

## **PRACTICE ADVISORY**

### **The Immigration Consequences Of Florida Burglary**

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#### **I. INTRODUCTION**

This practice advisory updates a 2011 advisory analyzing the Florida burglary statute and considering whether convictions under the statute constitute crimes involving moral turpitude (CIMT) or aggravated felonies within the meaning of the Immigration and Nationality Act.<sup>1</sup> Although the advisory will review relevant portions of the recent U.S. Supreme Court's decisions in *Moncrieffe v. Holder* and *Descamps v. United States*, it assumes basic familiarity with these decisions, as well as with removal grounds in the Immigration and Nationality Act, and the categorical approach.<sup>2</sup> For additional background on these topics, practitioners may wish to read the practice advisories on these cases authored by the National Immigration Project of the National Lawyers Guild, the Legal Action Center of American Immigration Council, and the Immigrant Defense Project.<sup>3</sup>

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<sup>1</sup> The original 2011 practice advisory was written by Rebecca Sharpless. This update was authored by Romy Lerner, but includes invaluable thoughts and written contributions by Dan Kesselbrenner, Edward Ramos, Rebecca Sharpless, and Andrew Stanton.

<sup>2</sup> *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013); *Descamps v. U.S.*, 133 S.Ct. 2276 (2013).

<sup>3</sup> See, e.g., *Moncrieffe v. Holder: Implications for Drug Charges and Other Issues Involving the Categorical Approach, Practice Advisory* (May 2, 2013), available at [http://www.nationalimmigrationproject.org/legalresources/practice\\_advisories/pa\\_Moncrieffe%20v.%20Holder%205-2-13.pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Moncrieffe%20v.%20Holder%205-2-13.pdf); *Descamps v. United States and the Modified Categorical Approach, Practice Advisory* (July 17, 2013), available at [http://www.nationalimmigrationproject.org/legalresources/practice\\_advisories/pa\\_Descamps\\_Practice\\_Advisory\\_6-26-13.pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Descamps_Practice_Advisory_6-26-13.pdf).

The Board of Immigration Appeals (BIA) and federal courts have not yet accepted some of the arguments in this advisory. Moreover, this practice advisory is no substitute for a practitioner's own research and should not be relied upon exclusively.

## II. GENERAL CONCEPTS IN ANALYZING IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

### A. Categorical and Modified Categorical Approach

Immigration judges and adjudicators are generally required to employ the categorical approach in analyzing whether a conviction falls within a removal ground.<sup>4</sup> Under the categorical approach, the immigration judge or adjudicator compares the elements of a criminal statute to the immigration ground of removal. The conduct alleged to underlie the offense is irrelevant. Instead, a conviction will only categorically be a removable offense if the minimum or least culpable conduct criminalized under the statute triggers removal. The U.S. Supreme Court has stated that the minimum conduct must not be a product of “legal imagination” but must have a “realistic” possibility of being criminalized under the statute.<sup>5</sup> The Eleventh Circuit in *Ramos v. Att’y Gen* held that the realistic probability test is satisfied where the express language of the criminal statute covers conduct that falls outside the relevant removal ground.<sup>6</sup> The Department of Homeland Security (DHS) may still argue that the realistic probability test requires evidence of actual prosecution even when the statute’s language itself includes non-removable conduct.<sup>7</sup>

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<sup>4</sup> See *Sanchez-Fajardo v. Att’y Gen.* 659 F.3d 1303 (11th Cir. 2011)(rejecting *Matter of Silva-Trevino* and affirming that the determination of whether a conviction is for a crime involving moral turpitude (CIMT) must be made under the categorical approach and modified categorical approach.). The Eleventh Circuit is one of five circuits that have rejected *Silva-Trevino* and reaffirmed application of the categorical approach to CIMTs. See *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014); *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012); *Jean-Louis v. Att’y Gen.* 582 F.3d 462 (3d Cir. 2009). Two recent U.S. Supreme Court decisions, *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), and *Descamps v. U.S.*, 133 S. Ct. 2276 (2013), strongly reaffirm the categorical approach for analyzing the immigration consequences of criminal convictions.

<sup>5</sup> *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-85 (2013) (citing *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007)).

<sup>6</sup> *Ramos v. Att’y Gen.*, 709 F.3d 1066, 1071-1072 (11th Cir. 2013). The Third and Ninth Circuits have also held that the realistic probability test is satisfied where the express language of the criminal statute covers conduct that falls outside the relevant removal ground. See *Jean-Louis v. Att’y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009); *U.S. v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007).

<sup>7</sup> The BIA has produced conflicting guidance on the realistic probability standard in two cases, *Matter of Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014), and *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014). DHS may use *Matter of Ferreira* to argue that a noncitizen must provide evidence of actual cases prosecuted even where the language of the statute itself covers non-removable conduct. Practitioners should argue that *Ramos* controls cases in the Eleventh Circuit. A detailed discussion of the realistic probability standard is beyond the scope of this practice

Even if successful, such arguments should not affect the Florida burglary analysis that follows. As explained below, Florida cases establish a realistic probability that non-removable conduct will be prosecuted.<sup>8</sup>

In some limited circumstances, the immigration judge or adjudicator may employ the modified categorical approach. The modified categorical approach involves looking to the documents contained in the record of conviction to determine whether the actual conviction was for a removable or a non-removable offense. As has been recently clarified by both the U.S. Supreme Court in *Descamps v. U.S.* and the Eleventh Circuit in *Donawa v. Att’y Gen.*, an immigration judge or adjudicator cannot automatically review the record of conviction whenever there is ambiguity about whether a conviction falls within a removal ground.<sup>9</sup> Review of the record of conviction is only proper when the statute is “divisible.”<sup>10</sup> Divisibility occurs when the statute contains alternative elements, often (but not always) by using a list or “or” language.<sup>11</sup> An element is any fact that jurors must agree upon in order to convict.<sup>12</sup> Elements differ from facts that are alleged to describe the means by which a crime was committed.

An immigration judge or adjudicator may not use the modified categorical approach when a statute has a single set of *indivisible* elements.<sup>13</sup> If a statute is merely overbroad or is missing an element, the inquiry must stop at the categorical approach and the adjudicator cannot review the record of conviction.<sup>14</sup> If an overbroad statute penalizes non-removable conduct in addition to removable conduct, a conviction under the statute cannot render an individual removable for a crime involving moral turpitude (CIMT) or aggravated felony.

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advisory. For more information on the conflict between *Chairez* and *Ferreira*, see *The Realistic Probability Standard: Fighting Government Efforts to Use it to Undermine the Categorical Approach*, authored by the National Immigration Project of the National Lawyers Guild, the Legal Action Center of American Immigration Council, and the Immigrant Defense Project <http://immigrantdefenseproject.org/wp-content/uploads/2014/11/realistic-probability-advisory.pdf>.

<sup>8</sup> *Infra* section IV.

<sup>9</sup> *Descamps v. U.S.*, 133 S.Ct. 2276, 2283 (2013); *Donawa v. Att’y Gen.*, 735 F.3d 1275, 1281 (11th Cir. 2013).

