FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRYAN MAIE, *Petitioner*, v. MERRICK B. GARLAND, Attorney General, *Respondent.*	No. 19-73099 Agency No. A215-927-131 OPINION

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted March 16, 2021
San Francisco, California

Filed August 2, 2021

Before: Marsha S. Berzon, Mary H. Murguia, and Morgan Christen, Circuit Judges.

Opinion by Judge Christen;
Concurrence by Judge Berzon

SUMMARY*

Immigration

Granting Bryan Maie's petition for review of a decision of the Board of Immigration Appeals, the panel held that: (1) Hawaii's fourth degree theft statute, Haw. Rev. Stat. § 708-833(1), a petty misdemeanor involving property valued at less than $250, is overbroad with respect to the BIA's definition of a crime involving moral turpitude (CIMT); (2) § 708-833(1) is indivisible; and (3) therefore, the BIA erred in concluding that Maie's § 708-833(1) convictions were CIMTs rendering him removable.

The panel rejected the government's contention that Maie's pro se admissions during his immigration hearing bound him such that he failed to preserve the argument that his convictions are not CIMTs. Noting that an alien's admissions regarding removability can satisfy the government's burden of proof if the IJ relies on those admissions, the panel explained that, here, the IJ did not rely on Maie's concession. Instead, the IJ recognized that Maie did not understand the relevant legal concepts, and so reviewed the record in determining removability. The panel also rejected the government's argument that Maie failed to preserve his challenge to his convictions by failing to raise the issue in his pro se appeal to the BIA. The panel explained that Maie did assert that his convictions were not CIMTs and that where, as here, the BIA considers an issue on the merits

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

and ignores a procedural defect, the court cannot decline to consider the issue based on the defect.

In concluding that § 708-833(1) is overbroad, the panel explained that, after *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847 (BIA 2016), the BIA's rule is that a theft offense is a CIMT if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded. Here, the BIA concluded that § 708-833(1) incorporates the Model Penal Code's definition of "intent to deprive," which the BIA had deemed morally turpitudinous in *Diaz-Lizarraga*.

The panel explained that § 708-833(1) incorporates Hawaii's statutory definition of "theft," § 708-830, which identifies eight distinct ways a person can commit theft. Examining the least serious conduct criminalized, § 708-830(6), theft by intentional failure to make required disposition of funds, the panel concluded that both subsections of that provision encompass conduct involving less culpable mens rea than the Model Penal Code's "intent to permanently deprive or substantially erode" standard. The panel explained that the case law of the Hawaii Supreme Court and the most relevant jury instructions supported its reading of § 708-830(6), and rejected the government's argument that Hawaii's legislative Commentary compels the conclusion that all eight variations of theft require an intent to deprive. Because Hawaii's definition of theft does not always require an intent to permanently deprive or substantially erode the owner's property rights, the panel thus concluded that Maie's statute of conviction, § 708-833(1), is overbroad.

Next, the panel concluded that Hawaii's fourth degree theft statute is indivisible because it proscribes one crime that can be committed eight different ways, not eight distinct crimes. The panel explained that Hawaii's legislature explicitly directed that a jury need not decide which subsection of § 708-830 is violated, observing that § 708-835 provides that a theft charge "in any degree may be proved by evidence that it was committed in any manner that would be theft under section 708-830, notwithstanding the specification of a different manner in the indictment." The panel further concluded that Hawaii's case law undercut the government's argument that § 708-835 requires the prosecution to tailor its case to one of the theft statute's eight subsections, and explained that the fact that the State of Hawaii sometimes charges with greater specificity than § 708-835 requires does not undermine the conclusion that the fourth degree theft statute is indivisible.

Accordingly, the panel concluded that Maie's convictions for fourth degree theft are not categorically CIMTs because § 708-833(1) is overbroad and indivisible, and therefore, the government did not show that Maie is subject to removal.

Concurring in full, Judge Berzon wrote separately to reiterate once again that, in her view, the phrase "crime involving moral turpitude" is unconstitutionally vague. Observing that the IJ's attempt to explain moral turpitude during Maie's hearing highlights that the BIA and the courts have failed to establish any coherent criteria, Judge Berzon urged this court to consider en banc whether the phrase is unconstitutionally vague, applying current vagueness jurisprudence.

COUNSEL

Anna Lovelace Owen (argued) and Olivia Medina, Certified Law Students; Leah Spero (argued), Gary A. Watt, and Stephen Tollafield, Supervising Counsel; Hastings Appellate Project, Hastings College of Law, University of California, San Francisco, California; for Petitioner.

