.

Finally, it bears noting that accepting the respondent's interpretation of the categorical approach in this case would lead to yet another patently absurd result. As DHS notes in its brief, a majority of states have adopted a unitary theft offense that encompasses both takings without consent and fraudulent takings where the owner's consent is obtained by trick or under false

[2] While the majority cites to language from Supreme Court cases that describe the categorical approach in terms of determining "whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of *a corresponding aggravated felony*," this language is dicta, insofar as both of the cited cases only involved a single aggravated felony offense. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (emphasis added) (addressing sexual abuse of a minor at section 101(a)(43)(A) of the Act) (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (addressing drug trafficking crimes at section 101(a)(43)(B) of the Act)).

pretenses.[3] Assuming these state statutes to be indivisible, like this one, the respondent's approach would mean that no alien could be found removable for having been convicted of an aggravated felony offense under most State theft statutes, notwithstanding the fact that the conviction necessarily had to be for either a theft offense under section 101(a)(43)(G) or a fraud offense under section 101(a)(43)(M)(i) of the Act. Even if a respondent wanted to accept responsibility for his or her conduct and concede removability, the categorical approach would not permit us to allow him or her to do so. *See Mathis v. United States*, 136 S. Ct. at 2270-71 (Alito, J., dissenting) ("For aficionados of pointless formalism, today's decision is a wonder, the veritable *ne plus ultra* of the genre."). So now we can add theft offenses to an ever expanding list of crimes for which aliens can no longer be found removable, a list that includes burglaries, crimes of violence, and an increasing number of controlled substance offenses. If we allow this to go on long enough, the day may come when it is near impossible for an alien to be removed on the basis of a criminal conviction. This is not just an absurd result, but is so far astray from what Congress must have intended in making criminal convictions grounds for removal that one cannot help but wonder how we got here. I know I do.

[3] As we noted in *Matter of Cardiel*, 25 I&N Dec. 12, 21 (BIA 2009), the same was true in 1994, when theft and fraud offenses were added to the definition of "aggravated felony" under the Act.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BATAVIA, NEW YORK

(b) (6) [redacted]

July 28, 2015

In the Matter of

ONESTA REYES	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act) - in that the respondent has been convicted of an aggravated felony theft offense as defined in Section 101(a)(43)(B) of the Act; Section 237(a)(2)(A)(iii) of the Act - in that the respondent has been convicted of an aggravated felony fraud offense as set forth in Section 101(a)(43)(M) of the Act

APPLICATIONS:

ON BEHALF OF RESPONDENT: MICHAEL Z. GOLDMAN

ON BEHALF OF DHS: BRANDI M. LOHR

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is charged with being removable from the United States pursuant to a Notice to Appear dated May 8, 2015 (Exhibit 1). That charge was subsequently deleted and the second charge of removability relating to an aggravated felony fraud offense was set forth in a Form I-261 dated May 21, 2015 (Exhibit 1A).

On July 13 of this year, the Government re-instated the original charged

ground of removability relating to the theft offense pursuant to a Form I-261 dated July 13, 2015, Exhibit 1B, received into evidence on today's date.

The respondent, through counsel, admitted all five factual allegations contained in Exhibit 1 of these proceedings. Specifically, it was admitted that the respondent is not a citizen of the United States, that she is a native and citizen of Italy, that she has been a permanent resident of this country since October 21, 1972. It was also admitted that the respondent was convicted of the crime of grand larceny in the second degree in violation of Section 155.40(1) of the New York State Penal Law pursuant to a judgment entered on or about July 1, 2014, by the county court of the State of New York, County of Nassau. It was further admitted that for that conviction, a sentence to a term of imprisonment of at least one year has been imposed.

The Court would note, however, that the respondent, through counsel, has contested the original charge of removability and continues to also contest the added I-261 charge and the reinstatement of the first charge of removability.