<sup>10</sup> *Id.*

<sup>11</sup> *Descamps v. U.S.*, 133 S.Ct. at 2283 (describing a divisible statute as one that “list[s] potential offense elements in the alternative”); *Donawa v. U.S. Attorney General*, 735 F.3d 1275, 1281 (11th Cir. 2013) (“the modified categorical approach is applied only when a single statute lists a number of alternative elements that effectively create several different crimes, some of which are aggravated felonies and some of which are not”) (citing *Descamps*, 133 S.Ct. at 2285); see also *Ramos v. Att’y Gen.*, 709 F.3d 1066 (finding that a Georgia shoplifting statute was divisible because it encompassed two distinct mens reas); *Jaggernaut v. U.S. Attorney General*, 432 F.3d 1346, 1354 (11th Cir. 2005) (finding a Florida theft statute was divisible and defining divisibility as when a statute “contains some offenses that are aggravated felonies and others that are not”).

<sup>12</sup> *Descamps v. U.S.*, 133 S.Ct. at 2288.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

Despite the clarity of the case law on this point, attorneys counseling immigrant defendants about safe pleas should be conservative in their advice. As of the date of this practice advisory, it is still commonplace for immigration judges and other adjudicators to review the record of conviction, even when the statute is not divisible in the way required by the U.S. Supreme Court and the Eleventh Circuit.

## B. Burden of Proof

DHS cannot meet its burden of establishing a noncitizen is deportable for a criminal conviction if the statute or record of conviction is inconclusive. However, cases have not yet settled whether an inconclusive record of conviction is sufficient when the noncitizen has the burden of proof (for example, when the grounds of inadmissibility apply or where the noncitizen is establishing threshold eligibility for relief, like cancellation of removal).<sup>15</sup> The U.S. Supreme Court in *Moncrieffe* treated the question of whether a criminal conviction falls within a ground of removal as a question of law rather than a question of fact.<sup>16</sup> Because removability for a crime is a question of law, arguably no evidentiary burden applies.<sup>17</sup> Under the minimum conduct test, any ambiguity about whether a conviction falls within a ground of removal must resolve in favor of the non-citizen.<sup>18</sup> Thus, for example, if an indivisible statute punishes both removable and non-removable conduct it can never trigger removal.<sup>19</sup> Likewise, a conviction under a divisible statute cannot trigger removal if the non-citizen's record of conviction does not clearly establish that the conviction was for removable conduct. This conclusion arguably should hold true even where the non-citizen bears the burden of proof. Cases involving indivisible statutes are the most straightforward, as the adjudicator looks only to the statute and not at the record of conviction. If the statutory elements are not a categorical match with the federal definition at issue, the

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<sup>15</sup> If a returning lawful permanent resident (LPR) is charged with a ground of inadmissibility, practitioners should argue that DHS has the burden of proving that the conviction triggers the exception to the general rule that returning LPRs are subject only to the grounds of deportation. See *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011). For other strategies for returning LPR's charged with a ground of inadmissibility see *Vartelas v. Holder: Implications for LPRs Who Take Brief Trips Abroad And Other Potential Favorable Impacts, Practice Advisory* (April 5, 2012), authored by the National Immigration Project of the National Lawyers Guild, the Legal Action Center of American Immigration Council, and the Immigrant Defense Project, available at: [http://nipnl.org/legalresources/practice\\_advisories/cd\\_pa\\_Vartelas\\_Practice\\_Advisory.pdf](http://nipnl.org/legalresources/practice_advisories/cd_pa_Vartelas_Practice_Advisory.pdf)

<sup>16</sup> *Moncrieffe v. Holder*, 133 S.Ct. at 1684-85.

<sup>17</sup> For an in-depth discussion of how the U.S. Supreme Court's decision in *Moncrieffe* supports the idea that the question of whether a conviction falls within a ground of removal is a question of law, not fact, see the practice advisory *Moncrieffe v. Holder: Implications for Drug Charges and Other Issues Involving the Categorical Approach, Practice Advisory* (May 2, 2013), authored by the National Immigration Project of the National Lawyers Guild, the Legal Action Center of American Immigration Council, and the Immigrant Defense Project, available at [http://www.nationalimmigrationproject.org/legalresources/practice\\_advisories/pa\\_Moncrieffe%20v.%20Holder%205-2-13.pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Moncrieffe%20v.%20Holder%205-2-13.pdf).

<sup>18</sup> See *Moncrieffe v. Holder*, 133 S.Ct. at 1686-87.

<sup>19</sup> *Id.*

noncitizen should meet his or her burden of proof when establishing admissibility or eligibility for relief.<sup>20</sup> Cases involving divisible statutes where the adjudicator reviews the record of conviction under the modified categorical approach are more complicated than cases involving indivisible statutes. The BIA and several federal courts have held that where a statute is divisible, an inconclusive record of conviction will *not* meet a non-citizen’s burden of proving he or she is admissible or eligible for relief from removal.<sup>21</sup> In contrast, the Second and Ninth Circuits have held that an inconclusive record *is* sufficient to meet the noncitizen’s burden.<sup>22</sup> Since the Eleventh Circuit has not ruled on the issue, practitioners should argue that an inconclusive record meets the noncitizen’s burden under *Moncrieffe* because the inquiry is legal rather than factual. For additional information on burden of proof, practitioners may wish to read the practice advisories on these cases authored by the National Immigration Project of the National Lawyers Guild, the Legal Action Center of American Immigration Council, and the Immigrant Defense Project.<sup>23</sup>

### III. CONTEMPORARY GENERIC BURGLARY

It is important to understand how the U.S. Supreme Court defines contemporary generic burglary when determining whether a conviction for Florida burglary is an aggravated felony. Burglary began as a common law crime aimed at protecting the right of an owner to defend his or her place of habitation at night.<sup>24</sup> Common law burglary consisted of “the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony.”<sup>25</sup> Burglary as a crime has expanded well beyond its original meaning. In Florida and many other states, burglary no longer requires any of the three elements listed above.<sup>26</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Syblis v. Atty. Gen.*, 763 F.3d 348 (3d Cir. 2014); *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009).

<sup>22</sup> *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008); *Almanza-Arenas v. Holder*, 771 F.3d 1184 (9th Cir. 2014).

<sup>23</sup> See, e.g., *Moncrieffe v. Holder: Implications for Drug Charges and Other Issues Involving the Categorical Approach*, Practice Advisory (May 2, 2013), available at [http://www.nationalimmigrationproject.org/legalresources/practice\\_advisories/pa\\_Moncrieffe%20v.%20Holder%205-2-13.pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Moncrieffe%20v.%20Holder%205-2-13.pdf); *Matter Of Chairez-Castrejon: BIA Applies Moncrieffe And Descamps To Modify And Clarify Its Views On Proper Application Of The Categorical Approach* *Descamps v. United States and the Modified Categorical Approach*, Practice Advisory (July 31, 2014), available at [http://www.nationalimmigrationproject.org/legalresources/practice\\_advisories/Chairez-Castrejon%20Advisory.pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/Chairez-Castrejon%20Advisory.pdf).

<sup>24</sup> LaFave, Substantive Criminal Law, § 21.1.

<sup>25</sup> LaFave, Substantive Criminal Law, § 21.1 (internal citations omitted).

<sup>26</sup> The Supreme Court recognized in *Taylor v. United States*, 495 U.S. 575, 593 (1990), that “the contemporary understanding of ‘burglary’ has diverged a long way from its common law roots.”