Jaclyn Shea and Anthony O. Pottinger, Trial Attorneys; Bernard A. Joseph and Lindsay B. Glauner, Senior Litigation Counsel; Jennifer J. Keeney, Assistant Director; Brian Boynton, Acting Assistant Attorney General; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

OPINION

CHRISTEN, Circuit Judge:

Bryan Maie seeks review of a decision by the Board of Immigration Appeals (BIA) that he is removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii) because his two prior convictions for violating Hawaii's fourth degree theft statute, Haw. Rev. Stat. § 708-833(1), constitute crimes involving moral turpitude (CIMTs). The BIA reasoned that Maie's prior convictions categorically qualify as CIMTs because the BIA understood that Hawaii adopted the Model Penal Code's definition of "intent to deprive" in its theft statute, and the BIA had previously decided that an Arizona shoplifting statute with a very similar definition of "intent to deprive" qualified as morally turpitudinous, *see Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847, 848, 854–55 (BIA 2016). Maie argues Hawaii's fourth degree theft statute is not

categorically a CIMT because it is overbroad—i.e., it criminalizes more conduct than the generic federal definition of a CIMT—and it is indivisible. We have jurisdiction under 8 U.S.C. § 1252, and we grant Maie's petition.[1]

I

Bryan Maie is a native and citizen of the Marshall Islands who came to the United States as a child with his family in 1989. Maie and his family arrived in Hawaii pursuant to the Compact of Free Association, which allows citizens of the Marshall Islands to come to the United States to live, work, and go to school without a visa. *See* 48 U.S.C. § 1901(b). Although he took one single-day trip back to the Marshall Islands in 2010, Maie has lived in Honolulu since he entered the United States in 1989.

In 2017, and again in 2018, the State of Hawaii charged Maie with fourth degree theft, a petty misdemeanor involving property valued at less than $250. Haw. Rev. Stat. § 708-833(1). He pleaded no contest to both charges. In 2019, the Department of Homeland Security served Maie with a Notice to Appear that alleged he was removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii) because he had been convicted of two CIMTs not arising from a single scheme.

Maie appeared pro se at his first immigration hearing and admitted the factual allegations contained in the Notice to Appear. The Immigration Judge (IJ) reviewed Maie's conviction records to determine whether the government established removability. The IJ explained that Maie's two

[1] Thomas Thomas's motion for leave to file an out-of-time brief as amicus curiae, ECF 47, is **DENIED**.

theft crimes involved moral turpitude because "[t]he state of mind" necessary to commit fourth degree theft in Hawaii is "'intentional' and/or 'with intent to deprive.'" The IJ also ruled that Maie's crimes were not a part of a single scheme of criminal conduct because they occurred two months apart. Based on these findings, the IJ concluded that Maie was removable.

Maie timely appealed to the BIA, again appearing pro se. He contested the IJ's determination that he had been convicted of two separate CIMTs and also asserted that the offenses did not qualify as CIMTs. The BIA dismissed Maie's appeal because the record supported his admissions that he had been convicted of two counts of fourth degree theft. The BIA separately rejected Maie's argument that his convictions did not qualify as CIMTs, explaining:

> The respondent avers that his 2018 convictions under the Hawaii Revised Statutes § 708-833(1) are not crimes involving moral turpitude. His argument is limited to the number and timing of the convictions and does not reach the mens rea and reprehensible act requirements for a crime involving moral turpitude. We note, however, that the respondent was convicted after our decision in *Diaz-Lizarraga*, and that Hawaii has adopted the model penal code definition of "intent to deprive" which we analyzed in that case in determining that a similar Arizona theft statute was a crime involving moral turpitude. *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016); *see also Barbosa v. Barr*, 926 F.3d 1053 (9th Cir. 2019) (finding that

> the standard described in *Diaz-Lizarraga* does not apply retroactively).

The BIA dismissed Maie's appeal, and he timely petitioned for review.

Maie's petition contends that his petty theft convictions are not categorically CIMTs. The government's initial response argued only that Maie failed to preserve this argument. For reasons explained more fully below, we conclude that Maie's argument was not waived. Because Maie's argument presents an issue we have yet to address in a published opinion, we ordered supplemental responses to fill the gap left by the government's first brief. Now, having considered the parties' post-argument briefs, we conclude that Hawaii's fourth degree theft statute is not a CIMT. Thus, the government has not shown that Maie is subject to removal.