In support of its charges of removability, the Government has entered into evidence, without objection, Group Exhibit 2 in these proceedings. That group exhibit consists of four sub-exhibits, including a Form I-213, record of deportable/inadmissible alien, a record of conviction for the conviction charged in Exhibit 1 of these proceedings, and noting that the respondent was sentenced to a term of imprisonment of one year to three years, plea minutes relating to the conviction, and finally, an immigrant visa face sheet relating to the respondent showing her entry into the United States in 1972 when she was 8 years old.

The respondent has subsequently made a motion to terminate these proceedings. When the Government was going only on an aggravated felony fraud charge, the respondent argued that the statute was not a divisible statute and that the

New York State statute was overly broad in connection with the fraud charge of removability.

On the reinstatement of the theft charge, the respondent continues to argue that it is an indivisible statute and that the Government has not established removability on the theft charge because the statute is so broad.

The Court would also note that the respondent's counsel has further argued that even if this is a divisible statute, that the Government has not established either charge of removability by evidence which is clear and convincing.

The only written response by the Government in relation thereto is a response arguing that the Court should use a circumstance-specific analysis as set forth in Nijhawan v. Holder, 357 U.S. 29, 38-40, 129 S. Ct. 2294, 174 L.Ed.2d 22 (2009). This Court's reading of Nijhawan would determine that it related only to the amount of the loss when a fraud charge of aggravated felony is set forth. It did not appear that the "circumstance-specific" analysis could be used to whether or not, or as to the elements of the crime to which the respondent was convicted. In this case, as will be set forth infra, the statute itself provides an insight into the amount of the loss involved.

The respondent was convicted of grand larceny in the second degree pursuant to 155.40 of the Penal Law of the State of New York, at subdivision 1. That statute provides "a person is guilty of grand larceny in the second degree when he steals property and when: . . . 1. The value of the property exceeds $50,000;". From the statute it is clear that if the respondent is found to have been convicted of a fraud offense that the value of the property involved, in excess of $50,000, would be more than the $10,000 required by the statute.

As pointed out by the attorney for the respondent, the New York State statute is a very broad statute. Counsel points out that New York State Penal Law

Section 155.05 defines larceny as "1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from the owner thereof.

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in Subdivision 1 of this section, committed in any of the following ways:

(a) By conduct heretofore defined or known as common law larceny, by tresspassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses;

(b) By acquiring lost property . . .

(c) By committing the crime of issuing a bad check, as defined in Section 190.05;

(d) By false promise. . .

(e) By extortion . . ."

It is clear from the definition of larceny that larceny can be committed in very many ways as stressed by the attorney for the respondent.

The respondent also points out that under New York State law, a jury is not required to determine unanimously exactly what means were used to obtain the larceny.

This Court must find that it agrees with the respondent that the statute itself is not a divisible statute and that under the categorical approach, the statute is much broader than either of the charges brought by the Government and, therefore, fails.

It could also be argued that it is a divisible statute because the elements of

larceny and the means of committing larceny could be considered to be different elements for the crime. If that were the prevailing argument, the Court would also find that the respondent's conviction would not fall within either of the charged grounds of removability by evidence which is clear and convincing. As argued by the attorney for the respondent, there is no indication that the respondent took property without the consent of her employers. And there is no indication that it was necessarily a permanent taking.

As far as the fraud charge of aggravated felony is concerned, this Court is fully aware of the Second Circuit's recent holding in Akinsade v. Holder, 678 F.3d 1038 (2d Cir. 2012), which indicated in a different statute that the Government must show a fraudulent intent or deceit and not any other intent including injuring the true owner thereof. Based upon the breadth of Akinsade, the Court must find that the charge of removability relating to an aggravated felony fraud offense would fail even if the statute is divisible.

The only charges against the respondent are the charges listed at the beginning of this decision. Since this Court has determined that the Government has failed to meet its burden of proof to establish removability on either of these charges, the following order of the Court shall enter:

ORDER

These proceedings are hereby terminated.

Please see the next page for electronic signature

JOHN B. REID
Immigration Judge

//s//

Immigration Judge JOHN B. REID

reidj on September 10, 2015 at 11:29 AM GMT