Contemporary generic burglary has been defined by the U.S. Supreme Court in *Taylor v. U.S.* as follows:

An unlawful or unprivileged entry into, or remaining in, a building or other structure with an intent to commit a crime.<sup>27</sup>

Generic contemporary burglary does not include entry into conveyances or a structure's curtilage (discussed below).<sup>28</sup> It requires an element of unlawful or unprivileged entry.

#### **IV. FEATURES OF FLORIDA BURGLARY**

Florida burglary is codified at Florida Statute §810.02. For offenses committed *on or before* July 1, 2001, burglary is defined in §810.02(1)(a) as “entering or remaining in a dwelling, structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.”<sup>29</sup> For offenses committed *after* July 1, 2001 burglary is defined in §810.02(1)(b) as follows:

1. Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter; or
2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance:
  - a. Surreptitiously, with the intent to commit an offense therein;
  - b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or
  - c. To commit or attempt to commit a forcible felony, as defined in s. 776.08<sup>30</sup>.

The Florida statute further subdivides burglary into first, second and third degree felonies.<sup>31</sup>

The Florida burglary statute extends beyond contemporary burglary, criminalizing a wider range of behavior. Understanding the breadth of the statute is key to determining whether a particular conviction triggers removal under immigration law. It is also essential to understand whether particular provisions are truly divisible or simply overbroad under the categorical approach.

The Florida statute may extend beyond contemporary burglary in the following ways: 1) the statute's definitions of structure and dwelling include outside areas known as curtilage; 2) the statute includes entries into conveyances, such as cars and boats; 3) unlawful entry is not an

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<sup>27</sup> *Taylor v. U.S.*, 495 U.S. 575, 598 (1990).

<sup>28</sup> *Id.* at 599 (recognizing that “[a] few State’s burglary statutes . . . define burglary more broadly, e.g., by eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings.”)

<sup>29</sup> §810.02(1)(a), Fla. Stat. (2014).

<sup>30</sup> §810.02(1)(b), Fla. Stat. (2014).

<sup>31</sup> *See* §810.02(2),(3),(4), Fla. Stat. (2014).

element of the crime; 4) invitees (people invited into a structure or conveyance) can be convicted of burglary if the invitation has been expressly or even impliedly withdrawn; and 5) Florida courts have established a low threshold for proving that the defendant intended to “commit an offense therein.”

#### **A. Florida’s Definitions of Dwelling and Structure Include Curtilage**

The Florida burglary statute does *not* require an actual entry into a structure or dwelling. An entry onto (or “remaining in”) the “curtilage” of the building is treated as an entry into (or “remaining in”) the building itself.<sup>32</sup> Section 810.011(1) of the Florida statutes provides: “[s]tructure’ means a building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof.”<sup>33</sup> Dwelling is similarly defined.<sup>34</sup> Curtilage is defined as the ground and buildings immediately surrounding a dwelling and customarily used in connection with it.<sup>35</sup> Case law requires that there be “some form of enclosure.”<sup>36</sup> The enclosure need not be complete.<sup>37</sup> Curtilage includes a partially or fully fenced yard, shed, or carport.<sup>38</sup>

The State of Florida routinely uses the curtilage provision to prosecute and convict people who never entered, or intended to enter, a dwelling or structure.<sup>39</sup> For example, a man who entered an unoccupied shed was found guilty of burglary of an occupied dwelling.<sup>40</sup> Likewise, the State of Florida has successfully prosecuted burglary of a dwelling where a defendant simply ran through a victim’s yard.<sup>41</sup>

As will be explained in further detail below, an immigration judge or adjudicator is not permitted to resort to the modified categorical approach and review the record of conviction to see if the actual structure, as opposed to curtilage, was involved in the crime.<sup>42</sup> Under *Descamps*, the inclusion of curtilage in the definitions of dwelling and structure render those definitions overbroad, but not divisible. The prosecution is not required to prove (and the jury need not

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<sup>32</sup> See § 810.011(1), (2), Fla. Stat. (2014).

<sup>33</sup> §810.011(2), Fla. Stat. (2014).

<sup>34</sup> “‘Dwelling’ means a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof.” §810.011(2), Fla. Stat. (2014).

<sup>35</sup> *State v. Hamilton*, 660 So. 2d 1038, 1044 (Fla. 1995).

<sup>36</sup> *Id.*

<sup>37</sup> *Chambers v. State*, 700 So. 2d 441 (Fla. 4th DCA 1997). See also *Jacobs v. State*, 41 So. 3d 1004 (Fla. 1st DCA 2010) (fencing on three sides of a home sufficient to make yard curtilage).

<sup>38</sup> See *Ferrara v. State*, 19 So. 3d 1033 (Fla. 5th DCA) (carport is curtilage); *Nicarry v. State*, 795 So. 2d 1114 (Fla. 5th DCA 2001) (shed is curtilage).

<sup>39</sup> See, e.g., *Frazier v. State*, 970 So. 2d 929 (Fla. 4th DCA 2008) (digging up a tree in a fenced yard is burglary of an occupied dwelling); *Jacobs v. State*, 21 So. 3d 1004 (Fla. 1st DCA 2010) (removing siding off side of vacant building is burglary).

<sup>40</sup> *Nicarry v. State*, 795 So. 2d 1114 (Fla. 5th DCA 2001).

<sup>41</sup> See, e.g., *Jean-Marie v. State*, 947 So. 2d 484 (Fla. 3d DCA 2006).

<sup>42</sup> *Infra* at section V.

determine) whether the defendant entered the actual building or its curtilage in order to convict. As described above, immigration judges and adjudicators are prohibited from employing the modified categorical approach where a provision is not divisible.<sup>43</sup>

## **B. The Florida Burglary Statute Includes Conveyances**

Florida's burglary statute also extends beyond the contemporary definition of burglary in that it includes conveyances. The statute punishes entering or remaining in "a dwelling, a structure, or a conveyance."<sup>44</sup> "Conveyance" means any motor vehicle, ship, vessel, railroad car, trailer, aircraft, or sleeping car.<sup>45</sup> Moreover, Florida law defines "dwelling" as a structure *or conveyance* "designed to be occupied by people lodging therein at night."<sup>46</sup> A defendant therefore may be convicted of burglary to a dwelling for entering an unsold and unoccupied mobile home sitting on a sales lot.<sup>47</sup>

The Florida statute may be characterized as divisible with respect to the type of structure—a dwelling, a structure *or* a conveyance—involved. The fact that the statute is written in the disjunctive, with the terms separated by an "or," provides one indication that it is divisible. Further, the Florida statute subdivides burglary into first, second, and third degree felonies, based, in part, on whether an individual enters or remains in a dwelling, a structure or a conveyance, and whether the structure is occupied or unoccupied.<sup>48</sup> The prosecution, therefore, must plead which type of structure the defendant is accused of entering or remaining in. Under the modified categorical approach, the immigration judge or adjudicator *may* look to the record of conviction to determine if the defendant was convicted of burglary of a conveyance, as opposed to a dwelling or structure.

## **C. "Unlawful" Entry is not an Element of Florida Burglary**

Neither pre- nor post-2001 Florida burglary requires unlawful entry as an element.<sup>49</sup> The U.S. Supreme Court recently reaffirmed in *Descamps* that generic burglary includes an element of

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<sup>43</sup> *Supra* at section IIA.