II

Where the BIA "has reviewed the IJ's decision and incorporated portions of it as its own, we treat the incorporated parts of the IJ's decision as the BIA's." *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002) (as amended). The BIA's determination that a crime is a categorical match to its generic federal counterpart is entitled to appropriate deference. *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1293 (9th Cir. 2018). We give no deference to the BIA's determination of the elements of a statute of conviction. *Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir. 2009) (en banc).

III

We begin with the government's original contention that Maie's admissions in his first immigration hearing bound him in future proceedings. The government is correct that an alien's admissions to charges of removablility can satisfy the government's burden of proof if the IJ relies upon the admissions in making her determination. *Perez-Mejia v. Holder*, 663 F.3d 403, 414–15 (9th Cir. 2011) (holding an alien's admission that he committed a removable offense under the Controlled Substances Act "relieved the government of the obligation to present any evidence on the factual question of the nature of the drug offense").

But here, the IJ did not rely on Maie's concessions when she determined that Maie was removable. Instead, when Maie asked the IJ why the two misdemeanor convictions made him removable, and whether there was anything he could do to contest the immigration charges, the IJ reviewed his records of conviction and explained that moral turpitude is a way of referring to "a crime involving . . . deceit, deception . . . ," and "even things like shoplifting can be a crime involving moral turpitude" because shoplifting entails "an intent to deprive the owner permanently or under circumstances where the owner's property rights are substantially eroded." In short, rather than relying on Maie's oral pro se admission, the IJ recognized that Maie actually did not at all understand the legal concepts underlying removal, and so reviewed the record to ascertain whether the government had established he was removable.

The government also argues that Maie failed to preserve the challenge to his convictions as qualifying CIMTs because he did not raise this issue in his pro se appeal to the BIA.

Again, we disagree. If the BIA considers an issue on its merits and chooses to ignore a procedural defect that would have justified declining to decide the issue, "we cannot then decline to consider the issue based upon [the] procedural defect." *Abebe v. Gonzales*, 432 F.3d 1037, 1041 (9th Cir. 2005) (en banc) (citation omitted). Maie's pro se appeal to the BIA did assert that his convictions were not CIMTs. *See Ren v. Holder*, 648 F.3d 1079, 1084 (9th Cir. 2011) (construing pro se filings liberally, and concluding that general contentions by a pro se petitioner were sufficient to satisfy the exhaustion requirement so long as they gave the BIA notice of the contested issue). And although he did not flesh out his argument, both the IJ and the BIA reached the merits of the issue. The BIA signaled its adoption of the IJ's reasoning by citing *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994), and went on to explain that Hawaii's fourth degree theft statute incorporates the Model Penal Code's definition of "intent to deprive," which the BIA deemed morally turpitudinous in *Diaz-Lizarraga*.[2] *See Chuen Piu Kwong v. Holder*, 671 F.3d 872, 876–77 (9th Cir. 2011) (holding the exhaustion requirement satisfied where the BIA expressly adopted an IJ decision that "explicitly discussed" a ground for relief). Accordingly, Maie's argument was preserved.

[2] We have explained that "where the BIA cites its decision in *Burbano* and does not express disagreement with any part of the IJ's decision, the BIA adopts the IJ's decision in its entirety." *Abebe*, 432 F.3d at 1040 (citation omitted). The BIA's citation to *Burbano* signals "that it ha[s] conducted an independent review of the record and ha[s] exercised its own discretion in determining that its conclusions [are] the same as those articulated by the IJ." *Arreguin-Moreno v. Mukasey*, 511 F.3d 1229, 1232 (9th Cir. 2008) (citation omitted).

IV

Maie argues that he is not subject to removal because his prior convictions do not qualify as CIMTs. The Immigration and Nationality Act specifies that "[a]ny alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct . . . is deportable." 8 U.S.C. § 1227(a)(2)(A)(ii). On several occasions, we have observed that, "[a]lthough the immigration statutes do not specifically define offenses constituting crimes involving moral turpitude, a crime involving moral turpitude is generally a crime that '(1) is vile, base, or depraved and (2) violates accepted moral standards.'" *Latter-Singh v. Holder*, 668 F.3d 1156, 1161 (9th Cir. 2012) (quoting *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 626 (9th Cir. 2010)).

