U.S. Department of Justice
Executive Office for Immigration Review

http://eoir-vll/lib_index.html
Published since 2007

Immigration Law Advisor

January 2017 **A Legal Publication of the Executive Office for Immigration Review** *Vol. 11 No. 1*

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The Evolving Interpretation of the Categorical and Modified Categorical Approaches: *Chairez III* and *Silva-Trevino III*

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In 2016, the Supreme Court, the United States Circuit Courts of Appeals, and the Board of Immigration Appeals continued to refine the interpretation of the categorical and modified categorical approaches—a process that has been ongoing since the Supreme Court adopted the categorical approach in *Taylor v. United States*, 495 U.S. 575, 598–99 (1990). These approaches, which were developed in the criminal context, are applied to determine whether a conviction under a criminal statute falls within an enumerated category of crime for immigration purposes, e.g., an aggravated felony or a crime involving moral turpitude. They involve examination of the elements of the criminal statute of conviction without regard to the underlying facts. *Mathis v. United States,* 136 S. Ct. 2243, 2248 (2016) (explaining that courts "focus 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" under the categorical approach). This article examines two significant Board cases from 2016 in the wake of the Supreme Court's decision in *Mathis*. The first addresses the issue of divisibility and the second addresses the application of the categorical approach in the context of crimes involving moral turpitude.

The Categorical and Modified Categorical Approaches

Under the categorical approach, Immigration Judges and the Board compare the elements of the criminal statute of conviction with the generic crime referenced under the relevant criminal ground of removability. If the criminal statute's elements are the same as or narrower than the generic offense, there is a categorical match to the criminal ground of removability. *See Taylor*, 495 U.S. at 599. If the criminal statute encompasses broader conduct than the generic crime, adjudicators determine whether a realistic probability exists that the minimum criminal conduct punished under the

statute would be subject to prosecution. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013). If not, then the statute is a categorical match to the generic offense. If so, then recourse to the modified categorical approach becomes relevant and can be applied provided that the criminal statute is divisible.

In particular, the criminal statute may list a single offense that incorporates disjunctive language or discrete offenses listed as alternatives. If not all of the disjunctive alternatives or discrete offenses categorically match the generic offense, the statute is considered to be divisible, and the modified categorical approach can be applied. Under the modified categorical approach, adjudicators may consult specific documents from the record of conviction to attempt to ascertain which set of elements were required to be proven for conviction under the criminal statute. *See Mathis*, 136 S. Ct. at 2249 (instructing that under the modified categorical approach, "[A] sentencing court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of.").

Divisibility

In *Mathis*, the Supreme Court expanded on and clarified the analytical approach to divisibility it announced earlier in *Descamps v. United States*, 133 S. Ct. 2276 (2013). In the immigration context, prior to *Descamps*, the Board had adopted a different interpretation of divisibility in *Matter of Lanferman*, 25 I&N Dec. 721, 727 (BIA 2012) (holding that a statute is divisible whenever its elements "could be satisfied either by removable or non-removable conduct" (quoting *Lanferman v. Bd. of Immigration Appeals*, 576 F.3d 84, 90 (2d Cir. 2009)). In response to *Descamps*, the Board issued *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014) ("*Chairez I*"), which modified the Board's divisibility analysis in conformity with its interpretation of the approach set forth in *Descamps*.

The respondent in *Chairez* was convicted after pleading guilty to felony discharge of a firearm in violation of section 76-10-508.1(1) of the Utah Code, for which he received a sentence to an indeterminate term of imprisonment not to exceed 5 years. The divisibility issue arose in determining whether this conviction rendered the respondent removable under sections 101(a)(43)(F) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(F) and 237(a)(2)(A)(iii), for a "crime of violence" aggravated felony.

Utah Code section 76-10-508.1(1) contains three distinct subsections, none of which were specifically charged in the criminal information. The Board concluded that sections 76-10-508.1(1)(b) and (c) include as an element the deliberate "use" of "violent physical force" against the person or property of another and therefore qualify as categorical crimes of violence under 18 U.S.C. § 16(a), an alternative listed under section 101(a)(43)(F) of the Act.