<sup>44</sup> § 810.02(1)(a),(b), Fla. Stat. (2014) (emphasis added).

<sup>45</sup> § 810.011(3), Fla. Stat. (2014).

<sup>46</sup> § 810.011(2), Fla. Stat. (2014).

<sup>47</sup> *State v. Bennett*, 565 So. 2d 803 (Fla. 2d DCA 1990).

<sup>48</sup> Entering or remaining in an *occupied* structure or conveyance, or an occupied or unoccupied dwelling, are all second degree felonies, while entering or remaining in an *unoccupied* structure or conveyance, are third degree felonies. §810.02(3), (4), Fla. Stat. (2014).

<sup>49</sup> Prior to the 2001 amendments, the burglary statute punished "entering or remaining" in the same provision. §810.02(1)(a), Fla. Stat. (2014). For offenses committed after July 1, 2001, Florida law punishes "entering a dwelling, a structure, or a conveyance" in one provision and, in another, it punishes: "[n]otwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance." §810.02(1)(b)1, 2, Fla. Stat. (2014).

*unlawful* entry.<sup>50</sup> Unlike generic burglary, the Florida burglary statute does not require a finding of *unlawful* entry. Florida’s statute makes consent to entry an affirmative defense, rather than making lack of consent an element of the crime.<sup>51</sup>

The prosecution need only prove, and the trier of fact need only find, that entry was unlawful if the defendant meets his or her burden of production that entry was licensed or invited or that the premises were open to the public. If the defendant does not raise the affirmative defense or meet his or her burden, the jury need not find that entry is unlawful in order to convict. The judge or immigration adjudicator should *not* be permitted to consult the record of conviction under the modified categorical approach to determine whether the noncitizens’s entry was unlawful in a particular case.

#### **D. Florida Law Expansively Criminalizes Actions Taken By Those Licensed or Invited To Enter**

Florida’s burglary statute also expansively criminalizes many actions taken by invitees. Invitees are people who have made a lawful, invited entry into a dwelling, structure, or conveyance (including curtilage of a dwelling or structure). The statute includes invitees who “remain in a dwelling, structure, or a conveyance” owned by another if they did not have permission to remain.<sup>52</sup> Florida courts have even recognized *implied* revocation of permission to remain when an invitee commits a crime in the dwelling, structure, or conveyance.<sup>53</sup> For example, an invited

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<sup>50</sup> *Descamps v. U.S.*, 133 S.Ct. at 2283.

<sup>51</sup> The Florida statute punishes entering a dwelling, structure, or conveyance “with the intent to commit an offense therein, *unless* the premises are at the time open to the public or the defendant is licensed or invited to enter.” §810.02(1)(a), (b)(1), Fla. Stat. (2014). The “unless” clause does not create an element of the crime the prosecution is required to prove, but rather an affirmative defense in which the *defendant* bears the burden of production. The Florida Supreme Court has stated “consent to entry is an affirmative defense to, rather than an essential element of, burglary.” *State v. Hicks*, 421 So.2d 510, 510-511 (Fla. 1982). Florida’s model jury instructions confirm that consent to entry or license to enter is an affirmative defense. *See* Fla. Std. Jury Insr. (Crim.) Burglary §810.02, Fla. Stat. (2014).

<sup>52</sup> §810.02, Fla. Stat. (2014).

<sup>53</sup> In 2001, the Florida legislature expanded the scope of the “remaining in” clause and nullified the Florida Supreme Court’s holding in *Delgado v. State*, 776 So. 2d 233 (Fla. 2000). § 810.015, Fla. Stat. (2001). In *Delgado*, the court had found that the clause applied only to people who had made an invited entry but then *surreptitiously* remained in the structure or conveyance. *Delgado* had overruled prior cases in which the courts had concluded that revoked consent could be inferred from the fact that the victim was aware that the defendant was committing a crime within his or her home. *See Ray v. State*, 522 So. 2d 963, 966 (Fla. 3d DCA 1988) (quoted in *Delgado*, 776 So. 2d at 238). Because the Florida legislature has nullified *Delgado*, *Delgado* (and cases relying on it) are no longer good law for interpreting the circumstances in which invitees can be prosecuted for burglary, at least with respect to offenses committed after the 2001 legislative amendment. Furthermore, for offenses committed after July 1, 2001, the burglary statute now specifies three different ways of committing the crime of burglary by “remaining in”. §810.02(1)(b)2, Fla. Stat. (2014).

guest to a party who smokes marijuana would not only be guilty of a misdemeanor marijuana charge but also of burglary in the second degree, a felony.<sup>54</sup>

### **E. Intent to Commit a Crime “Therein”**

Adding to the breadth of the Florida statute is the fact that the prosecution need not plead a specific crime as the crime the defendant allegedly intended to commit while in the dwelling, structure, or conveyance.<sup>55</sup> The Florida statute simply provides that the offender must have the “intent to commit an offense therein.”<sup>56</sup> In fact, the prosecution need not prove *any intent to commit an offense at all*. Intent to commit a crime may be *presumed* from a “stealthy entry.”<sup>57</sup> Courts have found “stealthy entry” based on conduct such as jumping a fence.<sup>58</sup> The crime intended to be committed therein can be at any level of severity and includes such things as resisting arrest without violence and, as discussed above, possession of marijuana.<sup>59</sup> The underlying offenses that provide possible factual predicates for burglary’s “crime therein” element are different *means* of committing a crime, not elements. Immigration judges and adjudicators may *not* employ the modified categorical approach and review the record of conviction to determine which underlying crime was involved.

## **V. IMMIGRATION CONSEQUENCES OF FLORIDA BURGLARY**

This section discusses whether Florida burglary is an aggravated felony under either the burglary or crime of violence ground. It then analyzes whether Florida burglary is a crime involving moral turpitude.

### **A. Burglary Aggravated Felony Analysis**

Florida burglary is not a burglary aggravated felony because its inclusion of conveyances and curtilage and failure to include an element of *unlawful* entry render it broader than contemporary generic burglary. Although an immigration judge or adjudicator can review the record of

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<sup>54</sup> This example comes from the Florida Supreme Court’s decision in *Delgado v. State*, 776 So. 2d at 239. Elsewhere, Justice Anstead used the following example: “[I]f one friend invites another over to watch the Super Bowl, and the invited guest becomes angry at his host because of the way the game is going, and punches his host in the nose ... a burglary would be automatically committed when the battery occurs.” *State v. Ruiz*, 863 So. 2d 1205, 1213 (Fla. 2003) (Anstead, J., concurring). As explained in footnote 53, the Florida Supreme Court in *Delgado v. State* had narrowed the interpretation of the “remaining in” clause, only to have its decision nullified by Florida legislature.

<sup>55</sup> *State v. Waters*, 436 So. 2d 66 (Fla. 1983).

<sup>56</sup> § 810.02(1)(a),(1)(b)1, (1)(b)2, Fla. Stat. (2014).

<sup>57</sup> § 810.07, Fla. Stat. (2001).

<sup>58</sup> *See, e.g., S.D. v. State*, 837 So. 2d 1173 (Fla. 4th DCA 2003).

