In the Matter of:  
Vera SAMA  
Respondent.  

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
BOARD OF IMMIGRATION APPEALS  

BRIEF OF AMICI CURIAE  

UNIVERSITY OF MARYLAND CAREY SCHOOL OF LAW IMMIGRATION CLINIC;  
MARYLAND OFFICE OF THE PUBLIC DEFENDER;  
IMMIGRANT & REFUGEE APPELLATE CENTER; and  
MARYLAND STATE BAR ASSOCIATION IMMIGRATION SECTION  

IN SUPPORT OF RESPONDENT
AMICI STATEMENTS OF INTEREST

The Immigration Clinic of the University of Maryland Carey School of Law has the dual mission of educating future lawyers and of representing individuals in removal and other immigration related proceedings. All legal services provided in the Clinic are provided free of charge. The Clinic represents dozens of individuals per year, and one of its areas of practice is the immigration consequences of criminal convictions. Because it is located in Maryland, many of its cases involve the consequences of Maryland offenses. In addition to representing individuals facing removal, members of the Clinic advise public defenders in Maryland about the consequences of convictions so that they can, in turn, comply with their duty under Padilla v. Kentucky to advise their clients regarding the likely consequences of potential criminal dispositions. The Clinic has a strong interest in the fair and predictable administration of the immigration law, particularly insofar as it affects the consequences of criminal dispositions.

The Maryland Office of the Public Defender is a statewide state agency providing representation through all stages of criminal proceedings to indigent defendants, including noncitizens, who cannot afford counsel. With nearly 200,000 cases annually, attorneys protect the constitutional rights of the indigent accused, protect the integrity of the criminal justice system, and advise clients, courts, prosecutors, and other stakeholders in the criminal justice system of the immigration consequences of criminal charges and convictions.

The Immigrant and Refugee Appellate Center, LLC, is a public service law firm based in Alexandria, Virginia, dedicated to assisting immigrants and immigration lawyers. IRAC attorneys frequently represent noncitizens on a pro bono basis and write extensively on immigration issues. As a public service, IRAC attorneys collect unpublished decisions of the Board of Immigration Appeals and post them online for immigrants, attorneys, academics, and policy makers. IRAC attorneys also provide guidance to public defenders and other criminal
defense lawyers regarding the immigration consequences of criminal convictions in Maryland, Virginia, and other states.

The MSBA Immigration Section has over 400 members and is a component of the Maryland State Bar Association. The Section includes immigration lawyers practicing immigration law in the State of Maryland, who are among the primary consumers of BIA case law. MSBA Immigration Section members represent clients in removal proceedings in Maryland and file many types of petitions and applications for which the interpretation of “aggravated felony” is crucial. The correct interpretation of state law is of paramount important to our clients, and therefore, to us. In addition, our organization advocates and provides educational programs for state agencies for fair and equitable legal interpretations and applications of the immigration statute, regulations and policies.

**STANDARD OF REVIEW**

The Board reviews decisions of an immigration judge pursuant to 8 C.F.R. § 1003.1(d)(3). The Board reviews questions of “law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo.” 8 C.F.R. § 1003.1(d)(3)(ii); *Turkson v. Holder*, 556 F.3d 523, 527 (4th Cir. 2012). It reviews findings of fact, including credibility findings, under a “clearly erroneous” standard. 8 C.F.R. § 1003.1(d)(3)(i); *Kaplun v. Attorney Gen.* of U.S., 602 F.3d 260, 268 (3d Cir. 2010).