However, section 76-10-508.1(1)(a) only requires the perpetrator to "know[] or hav[e] reason to believe" that discharge of the firearm may endanger any person. Citing applicable precedent, the Board concluded that this section lacks the element of the deliberate use of violent physical force required for a crime of violence under 18 U.S.C. § 16(a). Furthermore, the Board observed it does not meet the alternative requirements for a crime of violence under 18 U.S.C. § 16(b) because a defendant who recklessly discharges a firearm may create a substantial risk of injury, but does not do so deliberately. *See United States v. Zuniga-Soto*, 527 F.3d 1110, 1122–24 (10th Cir. 2008).

Thus, Utah Code section 76-10-508.1(1) is subject to the modified categorical approach because it is comprised of two sections that are categorically crimes of violence and one section that is not. However, section 76-10-508.1(1)(a), which is not a categorical crime of violence, is not further divisible to allow recourse to the modified categorical approach because it can be proven by intent, knowledge, or recklessness, without specifying the mens rea as an element of the offense. The Board therefore concluded that the DHS did not meet its burden to establish the respondent's removability for an aggravated felony crime of violence because section 76-10-508.1(1)(a) is not divisible with respect to the mens rea necessary to qualify as a crime of violence.

In sum, section 76-10-508.1(1)(a) is not divisible because, as explained by the Supreme Court in *Descamps*, each statutory alternative (i.e., committing the offense intentionally, knowingly, or recklessly) is not a separate element that must be proven to convict. *See Descamps*, 133 S. Ct. at 2281, 2283. Hence, the Board determined that the respondent was not removable for having committed

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AAO PRECEDENT DECISION

In *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016), the Administrative Appeals Office ("AAO") determined that, pursuant to section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i), U.S. Citizenship and Immigration Services ("USCIS") may grant a national interest waiver of the job offer and labor certification requirements to "qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States."

The AAO adopted a framework for determining eligibility for a national interest waiver, which includes requiring the petitioner to demonstrate by a preponderance of the evidence: (1) that his or her proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, the United States would benefit from waiving the job offer and labor certification requirements.

In this case, the AAO concurred with the Director that the petitioner was qualified for the national interest waiver as a matter of discretion. The appeal was sustained and the petition was approved.

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an aggravated felony crime of violence. *See Mathis*, 136 S. Ct. at 2256–57, 2257 n. 7 (explaining that in determining whether the listed items in an alternatively phrased statute are "elements" or "means," adjudicators analyze state court decisions, the statutory text, and in some cases record of conviction documents such as indictments, jury instructions, plea colloquies, and plea agreements).

Shortly after the issuance of *Chairez I*, the Tenth Circuit issued a precedent decision that provided an alternative approach to divisibility from that adopted by the Board. In *United States v. Trent*, 767 F.3d 1046, 1060–61 (10th Cir. 2014), the court concluded that a statute is divisible under *Descamps* if it employs "alternative statutory phrases." This divergence reflected the then-prevailing circuit court split. In particular, the Fourth, Ninth, and Eleventh Circuits followed the approach taken by the Board in *Chairez I*, whereas the First and Third agreed with the Tenth Circuit's analysis as set forth in *Trent*. *See Matter of Chairez* ("*Chairez II*"), 26 I&N Dec. 478, 483, n.3 (BIA 2015) (collecting cases). Hence, the Board reconsidered its decision in *Chairez I* and applied *Trent* to the Utah statute, but held that it would continue to apply its interpretation of *Descamps* elsewhere in the absence of contrary controlling authority in the relevant circuit. *Chairez II*, *supra*.

Thereafter in *Mathis*, the Supreme Court reinforced the interpretation adopted by the Board in *Chairez I*. In the wake of *Mathis*, the Board issued its third *Chairez* decision, relying on the Court's affirmation of *Descamps* and clarification that a criminal statute is not divisible based on disjunctive statutory language unless each statutory alternative defines an element of the offense rather than describing different means to commit the offense. *Matter of Chairez* ("*Chairez III*"), 26 I&N Dec. 819 (BIA 2016).