<sup>59</sup> *Young v. State*, 13 So. 3d 537 (Fla. 3d DCA 2009) (person commits burglary when fleeing a lawful arrest and enters a structure to avoid being arrested). The fact that structures include curtilage means that people can be arrested for burglary in this scenario after entering a fenced yard.

conviction to determine if the offense involved a conveyance, structure, or dwelling, none of these types of Florida burglary constitute generic burglary. As a consequence, practitioners should argue that a Florida burglary conviction is *never* a burglary aggravated felony.

A noncitizen is removable under immigration law as an aggravated felon if he or she has been convicted of a “burglary offense for which the term of imprisonment [is] at least one year.”<sup>60</sup> The BIA and federal courts have consistently interpreted the phrase “burglary offense” as incorporating what the U.S. Supreme Court termed contemporary “generic burglary” in the federal sentencing case *Taylor v. U.S.*<sup>61</sup> The court defined generic burglary as containing “at least the following elements: an *unlawful* or *unprivileged* entry into, or remaining in, a building or other structure, with intent to commit a crime.”<sup>62</sup> The court recognized that “[a] few State’s burglary statutes . . . define burglary more broadly, e.g., by eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings.”<sup>63</sup> In *Descamps v. U.S.*, the Supreme Court reaffirmed that a conviction under a burglary statute is not for generic burglary if it does not contain an element of unlawful entry.<sup>64</sup>

As discussed above, Florida burglary is unlike generic burglary because *unlawful* entry is not an element of the state crime.<sup>65</sup> Consent or license to enter is an affirmative defense to a burglary charged based on entering.<sup>66</sup> An affirmative defense to criminal charges is not an element and cannot be considered when analyzing whether the statute matches the generic definition of the relevant federal offense.<sup>67</sup> Since *unlawful* entry is not an element of the offense, an immigration judge or adjudicator may not review the record of conviction to determine whether entry was, in fact, unlawful.

Florida burglary also differs from the *Taylor* definition because it includes conveyances and defines dwelling and structure to include curtilage.<sup>68</sup> Although the BIA has stated otherwise in a footnote,<sup>69</sup> the United States Supreme Court’s decision in *James v. U.S.* definitively established that the Florida statute is *not* generic burglary because it includes curtilage and conveyances.<sup>70</sup>

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<sup>60</sup> 8 U.S.C. §1227(a)(2)(A)(ii) (aggravated felony ground of deportation) and 8 U.S.C. §1101(a)(43)(G) (burglary aggravated felony provision).

<sup>61</sup> 495 U.S. 575 (1990). *See, e.g., In re Perez*, 22 I&N Dec. 1325 (BIA 2000); *Solorzano-Patlan v. INS*, 207 F.3d 869, 874 (7th Cir. 2000); *Lopez-Elias v. Reno*, 209 F.3d 788, 792 (5th Cir. 2000); *Ye v. INS*, 214 F.3d 1128, 1132 (9th Cir. 2000).

<sup>62</sup> 495 U.S. at 598 (emphasis added).

<sup>63</sup> *Id.* at 599.

<sup>64</sup> *Descamps v. U.S.* 133 S.Ct. at 2283.

<sup>65</sup> *Supra* section IV.C.

<sup>66</sup> *Id.*

<sup>67</sup> *Donawa v. U.S. Att’y Gen.*, 735 F.3d 1275 at 1282.

<sup>68</sup> *See supra* sections IV.A.,B.

<sup>69</sup> *Matter of Louissaint*, 24 I&N. Dec. 754, 758 n. 3 (BIA 2009) (incorrectly stating that “the elements of the Florida statute prohibiting burglary of a dwelling correspond to the generic definition of burglary adopted by the United States Supreme Court in *Taylor v. United States*”).

<sup>70</sup> 550 U.S. 192, 210 (2007) (finding that the inclusion of curtilage and conveyances “takes Florida’s underlying offense of burglary outside the definition of ‘generic burglary’ set forth in

An immigration judge or adjudicator may review the record of conviction to determine whether the defendant was convicted of burglary of a *conveyance, dwelling or structure*. However, none of these types of burglary—of a conveyance, of a dwelling or of a structure—constitute generic burglary. As stated above, burglary of a dwelling or a structure do not match the generic definition because Florida defines dwelling and structure as inclusive of curtilage.<sup>71</sup> An immigration judge or adjudicator may *not* review the record of conviction to determine whether the case involved the actual structure or dwelling or its curtilage because entry into the actual structure or dwelling (rather than the curtilage) is a means, not an element. Burglary of a conveyance is likewise not generic burglary.

The fact that a person was convicted under the “remaining in” portion of the burglary statute does not change the analysis, as the structure or dwelling in which the person remained could have been curtilage. As stated above, the adjudicator cannot review the record of conviction to see if the “remaining in” was to the actual structure or dwelling.

In addition to including curtilage, Florida’s “remaining in” provision arguably also expands beyond generic burglary in the way it treats invitees. Florida’s statute criminalizes “remaining in a dwelling, structure or conveyance,” after lawful entry.<sup>72</sup> An individual may be convicted of burglary if he or she remains in a structure “surreptitiously”.<sup>73</sup> As described above, however, Florida law punishes remaining in a structure non-surreptitiously if permission to remain has been revoked and courts have recognized *implied* revocation of permission to remain.<sup>74</sup> Withdrawal of consent can be established by an invitee’s mere commission of a crime inside the dwelling, structure or conveyance. Thus, an individual may be convicted of burglary for committing an offense while visiting the property of another. Although generic burglary includes “remaining in” a structure, it is unclear the extent to which courts would accept Florida’s very broad construction of implied revocation of consent. However, practitioners may not need to rely upon this argument, as *all* forms of burglary to a structure or dwelling (including “remaining in”) do not constitute generic burglary due to the inclusion of curtilage (see discussion above).<sup>75</sup>

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*Taylor.*”). It is well-established that burglary of a conveyance does not constitute “generic burglary” for the purpose of the burglary aggravated felony analysis. *United States v. Rainer*, 616 F.3d 1212, 1215 (11th Cir. 2010) (“Alabama’s third-degree burglary statute is a non-generic burglary statute because it covers some vehicles, aircraft, and watercraft”); *In re Perez*, 22 I&N Dec. 1325 (BIA 2000) (Texas burglary of a vehicle conviction is not a “burglary offense” within the meaning of the aggravated felony definition); *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000) (burglary of a vehicle is not burglary under the aggravated felony definition).

<sup>71</sup> *Supra* section IV.A.

<sup>72</sup> §810.02 (1)(a),(1)(b)1,2, Fla Stat. (2014).

<sup>73</sup> §810.02 (1)(b)2(a), Fla Stat. (2014).

<sup>74</sup> *Supra* section IV.D.

<sup>75</sup> The extent to which the current “remaining in” provision is divisible is unclear. For offenses committed after July 1, 2001, the Florida statute provides three ways in which a defendant may criminally remain: “[s]urreptitiously, with the intent to commit an offense therein;” “[a]fter permission to remain therein has been withdrawn, with the intent to commit an offense therein;

## B. Crime of Violence Aggravated Felony Analysis

The burglary aggravated felony definition is only one of two ways in which a Florida burglary conviction could be characterized as an aggravated felony. Under 8 U.S.C. § 1101(a)(43)(F), the aggravated felony designation includes “a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [sic] at least one year.” 18 U.S.C. §16 defines “crime of violence” for both immigration and non-immigration purposes as:

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or*
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(emphasis added). None of the provisions of Florida’s burglary statute contains an element of “the use, attempted use, or threatened use of physical force against the person or property of another” to qualify as a “crime of violence” under section 16(a). The more pertinent definition is therefore section 16(b), which requires that the offense be a felony and “by its nature, involve[] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” Adjudicators must use a categorical or modified categorical approach to determine whether a particular conviction falls within the crime of violence definition.<sup>76</sup> Because no controlling case exists on the issue of whether particular types of Florida burglary convictions are crimes of violence, we look to the statutes and persuasive authority on these issues.