**SUMMARY OF THE ARGUMENT**

The issue in the case is whether a conviction for theft under Maryland Criminal Law Article § 7-104 can be an aggravated felony within the definition of the Immigration and Nationality Act (INA). A panel of this Board recently came to the conclusion that it cannot, in a well-reasoned opinion in the case of *Clayton Anthony Hugh Stewart*, A043 399 408 (BIA, 2/11/2015). Appendix, Attachment A at 4. The panel held that state law establishes that § 7-104
is non-divisible because Maryland juries are not required to agree unanimously on which of the provision’s subsections has been violated. The provision is thus overbroad and, because it criminalizes conduct beyond the federal generic definition of theft, the panel held that it is categorically not an aggravated felony theft offense. *Id.*

In the cases of *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013), and *Descamps v. United States*, 133 S. Ct. 2276, 2292 (2013), the Supreme Court recently reiterated the principles of the categorical analysis. In *Matter of Chairez*, 26 I&N Dec. 349, 351 (BIA 2014) (*Chairez I*), vacated on other grounds, *Matter of Chairez*, 26 I&N Dec. 478 (BIA 2015) (*Chairez II*), this Board applied those principles to the analysis of immigration consequences of convictions under the INA. In this categorical analysis, the facts of a case are irrelevant, and potential immigration consequences depend on a comparison of the elements of the state offense of conviction with the federal generic offense listed in the INA. In the strict categorical approach, immigration consequences can only be imposed if the minimum conduct prohibited in the elements of the state statute match or are more narrowly drawn than the federal generic offense. *Descamps*, 113 S. Ct. at 2281-83. Where a state statute criminalizes conduct beyond the generic federal offense, a modified categorical approach can sometimes be employed, but only where the state statute is divisible into separate, discrete offenses with elements that must be found unanimously by a jury. *Chairez I*, 26 I&N Dec. at 354; *see also Omargharib v. Holder*, 775 F.3d 192, 198 (4th Cir. 2014) (“Elements, as distinguished from means, are factual circumstances of the offense the jury must find ‘unanimously and beyond a reasonable doubt.’”)

Maryland’s consolidated theft statute, found at Maryland Criminal Law § 7-104, lists a number of alternative means by which the offense of theft can be committed. Those include, *inter alia*, theft by deception and theft of services. Md. Crim. Law § 7-104(b) and (e). Both of these forms of “theft” as defined by the state of Maryland fall outside the generic federal

Maryland’s theft statute is not divisible into separate offenses, however. In 1978, the Maryland General Assembly passed the consolidated theft statute with the express purpose “to create a single statutory crime encompassing various common law theft-type offenses in order to eliminate the confusing and fine-line common law distinctions between particular forms of larceny.” *Jones v. State*, 303 Md. 323, 333 (1985) (emphasis added). The legislative history, the text of the statute itself, pattern charging language, jury instructions, and case law from the state’s highest court make it clear that juries are not required to distinguish between the various means of committing theft in order to convict under the Maryland statute. The state’s highest courts have stated unequivocally that a Maryland jury need not unanimously agree on the method by which a theft was committed in order to convict a defendant of violating the consolidated theft statute. *See Rice v. State*, 311 Md. 116, 125-26 (1987) (finding a conviction sustainable where “six jurors may think the defendant guilty of violating [section (a)] and six guilty of violating [section (c)]; but on neither (a) nor (c) do all twelve agree”); *Craddock v. State*, 64 Md. App. 269, 278 (1985).

Because Maryland’s theft statute is non-divisible and covers a broader swath of conduct than the federal generic theft offense, it is categorically not a match for the federal offense and it cannot serve as the basis for an aggravated felony charge of removability under INA §§ 101(a)(43)(G) and 237(a)(2)(A)(iii).

Because of the importance of this analysis and the frequency with which the government pursues removal proceedings based on this offense, and in order to bring uniformity to the
application of the categorical analysis in like circumstances, Amici request that the Board publish a precedential opinion in this case in accord with the panel’s reasoning in Stewart.

**STATEMENT OF THE LAW**

I. COURTS EMPLOY A CATEGORICAL ANALYSIS TO DETERMINE WHETHER A STATE OFFENSE IS AN AGGRAVATED FELONY.

A. For a state offense to be considered an aggravated felony, all elements of the state offense must be construed the same as or more narrowly than the elements of the generic federal offense.