For many years, BIA precedent held that the showing required to establish "moral turpitude" is "a vicious motive or a corrupt mind' because 'evil or malicious intent is . . . the essence of moral turpitude.'" *Linares-Gonzalez v. Lynch*, 823 F.3d 508, 514 (9th Cir. 2016) (omission in original) (quoting *Latter-Singh*, 668 F.3d at 1161). This standard generally required an intent to defraud or intent to injure another person. *See id.*

Before *Diaz-Lizarraga*, the BIA's rule was that "a theft offense categorically involves moral turpitude if—and only if—it is committed with the intent to permanently deprive an owner of property." *Garcia-Martinez*, 886 F.3d at 1294 (emphasis and footnotes omitted) (quoting *Diaz-Lizarraga*, 26 I. & N. Dec. at 849). But in *Diaz-Lizarraga*, the BIA changed the threshold for theft offenses to qualify as CIMTs. *Diaz-Lizarraga* considered an Arizona shoplifting statute that

required the government to prove the defendant acted with an intent to deprive the owner of property. 26 I. & N. Dec. at 847–48. The Arizona statute incorporated the Model Penal Code's definition of "deprive," which the BIA summarized as an intent to permanently deprive or substantially erode the property rights of another. *Id.* at 851–52. The BIA determined that its case law had not kept pace with contemporary standards, concluded that the Model Penal Code's more capacious definition of "deprive" satisfies the mens rea necessary to qualify as a CIMT, and held that, because Arizona's shoplifting statute included an intent standard that was virtually the same as the Model Penal Code's, the Arizona statute was a categorical match. *Id.* at 854–55.

After *Diaz-Lizarraga*, the BIA's rule is that "a theft offense is a crime involving moral turpitude if it involves an intent to deprive the owner of his property *either permanently or under circumstances where the owner's property rights are substantially eroded*." *Id.* at 853 (emphasis added).

We have observed that *Diaz-Lizarraga* represented an "abrupt change" from the BIA's prior construction of theft-related CIMTs because it abandoned the need to show an intent to permanently deprive. *Garcia-Martinez*, 886 F.3d at 1295. In this appeal, we do not review whether *Diaz-Lizarraga* was correctly decided and we need not decide whether Congress intended CIMTs to include prior convictions that state legislatures deem "petty offenses," because Maie's convictions fail to satisfy even the BIA's sweeping new standard.[3]

[3] Similarly, we do not reach Maie's argument that the statutory term CIMT is void for vagueness.

V

A

We apply the categorical approach described in *Taylor v. United States*, 495 U.S. 575, 598–602 (1990), to determine whether a state statute is equivalent to its generic federal counterpart. Here, the *Taylor* approach requires us to compare the elements of Hawaii's fourth degree theft statute, Haw. Rev. Stat. § 708-833(1), to the BIA's interpretation of CIMT in the theft context. If the elements of Hawaii's statute are a categorical match to that interpretation, Maie's prior convictions qualify as CIMTs. *See Linares-Gonzalez*, 823 F.3d at 514 (citing *Descamps v. United States*, 570 U.S. 254, 260–66 (2013)). "A state offense categorically qualifies as . . . a CIMT when its elements, without any consideration of the facts underlying the individual case, are fully encompassed by the generic federal offense." *Jauregui-Cardenas v. Barr*, 946 F.3d 1116, 1119 (9th Cir. 2020). We conclude that Hawaii's fourth degree theft statute does not categorically describe a CIMT because it criminalizes conduct not encompassed by the BIA's understanding of what constitutes a CIMT. We further conclude that the statute is indivisible, so we do not employ the modified categorical approach.

1

The *Taylor* categorical inquiry "is not whether *some* of the conduct prohibited by the statute is morally turpitudinous, but rather whether *all* of the conduct prohibited by the statute is morally turpitudinous." *Morales-Garcia v. Holder*, 567 F.3d 1058, 1062 (9th Cir. 2009) (citation, internal quotation marks, and brackets omitted). Thus, we examine

the least serious conduct criminalized by Hawaii's fourth degree theft statute to determine whether that conduct necessarily involves moral turpitude. If it does not, the statute is overbroad because it criminalizes more conduct than its generic federal counterpart. *See id*. "When determining the reach of the state criminal statute at issue, we consider not only the text of the statute, but also state court interpretations of the statutory language." *Id.* at 1063.