### 1. Burglary to a Conveyance

As mentioned above, Florida’s burglary statute differs from generic burglary in that it criminalizes burglary to conveyances. Courts are split on the question of whether burglary to a conveyance constitutes a crime of violence aggravated felony.<sup>77</sup>

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or c. [t]o commit or attempt to commit a forcible felony, as defined in s. 776.08. §810.02 (1)(b)2(a),(b),(c), Fla Stat. (2014). It is not entirely clear whether these are means or elements.

<sup>76</sup> See, e.g., *Matter of Alcantar*, 20 I&N Dec. 801, (BIA 1994) (adopting the categorical approach in interpretations of 18 U.S.C. §16(b)).

<sup>77</sup> Compare *Ye v. INS*, 214 F.3d 1128, 1132 (9th Cir. 2000) (burglary to a conveyance under California law not a crime of violence); *Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000) (Illinois burglary to a conveyance is not categorically a crime of violence) with *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000) (Texas burglary to a conveyance is a crime of violence); *United States v. Delgado-Enriquez*, 188 F.3d 592, 59 (5th Cir. 1999) (same).

There are strong arguments that a conviction for Florida burglary *to a conveyance* is not a crime of violence. The U.S. Supreme Court has held that the “risk” of physical force under section 16(b) requires a reckless disregard of physical force being used in the course of committing the crime, not simply that harm will result.<sup>78</sup> It refers to “a category of violent, active crimes.”<sup>79</sup> In the criminal sentencing context, the court has recognized that “the behavior underlying . . . breaking into a building, differs so significantly from the behavior underlying . . . breaking into a vehicle, that [for sentencing purposes a] court must treat the two as different crimes.”<sup>80</sup>

The Florida statute encompasses a wide range of activities that do not involve the substantial risk that physical force will be used against a person or property. For example, the definition of “entry” into a conveyance is extremely broad, encompassing such actions as taking of property from the open bed of a pickup truck.<sup>81</sup> Furthermore, as discussed above, Florida’s statute is expansive insofar as it permits implied revocation of consent to invitees. Under the current interpretation, a guest in a car would be considered to have committed a burglary if she or he commits a crime in the car.

Because the Florida burglary to a conveyance statute is expansive and encompasses many types of criminal behavior in which physical force is not likely to occur, it is possible to argue that some convictions under the statute do not constitute crimes of violence. Whether or not a particular conviction constitutes a crime of violence may depend on the record of conviction in the case. Noncitizens should assume that the federal immigration authorities will charge a burglary offense as a crime of violence if the sentence imposed was a year or more imprisonment.

## 2. Burglary to a Structure or Dwelling

Burglary to a structure or dwelling under the Florida statute presents a much more difficult question than burglary to a conveyance. There is no controlling case law on whether a Florida conviction for burglary of a structure or dwelling constitutes a crime of violence under the aggravated felony provision. Significantly, however, a number of cases in dicta have suggested that at least certain Florida burglary to an *occupied dwelling* convictions constitute crimes of violence. Moreover, in the context of criminal sentencing enhancements, courts have held that Florida occupied dwelling convictions fall within the crime of violence definition at 18 U.S.C. § 16 or similar definitions. Case law concerning burglary to *unoccupied dwellings* and burglary to *structures* other than dwellings is less clear.

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<sup>78</sup> *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004).

<sup>79</sup> *Id.* at 11.

<sup>80</sup> *Chambers v. United States*, 555 U.S. 122 (2009) (citing *Shepard v U.S.*, 544 U.S. 13, 16-17 (2005) and *Taylor v. U.S.* 495 U.S. 575, 598 (1990)).

<sup>81</sup> *Braswell v. State*, 671 So. 2d 228 (Fla. 1st DCA 1996). See also *Barton v. State*, 797 So. 2d 1276 (Fla. 4th DCA 2001) (bed of a pick-up truck can constitute a “conveyance”); *Greger v. State*, 458 So. 2d 858 (Fla. 3d DCA 1984) (person held to have “entered” a boat by removing parts of a protruding motor).

In *Leocal v. Ashcroft*, the Supreme Court stated in dicta that “[a] [generic] burglary would be covered under § 16(b) *not* because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.”<sup>82</sup> More recently, however, the Court has stressed the importance of statistical evidence to the determination of whether violence would accompany the commission of a crime.<sup>83</sup> This focus on statistical evidence may open the door to arguments about how certain types of burglary do not involve a substantial risk of use of force.

The U.S. Court of Appeals for the Eleventh Circuit has stated in dicta in a criminal sentencing enhancement case that “[t]he risk of violence in a [generic] burglary is not merely temporally coincident with the offense, but arises from the actions of the burglar in committing the crime itself, and the likely consequences that would ensue upon intervention of another person.”<sup>84</sup> Importantly, both this case and the Supreme Court’s decision in *Leocal* addressed whether a conviction that met the test for *generic* burglary would qualify as a § 16(b) crime of violence. As noted above, the Florida burglary statute does *not* comport with generic burglary because it includes curtilage and conveyances, and fails to require *unlawful* entry. Moreover, the reasoning of these cases, which focuses on the risk of confronting another person, appears focused on burglaries of occupied dwellings. Indeed, in analyzing Massachusetts breaking and entering statutes, the First Circuit distinguished *Leocal*, and held that the statutes “applying as they do to nonviolent entries of *rarely-occupied structures* through unlocked doors or windows, do not necessarily involve conduct that would pose a risk of physical injury or of the use of force” under § 16(b).<sup>85</sup>

Significantly, however, courts have also analyzed *nongeneric* Florida burglary to a dwelling in criminal sentencing enhancement cases. These cases did not involve § 16(b) but the definition of “violent felony” under the Armed Career Criminal Act (ACCA). In *James v. U.S.*, the U.S. Supreme Court ruled that a Florida conviction for attempted burglary to a dwelling constituted a “violent felony” within the meaning of the ACCA.<sup>86</sup> The definition of a “violent felony” under the ACCA includes a provision for any crime that “involves conduct that presents a serious potential risk of physical injury to another.”<sup>87</sup> The court reasoned that attempted burglary to a dwelling involves a risk of physical injury because of the “possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate.”<sup>88</sup> The court further held that the fact that attempted

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<sup>82</sup> 543 U.S. 1, 10 (2003).

<sup>83</sup> *Chambers v. United States*, 555 U.S. 122, 129 (2009) (citing to a United States Sentencing Commission report as support for its conclusion that the crime of failing to report (escape) “does not involve a serious potential risk of physical injury” under the Armed Career Criminal Act).

<sup>84</sup> *United States v. Johnson*, 399 F.3d 1297, 1300 (11th Cir. 2005) (quoting *United States v. Singleton*, 182 F.3d 7, 14 (D.C. Cir. 1999)).