In the case of *Taylor v. United States*, the Supreme Court established the categorical approach that is used to determine whether a conviction is an aggravated felony. 49 U.S. 575 (1990). In conducting a categorical analysis, adjudicators must not take into consideration the facts of the instant case but rather determine whether the minimum conduct prohibited by the state definition of the convicted offense falls within the scope of the federal generic version of the offense. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Descamps v. United States*, 133 S. Ct. 2276, 2292 (2013).¹ A state’s definition of the convicted offense is only a categorical match to the generic federal offense if the state definition has the same elements as the generic federal offense or if the state definition “defines the crime more narrowly” than the generic federal offense. *Descamps*, 113 S. Ct. at 2281-83.

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¹ See also, *Matter of Silva-Trevino*, 26 I&N Dec. 550 (A.G. 2015), vacating *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). The underlying legal question in *Silva-Trevino* was not whether the offense was an aggravated felony, but rather, whether it was a crime involving moral turpitude. However, the larger issue was whether the Attorney General could add a “third step” that is, create a third type of analysis that goes beyond the categorical and modified approaches to inquire into the facts underlying a conviction. As the Attorney General recently conceded, five courts of appeals rejected this construct. In effect, by vacating the earlier *Silva-Trevino* decision, the Attorney General has directed the BIA to follow Supreme Court and Circuit Court law on the categorical and modified categorical approaches and not examine “additional evidence” including the “facts” of the underlying criminal case. The Attorney General conceded that *Silva-Trevino*’s purported goal of establishing uniformity had not been accomplished. The withdrawal of *Silva-Trevino* is more evidence that the time is now ripe for the BIA to issue a precedent decision along the lines of the correctly reasoned decision in *Clayton Hugh Anthony Stewart*, A 043-339-408 (BIA 2/11/2015).
If the elements of the state offense penalize conduct not penalized by the federal offense, the state offense is overbroad and not a categorical match to the generic federal offense. *Chairez I*, 26 I&N Dec. at 351; *Descamps*, 133 S.Ct. at 2283. Equally, if the generic federal offense contains an element not included in the state offense, any conviction for that state offense does not qualify as an aggravated felony. *Descamps*, 133 S. Ct. at 2292.

**B. The modified categorical approach may only be applied when the state statute contains distinct, alternative elements that a jury must unanimously find to have been met.**

The Supreme Court has sanctioned the use of a modified categorical analysis only where a state statute is divisible into distinct, alternative offenses. *Descamps*, 133 S. Ct. at 2284-85. In order to be divisible, a statute must set out alternative elements that describe two or more “different…crimes”, at least one of which must be a match for the federal offense. *Id.* at 2285. For a variety of reasons explained in *Descamps*, including constitutional concerns, the Supreme Court identified the requirement of jury unanimity as the defining characteristic of true alternative elements that indicate that a statute includes different offenses. *Id.* at 2290.

In *Chairez I*, following the Supreme Court’s decision in *Descamps*, the Board of Immigration Appeals (BIA or the Board) held that for a statute to be divisible (1) it must include alternative elements and (2) state law must require jury unanimity on each of the alternative

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2 *Chairez I* was vacated in part by *Matter of Chairez*, 26 I&N Dec 478 (BIA 2015) (*Chairez II*). As explained by the BIA, the change was made to be consistent with the Tenth Circuit’s approach to divisibility post-*Descamps*. Specifically, according to *Chairez II*, in *U.S. v. Trent*, 767 F.3d 1046 (10th Cir. 2014), the Tenth Circuit concluded that the *Descamps* Court did not understand the term “element” to mean only those facts about a crime that must be proved to a jury unanimously and beyond a reasonable doubt. *Chairez*, 26 I&N Dec. at 484, citing *Trent*, 767 F.3d at 1058-61. However, the instant case arises in the Fourth Circuit. Unlike the Tenth Circuit’s post-*Descamps* ruling in *Trent*, the Fourth Circuit has held that by “elements” the Supreme Court in *Descamps* meant “factual circumstances of the offense that the jury must find ‘unanimously and beyond a reasonable doubt.’” *U.S. v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013). See also *Omargharib*, 775 F.3d at 198.
elements of the charge.\textsuperscript{3} 26 I&N Dec. 349, 354. If state law does not require the jury to make a finding on each of the listed alternatives, the statute is non-divisible and the different acts described in the statute merely describe different \textit{means} of committing the underlying offense rather than alternative elements or alternative offenses. \textit{Id. See also} \textit{Omargharib v. Holder}, 775 F.3d 192, 198 (4th Cir. 2014) (“Elements, as distinguished from means, are factual circumstances of the offense the jury must find ‘unanimously and beyond a reasonable doubt.’
\textsuperscript{4}”).