The Hawaii Penal Code defines four degrees of theft that criminalize conduct based on the value or kind of property stolen and, in some instances, the circumstances surrounding the theft. *See* Haw. Rev. Stat. §§ 708-830 to 708-833. First degree theft criminalizes theft of property or services valued at more than $20,000, or theft of a firearm, dynamite or other explosive, or "property or services during an emergency period." Haw. Rev. Stat. § 708-830.5. Second degree theft criminalizes theft of, for example, "[p]roperty or services the value of which exceeds $750," and agricultural products or equipment from fenced or enclosed premises that have "no trespassing" or similar signs prominently displayed. Haw. Rev. Stat. § 708-831. Third degree theft criminalizes theft "[o]f property or services the value of which exceeds $250 or . . . [o]f gasoline, diesel fuel, or other related petroleum products . . . of any value not exceeding $750." Haw. Rev. Stat. § 708-832(1). The statute Maie was convicted of violating, § 708-833(1), provides: "A person commits the offense of theft in the fourth degree if the person commits theft of property or services of any value not in excess of $250."

All four degrees of theft incorporate Hawaii's statutory definition of "theft," § 708-830(1)–(8), which identifies eight

distinct ways a person can commit "theft."[4] Five expressly require an intent to deprive or defraud; three do not. *See* Haw. Rev. Stat. § 708-830(4) (obtaining services by deception); *id.* § 708-830(5) (diverting services); *id.* § 708-830(6) (failing to make required disposition of funds).

It appears the IJ concluded that Maie's convictions for fourth degree theft were CIMTs because the IJ concluded the state of mind required to commit fourth degree theft is "'intentional' and/or with 'intent to deprive.'" The BIA adopted the IJ's reasoning and cited its decision in *Diaz-Lizarraga*, where it concluded Arizona's shoplifting statute qualified as a CIMT because Arizona adopted the Model Penal Code's definition of "intent to deprive." The Commentary to Hawaii's Penal Code states Hawaii's theft statutes "follow[] the Model Penal Code" and consolidate traditionally distinct common law theft crimes into one statute for simplicity, separated by degrees to delineate the seriousness of each offense. *See* Haw. Rev. Stat. Ann. Commentary on §§ 708-830 to 708-833. Maie argues that the BIA erred because it failed to recognize there are differences between Hawaii's definition of theft and the Model Penal Code's definition of theft. In particular, he argues that at least some of the ways to violate Hawaii's theft statute do not

[4] Hawaii defines "theft" as "any of the following" eight actions: (1) obtaining or exerting unauthorized control over property, with an intent to deprive; (2) obtaining or exerting control over property through deception, with an intent to deprive; (3) appropriating property, with an intent to deprive; (4) intentionally obtaining services by deception; (5) intentionally diverting services to which a person is not entitled; (6) intentionally failing to make required disposition of funds; (7) receiving stolen property, with intent to deprive; or (8) shoplifting, with intent to defraud. Haw. Rev. Stat. § 708-830(1)–(8).

require an "intent to deprive" comparable to the Model Penal Code's standard.

2

We agree with Maie that § 708-830(6), theft by intentional failure to make required disposition of funds, is the least serious of the acts criminalized in Hawaii's fourth degree theft statute. Section 708-830(6) contains two subsections that criminalize separate conduct. Subsection 708-830(6)(a) requires intent to "deal with" another's property as one's own. A person commits this type of theft if he "intentionally obtains property from anyone upon an agreement . . . and deals with the property as the person's own and fails to make the required payment or disposition." Haw. Rev. Stat. § 708-830(6)(a). Thus, subsection (a) criminalizes a person's misuse of property entrusted to him.

Subsection 708-830(6)(b) criminalizes the intentional failure to make a required payment to an employee subject to an agreement or known legal obligation. A person commits this type of theft if he "obtains personal services from an employee upon agreement . . . and . . . intentionally fails to make the payment or disposition at the proper time." Haw. Rev. Stat. § 708-830(6)(b). Pursuant to subsection (b), intentionally withholding or delaying a paycheck qualifies as theft, even if the paycheck is later delivered. It appears that § 708-830(6)(a) does not require the government to prove the defendant intended to permanently deprive or substantially erode the owner's property rights, and § 708-830(6)(b) certainly does not.