Crimes Involving Moral Turpitude

In *Matter of Silva-Trevino* ("*Silva-Trevino III*"), 26 I&N Dec. 826, 830 (BIA 2016), the Board was required "to develop a uniform standard" for determining whether a crime involves moral turpitude under the Act. The Board concluded that the categorical and modified categorical approaches apply when analyzing whether a criminal conviction constitutes a crime involving moral turpitude for immigration purposes. The Board also reaffirmed that, absent governing Federal court of appeals precedent to the contrary, the realistic probability test should be applied as part of the categorical inquiry in this context. As discussed, this test focuses on the minimum conduct that has a realistic probability of being prosecuted under the criminal statute and is part of the categorical inquiry in the aggravated felony context. *See Moncrieffe*, 133 S. Ct. at 1684–85; *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (explaining that, under the realistic probability test, an offender may not rely solely on legal imagination to define the least culpable conduct that could result in a conviction but "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues"); *see also Matter of Chairez*, 26 I&N Dec. at 355–58 (discussing the realistic probability test in the context of a firearms offense under section 237(a)(2)(C) of the Act).

The respondent in *Silva-Trevino* stood convicted of indecency with a child under section 21.11(a)(1) of the Texas Penal Code. At issue was whether the respondent was ineligible to adjust status because his conviction constituted a crime involving moral turpitude that rendered him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). The Texas statute reached conduct that was not morally turpitudinous and could not be said to be a categorical match on its face with the moral turpitude ground of inadmissibility. Because the Fifth Circuit has rejected the realistic probability test in favor of a "minimum reading" approach, the Board applied the Fifth Circuit test to determine whether a minimum reading of the criminal statute only reaches offenses involving moral turpitude. *Gomez-Perez v. Lynch*, 829 F.3d 323, 327 (5th Cir. 2016).

The Board concluded that, under the Fifth Circuit's minimum reading approach, the respondent's crime is not a categorical crime involving moral turpitude because Texas Penal Code section 21.11(a)(1) is broad enough to punish behavior that is not accompanied by the defendant's knowledge that the victim was a minor, and case law from Texas courts reflected prosecution of non-turpitudinous touching. *Silva-Trevino*, 26 I&N Dec. at 835–36. Since it was undisputed that Texas Penal Code section 21.11(a)(1) is not divisible, the modified categorical approach did not apply, and the respondent was not ineligible to adjust status for having committed a crime involving moral turpitude. *Id*. at 838.

Silva-Trevino highlights the circuit court split on the application of the realistic probability test. In particular, the Seventh, Eighth, Ninth, and Tenth Circuits have adopted the realistic probability test in the context of crimes involving moral turpitude, whereas the Third and Fifth Circuits have rejected it. The remaining circuits have either reserved the question, including the First, or not spoken to the issue, including the Second, Fourth, Sixth, and Eleventh Circuits. *See id.* at 831–32 (collecting cases).

Conclusion

The application of the categorical and modified categorical approaches continues to evolve. Immigration Judges and the Board are bound to apply the governing law from the relevant circuit court of appeals, absent Supreme Court precedent to the contrary. *See Matter of Chairez*, 26 I&N Dec. at 820 (reiterating that "Immigration Judges and the Board must follow applicable circuit law to the fullest extent possible when seeking to determine what *Descamps* and *Mathis* require."). Accordingly, it is essential to research, analyze, and apply post-*Mathis* circuit court law when employing these approaches. First, determine whether the circuit court has applied *Mathis* to the relevant statute of conviction in the immigration or criminal context. *See, e.g.*, *Singh v. Att'y Gen. of U.S.,* 839 F.3d 273 (3d Cir. 2016) (applying *Mathis* and finding 35 Pa. Stat. Ann. § 780-113(a)(30) divisible for purposes of section 101(a)(43)(B) of the Act because the particular drug under the statute is an element of the offense and the Pennsylvania drug schedules are more inclusive than the Federal schedules); *United States v. Henderson*, 841 F.3d 623 (3d Cir. 2016) (applying *Mathis* and concluding that 35 Pa. Stat. Ann. § 780-113(f)(1) is divisible for purposes of Federal sentencing under 18 U.S.C. § 924(e) because the particular drug is a distinct element of the offense). Absent authority specific to the criminal statute of conviction, cases applying post-*Mathis* categorical analysis to other criminal statutes in the governing circuit will provide guidance.

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