A state offense can be non-divisible despite listing multiple “means” of committing the offense. \textit{Id.} at 354-55. Legislatures often list “alternative means of committing a crime without intending to define separate elements or separate crimes” \textit{Schad v. Arizona}, 501 U.S. 624, 636 (1991). For an offense to be divisible, the jury must be required to agree unanimously on which of the specific alternative elements was committed, while for a non-divisible offense, the jury must merely agree that the defendant committed the underlying offense using any one of the listed alternatives. \textit{Chairez I}, 26 I&N Dec. at 354.\textsuperscript{4}

\textsuperscript{3} The Immigration Judge’s misunderstanding of \textit{Descamps} and \textit{Chairez I} is starkly illustrated in the decision below by the Judge’s statement that “As a state jury may permissibly convict without unanimity, jury unanimity simply cannot be what defines the elements of an offense.” \textit{Vera Sama}, A # 076 581 488, Decision and order of Immigration Judge dated 1/16/2015, at 9. The Board addressed this very matter in \textit{Chairez I}, noting that the federal constitutional right to unanimous jury verdicts does not apply to the states and that jury unanimity is required for conviction in state court only if the state imposes it on itself. “Thus, where a defendant was lawfully convicted by a nonunanimous jury, we deem the ‘elements’ of the offense to be those facts about which the jury was required to agree by whatever vote was required to convict in the pertinent jurisdiction.” \textit{Chairez I}, 26 I&N Dec. at 353, n. 2. The principle remains, as this Board recognized, that the jury must find the elements of an offense by whatever margin is required by the law of the state.

\textsuperscript{4} The Supreme Court in \textit{Descamps} presented the following hypothetical: a state passes a statute merely requiring juries to agree that the defendant used a weapon, but lists eight potential weapons (a knife, a gun, etc.) for purposes of the offense. 133 S. Ct. at 2290. This statute is non-divisible, as the jury only has to find the defendant used a weapon, not agree on which weapon was used. \textit{Id.} In contrast, had the statute required the jury to unanimously agree on which weapon was used, the statute would have been divisible and the identity of the weapon would be an element of the statute. \textit{Id.} A court reviewing such a conviction to determine if the defendant used a gun, for example, would be able to tell which weapon the defendant used, because the jury necessarily would have had to agree unanimously as to the identity of the weapon, and not merely \textit{that} the defendant used \textit{a} weapon (as would be the case for a non-divisible statute). \textit{Id.}
When a statute is non-divisible, a strict categorical approach must be applied to determine if that statute can trigger federal consequences. Descamps, 133 S. Ct. at 2279. If a non-divisible state offense “sweeps more broadly” than and prohibits conduct that does not fall within the federal category, it is categorically not a match for the generic federal offense and cannot trigger immigration consequences, even if the defendant or respondent in a particular case may have actually committed the offense in the generic federal form. Id. at 2283.

II. THE GENERIC FEDERAL DEFINITION OF THEFT REQUIRES A NONCONSENSUAL TAKING AND A TAKING OF PROPERTY AS ELEMENTS OF THE OFFENSE.