<sup>85</sup> *U.S. v. Fish*, 758 F. 3d 1, 8 (1<sup>st</sup> Cir. 2014) (emphasis added).

<sup>86</sup> *James v. United States*, 550 U.S. 192 (2007). The ACCA is at 18 U.S.C. § 924(e). The court did not specify whether the burglary was to an occupied or unoccupied dwelling.

<sup>87</sup> 18 U.S.C. § 924(2)(B).

<sup>88</sup> 550 U.S. at 1594.

burglary of a dwelling under Florida law includes *curtilage* does *not* take the offense outside the definition of a “violent felony.”<sup>89</sup> The Eleventh Circuit has also stated in dicta that burglary to the curtilage of a structure “presents a serious potential risk of physical injury to another” under the ACCA.<sup>90</sup>

In *James*, the U.S. Supreme Court arguably based its holding on a misconstruction of the Florida burglary statute. In finding that attempted burglary poses a risk of physical injury, the Supreme Court was focused on the risk of confrontation inherent in actual or attempted *illegal* entry.<sup>91</sup> The Supreme Court recognized that, in the crime of violence analysis, “the proper inquiry is “whether the conduct encompassed by the *elements* of the offense, in the ordinary case, presents a serious potential risk of injury.”<sup>92</sup> The court failed to recognize that, as described above, Florida burglary does not require unlawful entry.<sup>93</sup>

Because *James* and the Eleventh Circuit cases interpret “violent felony” under the ACCA instead of “crime of violence” under 18 USC § 16, they do not control the immigration aggravated felony analysis. The U.S. Supreme Court has recognized the difference between the risk of injury and the risk of physical force being used, stating that “§16(b) plainly does not encompass all offenses which create a ‘substantial risk’ that injury will result from a person’s conduct.”<sup>94</sup>

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<sup>89</sup> *Id.* at 213.

<sup>90</sup> *United States v. Jackson*, 250 Fed.Appx. 926 (11th Cir. 2007) (citing *United States v. Matthews*, 466 F.3d 1271, 1275 (11th Cir. 2006)). *See also United States v. Parrish*, 312 Fed.Appx. 297, 300 (11th Cir. 2009) (for purposes of the ACCA, burglary to curtilage is a “violent felony” because of the risk that the defendant “would have a face-to-face confrontation with another person while crossing the curtilage or within the interior of the structure”). *Cf. United States v. Gomez-Guerra*, 485 F.3d 301 (5th Cir. 2007) (phrase “burglary of a dwelling” within the meaning of a sentencing enhancement statute does not include curtilage).

<sup>91</sup> In *James*, the Supreme Court construed the issue before it as “whether overt conduct directed toward *unlawfully* entering or remaining in a dwelling, with the intent to commit a felony therein, is ‘conduct that presents a serious potential risk of physical injury to another.’” *James v. United States*, 550 U.S. at 203 (citing 18 U.S.C. § 924(e)(2)(B)(ii)) (emphasis added). In discussing the risk of physical harm posed by attempted burglary, the Court positively cited and quoted *U.S. v Payne*, 966 F.2d 4, 8 (1<sup>st</sup> Cir. 1992), which stated that “in all of these cases the risk of injury arises, not from the completion of the *break-in*, but rather from the possibility that some innocent party may appear on the scene while the *breaking-in* is occurring.” *James v. United States*, 550 U.S. at 204 (emphasis added). The Court in *James* further found that the only cases holding that attempted burglary does not pose a significant risk of injury “involved attempt laws that could be satisfied by preparatory conduct that does not pose the same risk of violent confrontation and physical harm posed by an attempt to enter a structure *illegally*.” *Id.* at 205 (emphasis added). Finally the Court stated “a burglar who *illegally* attempts to enter the enclosed area surrounding a dwelling creates much the same risk of physical confrontation....as one who attempts to enter the structure itself.” *Id.* at 213.

<sup>92</sup> *James v. United States*, 550 U.S. at 208.

<sup>93</sup> *Supra* at section IV.C.

<sup>94</sup> *Leocal v. Ashcroft*, 543 U.S. 1 (2004). The court further explained that the “‘substantial risk’ in 16(b) relates to the use of force, not to the possible effect of a person’s conduct.” *Id.* *See also*

More directly relevant is the Eleventh Circuit’s ruling that, in the criminal sentencing context, Florida burglary to a *dwelling* is a crime of violence under 18 U.S.C. § 16.<sup>95</sup> The court reasoned that “any ‘burglary of a dwelling, by its nature, creates a substantial risk of physical force’” because “whenever an intruder enters a dwelling, a person may be present inside, in which case the alarm to both the intruder and the resident may result in the use of physical force.”<sup>96</sup> Other circuits have also found that burglary to a dwelling under other state statutes is a crime of violence in the criminal sentencing context.<sup>97</sup>

The Eleventh Circuit’s decision, however, did not address the specific issue of whether burglary *to curtilage* falls within the §16(b) definition. It would seem that the court’s reasoning about the inherent risk of physical force when an intruder enters a dwelling is aimed at cases involving entry into the dwelling itself, rather than a fenced yard, carport, or shed. As discussed above, however, both the U.S. Supreme Court and the Eleventh Circuit have ruled in the context of the ACCA that curtilage does *not* take a burglary to a dwelling offense outside the definition of a “violent felony.” While no argument is foreclosed by the above case law, courts could find that the rationale of these cases applies equally to the aggravated felony “crime of violence” context. Because the rationale is directed at the risk of confrontation, however, convictions involving burglary to an *occupied dwelling* may be more likely to fall within the “crime of violence” definition.

### C. Crime of Moral Turpitude Analysis

Florida burglary is arguably not a crime involving moral turpitude.<sup>98</sup> Moral turpitude involves 1) reprehensible conduct 2) committed with specific intent, deliberateness, willfulness or recklessness.<sup>99</sup>

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*In re Brieva-Perez*, 23 I&N Dec. 766, 769 (BIA 2005) (cases interpreting criminal sentencing guidelines does not control crime of violence aggravated felony analysis under 18 USC § 16); *In re Sweetser*, 22 I&N Dec. 709, 715-16 (BIA 1999) (same).

<sup>95</sup> *United States v. Gonzalez-Lopez*, 911 F.2d 542 (11th Cir. 1990). Although the Eleventh Circuit was interpreting 18 U.S.C. § 16 in the context of criminal resentencing, its interpretation likely controls in the immigration context. *See Leocal v. Ashcroft*, 543 U.S. 1, 6-7 (2004) (recognizing that the “crime of violence” definition at 18 U.S.C. §16 provides a “general definition” in “both criminal and noncriminal” contexts); *In re Brieva-Perez*, 23 I&N Dec. 766, 769 (BIA 2005) (18 U.S.C. § 16(b) has the same meaning in criminal and immigration contexts).

<sup>96</sup> *United States v. Gonzalez-Lopez*, 911 F.2d at 549 (citing *United States v. Davis*, 881 F.2d 973 (11th Cir. 1989), *cert. denied*, 493 U.S. 1026 (1990)).

<sup>97</sup> *See, e.g., United States v. Castillo-Morales*, 507 F.3d 873 (5th Cir. 2007); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003) (burglary of a dwelling is a crime of violence because of the risk of force if the occupants are home); *United States v. Becker*, 919 F.2d 568 (9th Cir. 1990); *Lisbey v. Gonzales*, 420 F.3d 930 (9th Cir. 2005); *United States v. Davis*, 881 F.2d 973 (11th Cir. 1989).