Case law from the Hawaii Supreme Court supports the conclusion that § 708-830(6)(a) sweeps more broadly than the

federal generic definition of a CIMT because it does not require proof that a defendant acted with the Model Penal Code's "intent to deprive." In *State v. Gaylord*, 890 P.2d 1167, 1170–71 (Haw. 1995), the defendant was convicted of two counts of first degree theft and one count of second degree theft after he used his position as an attorney to appropriate client funds and abscond with them. *Gaylord* concerned three separate charges of first and second degree theft because the value of each client's funds was $47,248.95, $70,000.00, and $5,000.00, respectively. *See id.* On appeal, the Hawaii Supreme Court acknowledged that "intent to appropriate the value of property for the actor's own benefit" was part of the gravamen of § 708-830(6)(a), *id.* at 1179 n.20 (internal quotation marks omitted), but the court did not require the government to show that the attorney intended to permanently deprive or substantially erode his clients' property interests, *see id.* at 1176. In the process, the court identified the elements of § 708-830(6)(a) and did not include an intent to permanently deprive an owner of property or substantially erode the owner's property interest. *See id.* at 1177.

We may look to a state's pattern jury instructions to determine the elements of a crime. *See Descamps*, 570 U.S. at 275 n.5; *see also Ramirez v. Lynch*, 810 F.3d 1127, 1135 (9th Cir. 2016). There is no pattern jury instruction specific to fourth degree theft because Hawaii does not provide a right to jury trial for fourth degree theft, as it is considered a petty misdemeanor punishable by up to thirty days of imprisonment.[5] Nevertheless, our reading of § 708-830(6)(a)

[5] Hawaii Revised Statute § 806-60 provides: "Any defendant charged with a serious crime shall have the right to trial by a jury of twelve members. 'Serious crime' means any crime for which the defendant may

and (b) tracks Hawaii's most relevant jury instructions. The pattern jury instructions for first and second degree theft offenses committed by intentionally failing to make a required disposition of funds in violation of § 708-830(6)(a) or (b) do not require the government to prove the defendant intended to permanently deprive or substantially erode the owner's property interest.

For defendants charged with violating § 708-830(6)(a), the government must prove the defendant intentionally obtained property, did so upon an agreement or subject to a known legal obligation to make payment or disposition, dealt with the property as his own, and failed to make the require payment or disposition. *See* Haw. Crim. Jury Instr. 10.22.2A; 10.22.2B. The pattern jury instructions for § 708-830(6)(b) offenses require proof that the defendant intentionally obtained personal services from an employee, did so subject to an obligation to make payment, and failed to make payment at the proper time. *See* Haw. Crim. Jury Instr. 10.22.3A; 10.22.3B.

Because the state need not prove that a defendant charged with committing theft by intentionally failing to make a required disposition of funds in violation of § 708-830(6)(a) or (b) intended to permanently deprive or substantially erode the owner's property interest, these subsections criminalize more conduct than the BIA's definition of CIMT; they encompass conduct involving less culpable mens rea than the

---

be imprisoned for six months or more." Fourth degree theft is a petty misdemeanor punishable by up to thirty days of imprisonment, Haw. Rev. Stat. §§ 706-663; 708-833(1), and is therefore not required to be tried by a jury. *See State v. Emerson*, 129 P.3d 1167, 1172 (Haw. Ct. App. 2006), *as corrected* (Feb. 10, 2006).

Model Penal Code's "intent to permanently deprive or substantially erode" standard.

The government argues that Hawaii's legislative Commentary compels the conclusion that all eight variations of theft require an intent to deprive. The Commentary states that "in all theft offenses, the requisite mental state is intent to deprive the owner of the value of property or services." Haw. Rev. Stat. Ann. Commentary on §§ 708-830 to 708-833. But the government puts too much weight on the Commentary. First, the government implies that the phrase "intent to deprive" as used in the Commentary necessarily carries the same meaning as the Model Penal Code's "intent to permanently deprive or substantially erode" standard that the BIA found dispositive in *Diaz-Lizarraga*, but that is by no means clear.

Further, the government overlooks that the Commentary is prepared by the Judicial Council of Hawaii, not Hawaii's legislature, Haw. Rev. Stat. Ann. Commentary on § 701-105; *see also State v. Nobriga*, 527 P.2d 1269, 1271 (Haw. 1974), and the legislature explicitly limited the Commentary's persuasive power. *See* Haw. Rev. Stat. § 701-105 (directing that the Commentary "may be used as an aid in understanding" the statute "but not as evidence of legislative intent"). Because the Commentary cannot overcome the plain text of the statute, we must look to the statute as written by Hawaii's legislature and as interpreted by Hawaii state courts to identify the elements of a state offense. *See Morales-Garcia*, 567 F.3d at 1063.