As defined in INA § 101(a)(43)(G), an aggravated felony is, inter alia, “a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year [sic].” INA § 101(a)(43)(G). The Immigration and Naturalization Act does not define “theft offense.” Therefore, the definition of theft for purposes of the aggravated felony analysis is found in federal case law. The Supreme Court held in Gonzales v. Duenas-Alvarez that the generic federal definition of theft for the purposes of an aggravated felony is the “taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.” 549 U.S. 183, 189 (2007) (internal quotation marks omitted) (emphasis added); see also Soliman v. Gonzales, 419 F.3d 276, 282 (4th Cir. 2005) (“when a theft offense has occurred, property has been obtained from its owner ‘without consent.’”); and Matter of Garcia-Madruga, 24 I&N Dec. 436, 440 (BIA 2008)( “… the taking of property without consent is required for …[a] ‘theft offense,’ …”). As articulated in this case law, lack of consent and the element of property are both required under the generic federal definition of theft for purposes of an aggravated felony.
As a taking of *property* is an essential element of a generic theft offense, the generic federal definition of theft does not include theft of services. *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003) (citing *United States v. Corona-Sanchez*, 291 F.3d 1201, 1208 (9th Cir. 2002) (en banc) (*superseded on other grounds*)) (holding that “as services are not property,” the conduct proscribed by Arizona’s theft statute extends beyond the term “theft offense.”). *See also United States v. Juarez-Gonzalez*, 451 F. App’x 387 (5th Cir. 2011)(unpub.); and *Benyahia Hebbar*, A 079 374 882 (BIA 6/11/2012) (specifically noting that theft of services and theft by fraud are not included in the generic federal definition of theft), Appendix, Attachment B, at 5.

Likewise, because it requires an unauthorized taking, the federal generic definition of theft does not include theft by deception or theft by fraud. *Soliman v. Gonzales*, 419 F.3d 276, 282-82 (4th Cir. 2005)(distinguishing theft and fraud offenses for aggravated felony purposes).

**ARGUMENT**

**I. MARYLAND’S CONSOLIDATED THEFT STATUTE, MARYLAND CRIMINAL LAW ARTICLE § 7-104, IS NON-DIVISIBLE.**

Maryland’s theft statute includes a detailed list of different ways that the crime of theft can be committed under Maryland law, but the legislative history, the text of the statute itself, pattern charging language and jury instructions, and case law from the state’s highest court make it clear that the statute is non-divisible for purposes of the analysis of immigration consequences.

The Maryland General Assembly enacted a consolidated theft statute in 1978, the purpose of which was “‘to eliminate [the] technical and absurd distinctions that ha[d] plagued the larceny related offenses.’” *Jones v. State*, 303 Md. 323, 328 (1985) (quoting the October 1978 Report by the General Assembly’s Joint Subcommittee on Theft Related Offenses). The statute “consolidated various common law larceny related offenses into a single offense designated as ‘theft,’” *id.* at 343, and identified a non-exclusive list of “five different methods”
of committing theft. *Id.* at 341; Md. Code, Crim. Law § 7-102(a) (“Conduct described as theft in this part constitutes a single crime and includes the separate crimes formerly known as (1) larceny; (2) larceny by trick; (3) larceny after trust; (4) embezzlement; (5) false pretenses; (6) shoplifting; and (7) receiving stolen property.”) (emphasis added). Maryland’s appellate courts have explained that the subsections of § 7-104 – which describe conduct previously constituting different common law crimes – “merely specify different acts or transactions through which theft can be proved.” *Jones*, 303 Md. at 338 (citing *Whitehead v. State*, 54 Md. App. 428, 442 (1983)).

As the Maryland Court of Appeals stated in *Jones*: “It is readily evident from the language of the consolidated theft statute, and from its underlying history, that the legislature made ‘stealing’ property or services of another . . . a single criminal offense.” 303 Md. at 339.