<sup>98</sup> The term “crime involving moral turpitude” appears in both the grounds of inadmissibility and the grounds of deportation.

<sup>99</sup> *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689 (A.G. 2008).

One element of Florida burglary is an intent to commit a crime after entry. The traditional rule has been that burglary involves moral turpitude only if the crime intended by the perpetrator involved moral turpitude.<sup>100</sup> For example, if the underlying crime were theft, the inquiry would focus on whether theft involved moral turpitude. The BIA has justified its focus on the underlying offense because burglary can occur by “simply pushing ajar the unlocked door of an unused structure and putting one’s foot across the threshold.”<sup>101</sup> As discussed above, Florida burglary can also occur if a person “remains in” a dwelling or structure (or curtilage thereof) after having made an invited or licensed entry.

Properly analyzed under the traditional rule and *Descamps*, Florida burglary is arguably *never* a CIMT. The Florida statute does not include an intention to commit any specific crime as an element of the offense. The jurors need not agree on what crime the defendant intended to commit, even if the prosecutor alleged a particular crime in the charging document.<sup>102</sup> Under the categorical approach, the least culpable conduct punished under the statute is used to determine whether a crime constitutes a CIMT. Here the least culpable conduct consists of entering or remaining with the intent to commit an offense that is *not* a CIMT (e.g. to smoke marijuana), which under the traditional test means that the burglary offense itself is not a CIMT. Further, because the Florida statute does not make any specific crime an element of burglary, an immigration judge or adjudicator may not review the record of conviction to determine the underlying offense involved in a particular case. The underlying offenses that provide possible factual predicates for burglary’s “crime therein” element are classic examples of different *means* of committing a crime, not elements.

### 1. Occupied Dwelling: *Matter of Louissaint*

Relying on the Attorney General’s framework in *Matter of Silva-Trevino*, the BIA in *Matter of Louissaint* departed from the traditional rule, holding that a Florida conviction for second-degree burglary of an occupied dwelling under Fla. Stat. § 810.02(3) is categorically a crime of moral turpitude *regardless of what crime was intended to be committed*.<sup>103</sup> The BIA distinguished its traditional rule on the ground that the conviction at issue in *Louissaint* involved an *occupied dwelling*, as opposed to a structure.<sup>104</sup> Since *Louissaint* involved burglary of an *occupied dwelling*, it should not be applicable to cases involving other types of structures. Further, *Louissaint* involved a charge under subsection (1)(b)(1) of the Florida statute for *entry* with intent to commit a crime. Any discussion of the “remaining in” prong is mere dicta and should not be controlling.

Practitioners should argue that *Matter of Louissaint* is no longer good law, even for cases involving occupied dwellings. The BIA’s reasoning has been undermined by cases clarifying that

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<sup>100</sup> See *Matter of M-*, 2 I&N Dec. 721, 723 (BIA, AG 1946).

<sup>101</sup> *Id.* at 723.

<sup>102</sup> *State v. Waters*, 436 So. 2d 66 (Fla. 1983); § 810.07, Fla. Stat. (2001).

<sup>103</sup> 24 I&N Dec. 754 (BIA 2009).

<sup>104</sup> *Id.* at 756.

unlawful entry is not an element of Florida burglary.<sup>105</sup> In *Matter of Louissaint*, the BIA found that *unlawful* entry into an occupied dwelling is a CIMT.<sup>106</sup> The BIA reasoned that burglary constitutes a CIMT because of the danger of violence inherent in “breaking” into a dwelling.<sup>107</sup> However, the BIA based this conclusion on the erroneous assumption that unlawful entry is an element of Florida burglary.<sup>108</sup> As discussed above, unlawful entry is *not* an element of Florida burglary. Rather, consent or invitation to enter is an affirmative defense.<sup>109</sup> Under *Donawa*, an affirmative defense cannot form part of the analysis of whether Florida burglary is a CIMT because an affirmative defense is not an element of the crime.<sup>110</sup>

The BIA also failed to recognize that Florida’s definition of burglary includes curtilage.<sup>111</sup> By not recognizing that Florida includes curtilage in its definition of dwelling, the BIA neglected to analyze the considerable case law in Florida documenting the prosecution of relatively minor crimes that took place in fenced yards, carports, and sheds. Because the BIA did not evaluate whether these types of minor offenses involve reprehensible conduct, it did not properly consider whether the *least culpable conduct* reasonably prosecuted under the statute involves reprehensible conduct.

Finally, the BIA based its holding on the Attorney General’s decision in *Matter of Silva-Trevino*,<sup>112</sup> a case that has been rejected by the Eleventh Circuit and several other circuits.<sup>113</sup>

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<sup>105</sup> *Descamps v. U.S.* 133 S.Ct. 2276 (reaffirming use of an elements based test in analyzing immigration consequences of criminal convictions); *Donawa v. U.S. Att’y Gen.*, 735 F.3d 1275 (finding that an affirmative defense is not an element of the crime.). See *infra* section IV.C.

<sup>106</sup> 24 I&N Dec. at 758 (“we conclude that the conscious and overt act of *unlawfully* entering or remaining in an occupied dwelling with the intent to commit a crime is inherently ‘reprehensible’ conduct committed ‘with some form of scienter, as required by *Matter of Silva-Trevino*.’”) (emphasis added)

<sup>107</sup> 24 I&N Dec. at 758-759 (“by *breaking* into a dwelling of another for an illicit purpose, the burglar tears away the resident’s justifiable expectation of privacy and personal security and invites a violent defensive response from the resident.”) (emphasis added).

<sup>108</sup> *Id.* at 758. *Louissaint* states that “By judicial construction, burglary...has been interpreted by the Florida courts to require three essential elements: “(1) knowing entry into a dwelling, (2) knowledge that such entry is without permission, and (3) criminal intent to commit an offense within the dwelling.” (citing *M.E.R. v. State*, 993 So.2d 1145,1148 (Fla. Dist. Ct. App. 2008). *Id.* The BIA cited an erroneous lower court opinion for the proposition that there is a requirement that defendant have knowledge that entry is without consent. In fact, the statute has no *mens rea* requirement at all with respect to entry.

<sup>109</sup> *Supra* section IV.C.

<sup>110</sup> 735 F.3d at 1282.

<sup>111</sup> *Id.*

<sup>112</sup> 24 I&N Dec. 687 (A.G. 2008)

<sup>113</sup> *Sanchez-Fajardo*, 659 F. 3d at 1310 (rejecting *Silva-Trevino*’s modification to the categorical and modified categorical approaches); *Ramos*, 709 F.3d 1066, 1072 (11<sup>th</sup> Cir. 2013) (recognizing that statutory language alone can create the “realistic probability” that the statute of conviction could be applied to conduct falling outside the INA’s statutory definition). The Eleventh Circuit is one of five circuits that have rejected *Silva-Trevino*. See *Silva-Trevino v. Holder*, 742 F.3d 197

Practitioners should argue that *Matter of Louissaint* has been abrogated by Eleventh Circuit case law rejecting *Silva-Trevino*.

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(5th Cir. 2014); *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012); *Jean-Louis v. Att’y Gen.* 582 F.3d 462 (3d Cir. 2009).