Contrary to the Commentary's unqualified statement that Hawaii's theft statute follows the Model Penal Code, the Hawaii legislature chose to deviate from the Model Penal

Code by criminalizing at least some conduct that does not require proof of the defendant's intent to permanently deprive or substantially erode the owner's property interest. Model Penal Code § 223.0(1) at 124 (Am. L. Inst. 1980). In particular, § 708-830(6)(b) of Hawaii's theft statute was not adopted from the Model Penal Code and it criminalizes significantly more conduct. The drafters of the Model Penal Code expressly declined to include a provision that criminalizes failure to make a required payment after receiving the services of an employee, explaining that theft by failure to make required disposition "must not be construed so broadly that a bright line between theft and breach of contract is obscured." Model Penal Code § 223.8 cmt. at 261 (Am. L. Inst. 1980). Because Hawaii clearly departed from the Model Penal Code, we decline to afford the Commentary the weight the government urges. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) ("The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.").

We conclude that Hawaii's definition of "theft" does not always require the government to prove the defendant acted with an intent to permanently deprive or substantially erode the owner's property rights. Accordingly, Hawaii's fourth degree theft statute is overbroad because it criminalizes conduct not encompassed by the BIA's definition of a CIMT.

B

The next step is to determine whether § 708-833(1) is divisible. *See Sandoval v. Sessions*, 866 F.3d 986, 993 (9th Cir. 2017). If the statute of conviction is not a categorical match, but is divisible, we apply the modified categorical

approach to determine the elements of the particular crime the defendant was convicted of committing. *See Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)). The modified categorical approach allows us to consider a particular class of documents to determine the elements established by the prior conviction, without considering the factual circumstances of the crime. In this way, the modified categorical analysis allows us to determine whether each element of the generic federal counterpart was necessarily established beyond a reasonable doubt, even if the statute of conviction is broader. In contrast, if the statute of conviction is not a categorical match and is indivisible, we cannot employ the modified categorical approach and our inquiry ends. *See id*. at 2248–49.

Here, the divisibility inquiry requires that we identify the elements of Maie's conviction to determine whether fourth degree theft contains multiple alternative elements of functionally distinct crimes, or multiple alternative means to commit fourth degree theft. *Rendon v. Holder*, 764 F.3d 1077, 1084–86 (9th Cir. 2014) ("The critical distinction is that while indivisible statutes may contain multiple, alternative *means* of committing the crime, only divisible statutes contain multiple, alternative *elements* of functionally separate crimes."); *Mathis*, 136 S. Ct. at 2249. The BIA did not consider divisibility, but because we "owe no deference to the decision of the BIA on [divisibility] . . . there is no reason to remand for the BIA to decide the issue of divisibility in the first instance." *Sandoval*, 866 F.3d at 993.

Where a jury instruction is available, we can look to it to identify the elements on which a jury must be unanimous among a list of alternatives in the statute. *See Mathis*, 136 S.

Ct. at 2248–49 ("'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'" (citation omitted)). If the jury must agree on one of the alternatives, the alternatives are elements and the statute is divisible into separate crimes; if they do not have to agree, the alternatives are means and the statute is indivisible. *See id.* at 2249. "Any statutory phrase that—explicitly or implicitly—refers to multiple, alternative means of commission must still be regarded as indivisible if the jurors need not agree on which method of committing the offense the defendant used." *Rendon*, 764 F.3d at 1085; *see also Sandoval*, 866 F.3d at 993–94.

We conclude that Hawaii's fourth degree theft statute is indivisible because it proscribes one crime that can be committed eight different ways, not eight distinct crimes. Accordingly, Maie's prior theft convictions do not categorically match the BIA's definition for CIMTs.

The divisibility analysis here is straightforward because Hawaii's legislature explicitly directed that a jury need not decide which subsection of § 708-830 is violated to sustain a conviction for fourth degree theft. Section 708-835 states "[a] charge of an offense of theft in any degree may be proved by evidence that it was committed in any manner that would be theft under section 708-830, notwithstanding the specification of a different manner in the indictment . . . ."

Hawaii case law is in accord. In *State v. Klattenhoff*, 801 P.2d 548, 600 (Haw. 1990), *abrogated on other grounds by State v. Walton*, 324 P.3d 876, 906 (Haw. 2014), appellant was the treasurer of an organization convicted of two counts of first degree theft for obtaining or exerting unauthorized control over $20,000 belonging to the organization.