A. The history of Maryland’s consolidated theft statute shows that the legislature intended it to be non-divisible.

Prior to 1979, Maryland common law defined larceny as “the wrongful taking and carrying away the chattels of another with a felonious intent to convert them to the taker’s own use.” *Worthington v. State*, 58 Md. 403, 409 (1882); see also Judge Charles E. Moylan, Jr., *Maryland’s Consolidated Theft Law & Unauthorized Use* 1 (2001). Common-law larceny, however, excluded a wide range of theft crimes. Thus, for example, an individual who received stolen goods – but did not personally take them from their rightful owner – could not be convicted of larceny. *See Fletcher v. State*, 231 Md. 190, 192 (1963) (noting that common-law larceny requires “a felonious taking and carrying away” of another person’s personal property). If a shopper at a retail store concealed merchandise or removed price tags, he, too, was not guilty of larceny because he never actually “carried away” the merchandise. Moylan at 5. Common-law larceny also excluded embezzlement, “[t]he fraudulent taking of personal property with which one has been entrusted,” Black’s Law Dictionary (9th ed. 2009) (West); see *Nolan v.*
State, 213 Md. 298, 313 (1957) ("If a servant takes goods out of the master’s possession, the crime is larceny, but if he takes goods before these reach his master’s possession the crime is embezzlement."), and failed to account for, among other criminal conduct, the theft of real property and the theft of services. The Maryland criminal code thus grew to fill these gaps, and theft-related offenses proliferated.

Maryland courts recognized the distinct crime of receiving stolen property. Fletcher, 231 Md. at 192 (citing Weddle v. State, 228 Md. 98, 102 (1962)). The General Assembly passed a shoplifting statute, making it easier to prosecute individuals who attempted to steal merchandise from retail stores. Moylan at 5 ("Absent the shoplifting law, merchants had frequently felt compelled to wait until the thief actually moved out of the store with the stolen item before making the arrest or sounding the alarm."). The criminal code eventually included seven different types of embezzlement, each of which involved a different variety of unlawful converter. Moylan at 3. The code also included the crime of larceny-after-trust, used specifically to prosecute servants who had received property directly from the rightful owner of the property, instead of from a third party. Moylan at 3. The legislature enacted the False Pretenses Act to criminalize the “acts of making, uttering and delivering a worthless check.” Waye v. State, 231 Md. 510, 513 (1963). To address the fact that larceny applied only to personal property, Maryland enacted a statute to criminalize theft of realty, such as pipes, water fixtures, stoves, and bathtubs, and to address the fact that larceny covered only physical property, the state enacted statutes that criminalized various types of thefts of services, including the failure to pay promised wages; fare evasion on public transportation; and refusal to pay a taxi driver for a ride. Id. Such was the landscape of Maryland theft law before the consolidated theft statute emerged on the scene.
As the Court of Special Appeals (the state’s second highest court) observed in 1970, without “a legislative enactment creating an all inclusive crime of theft[,] . . . precise factual circumstances determine what offense is committed[,] and one offense is distinguished from another by fine distinctions, always technical and frequently absurd.” *Farlow v. State*, 9 Md. App. 515, 516-19 (1970). A key concern with theft law prior to 1979 was that culpable individuals would go unpunished: “[I]f the proof established deviates from the proof anticipated, . . . there may be acquittal of the offense pursued.” *Id.* (finding insufficient evidence of common-law larceny of monies, though the evidence supported the uncharged crime of larceny of goods); see also *Nolan v. State*, 213 Md. 298, 316 (1957) (finding the evidence insufficient to support a conviction for embezzlement, though the evidence supported the uncharged crime of larceny).

In enacting its consolidated theft statute, Maryland joined a national trend, the purpose of which was “to create a single statutory crime encompassing various common law theft-type offenses in order to eliminate the confusing and fine-line common law distinctions between particular forms of larceny.” *Jones*, 303 Md. at 333 (emphasis added) (noting that the Model Penal Code adopted a consolidated theft statute in 1962 and that at least 35 states had followed suit). The statute functions as an indivisible statute, in that it establishes “a single, indivisible set of elements.” *Descamps v. United States*, 133 S.Ct. 2276 (2013).