Klattenhoff challenged the sufficiency of the evidence used to convict him. *Id.* at 599. The Hawaii Supreme Court affirmed his convictions, but did not specify which subsection of § 708–830 the evidence supported. *Id*. at 607. Instead, the court held that "HRS § 708–835 permits proof of theft by any manner under HRS § 708–830, including appropriation [§708-830(3)] and deception [§708-830(4)]." *Id.*; *see also State v. Jones*, 29 P.3d 351, 371 (Haw. 2001) (as amended) ("[U]nanimity is not required where alternative means of establishing an element of an offense are submitted to the jury, *provided that* there is no reasonable possibility that the jury's verdict was based on an alternative unsupported by sufficient evidence.").

The government argues that we should not rely on § 708-835 because that statute requires the State to give "fair notice" of the essential elements of the criminal charges brought against a defendant. "A charge's essential elements include conduct, attendant circumstances, and results of conduct." *State v. Kauhane*, 452 P.3d 359, 367 (Haw. 2019). The government reasons that describing the essential elements of the charge necessarily requires the prosecution to tailor its case to one of the theft statute's eight subsections, thereby identifying the particular subsection of the theft statute to the defendant.

Hawaii case law undercuts the government's argument. In *Tomomitsu v. State*, 995 P.2d 323, 325 (Haw. Ct. App. 2000), the Hawaii Intermediate Court of Appeals considered an appeal by a defendant convicted of three theft offenses: second degree robbery, for stealing a camera and wristwatch; first degree theft, for selling the stolen camera; and second degree theft, for selling the stolen wristwatch. The court vacated Tomomitsu's convictions for first and second degree

theft, holding Hawaii law does "not permit the conviction [of] a defendant of two counts of theft for, first, having obtained or taken an item of property and, second, for having disposed of or sold the same item of property." *Id.* at 327. The court explained that § 708–830 "specifies eight ways of committing theft . . . . Obtaining the property is one way (HRS § 708–830(1))," and "[d]isposing of the property is another way (HRS § 708–830(7))." *Id.* at 326–27. Were Hawaii's theft statute divisible, the court could have upheld the separate convictions because Tomomitsu's conduct satisfied the elements of two subsections of § 708-830. *See Rendon*, 764 F.3d at 1084–86. Thus, the result in *Tomomitsu* reinforces our conclusion that the Hawaii theft statute is indivisible; a person is properly convicted of one crime, not two, even if his conduct satisfies two separate subsections of § 708-830.

The government points to cases where the State charged a defendant with a specific subsection of theft in addition to a particular degree of theft based upon the value of the stolen property. *See, e.g.*, *State v. Taylor*, 269 P.3d 740 (Haw. 2011). In the government's view, these cases support its argument that the various ways of committing theft must be divisible into separate crimes. We disagree. Though § 708-835 gives the State flexibility to prove theft by any means, the fact the State of Hawaii sometimes charges with greater specificity than § 708-835 requires does not undermine the conclusion that the fourth degree theft statute is indivisible.

Because we conclude that § 708-833(1) is overbroad and indivisible, Maie's convictions for fourth degree theft are not

categorically CIMTs. Thus, the government did not show that Maie is subject to removal pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii).

PETITION GRANTED.

BERZON, J., concurring:

I concur in the majority opinion in full. I write separately to reiterate once again that, in my view, the phrase "crime involving moral turpitude" is unconstitutionally vague. *See Barbosa v. Barr*, 926 F.3d 1053, 1060–61 (9th Cir. 2019) (Berzon, J., concurring); *Jauregui-Cardenas v. Barr*, 946 F.3d 1116, 1121 (9th Cir. 2020) (Berzon, J., concurring); *Silva v. Garland*, 993 F.3d 705, 720 (9th Cir. 2021) (Berzon, J., concurring).

We are bound by this court's precedent to the contrary in *Martinez-de Ryan v. Whitaker*, 909 F.3d 247 (9th Cir. 2018). But the IJ's attempt to explain moral turpitude during Maie's hearing—defining it as "a fancy way of saying it's a crime involving . . . deceit, deception, you know" and conceding that "in some cultures the moral turpitude standard varies a little bit"—highlights that the BIA and the courts have failed to establish any "coherent criteria" consistently defining a "crime involving moral turpitude," *Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1258 (9th Cir. 2019) (Fletcher, J., concurring). I continue to urge this court consider en banc whether the phrase is unconstitutionally vague, applying current vagueness jurisprudence. *See Johnson v. United States*, 576 U.S. 591 (2015).