**B. The text of the consolidated theft statute, including the text of its charging provisions, demonstrates that it is a non-divisible statute.**

In its description of the offense and its charging provision, Maryland’s General Assembly has made clear that, under the Consolidated Theft Statute, theft is a single crime that can be committed in different ways. In Criminal Law Article § 7-102(a), a provision entitled “Rules of Construction,” the General Assembly stated that “[c]onduct described as theft in this part
constitutes a single crime and includes [a list of seven former common law offenses].” Md. Code Ann., Crim. Law Art. § 7-102(a) (2002) (emphasis added). Accordingly, to properly charge an individual with any form of theft under § 7-104, the statute provides explicitly that a prosecutor need only state:

“(Name of defendant) on (date) in (county) stole (property or services stolen) of (name of victim), having a value of (less than $1,000, at least $1,000 but less than $10,000, at least $10,000 but less than $100,000, or $100,000 or more) in violation of § 7-104 of the Criminal Law Article, against the peace, government, and dignity of the State.”

Md. Code Ann., Crim. Law Art. § 7-108(a) (2002 & 2009 Supp.). This charging language “allege[s] the essential elements of the offense charged.” Jones, 303 Md. at 336-37. In fact, it “charge[s] the crime of theft conjunctively by any or all of five methods,” and the prosecutor can prove the charge by showing that theft “was committed in any manner that would constitute theft under the statute.” Id. (citing Whitehead v. State, 54 Md. App. 428, 458 (1983).

The Maryland legislature’s intent to treat various methods of theft as a single offense is also evidenced by an unusual provision governing the charging of theft. Criminal Law Article § 7-109(a) provides in pertinent part that “a charge of theft may be proved by evidence that the theft was committed in a manner that is theft under this part, even if a different manner is specified in the information, indictment, warrant, or other charging document.” Thus, even in the unusual case where the State charges theft using language that specifies how it was committed, the defendant can be convicted on evidence that he or she committed theft in any manner, subject only to the authority of the court to grant a continuance if necessary to protect the defendant’s right to a fair trial. Id. § 7-109(b). This is another indication of the legislature’s intent to eliminate distinctions based on the method of theft employed.

The pattern charging language provided by the state for use by its District Court Commissioners is yet more evidence. The pattern charging language follows this minimalist
language provided in the statute, requiring a charging document to allege only that the defendant:
“...did steal _____ (property or service stolen) of _______ (owner) having a value of ______.
...” District Court of Maryland, Commissioner Charging Language, http://www.courts.state.md.us/district/directories/commissionermap.html, at 194 (effective 10/1/14) (emphasis added). No more specific language is required to allege the essential elements of theft under § 7-104.

C. To convict an individual of theft, a Maryland jury need not agree unanimously on the manner in which the theft was accomplished.

1. Case law from the state’s highest court makes clear that a jury need not agree unanimously on the means by which a theft was committed.

A Maryland jury need not unanimously agree on the method by which a theft was committed to convict a defendant of violating the consolidated theft statute. See Rice v. State, 311 Md. 116, 125-26 (1987); Craddock v. State, 64 Md. App. 269, 278 (1985). The statute does not “encompass[] multiple crimes for jury instruction purposes.” Rice, 311 Md. at 124. Rather, it “posits a single offense.” Id.; see also Craddock, 64 Md. App. at 278 (“[T]he statute sets forth various acts that constitute the crime of theft. As long as jurors unanimously agree that theft in some form was committed, nothing more is required.”). As a result, “in jury deliberations, six jurors may think the defendant guilty of violating [section (a)] and six guilty of violating [section (c)]; but on neither (a) nor (c) do all twelve agree.” Rice, 311 Md. at 124-25. The Maryland Court of Appeals, the state’s highest court, has held that such a situation is consistent with legislative intent, observing that the legislature that enacted the consolidated theft statute “was well aware that jurors might draw conflicting inferences from evidence,” id. at 125, and intended the statute to create a “straight and clear path” from proof of theft – by any means – to conviction. Id.
Similarly, in *Craddock*, the Court of Special Appeals reasoned:

> Clearly, the gravamen of the offense of theft is the depriving of the owner of his rightful possession of his property. The particular method employed by the wrongdoer is not material; an accusation of theft may be proved by evidence that it was committed in any manner that would be theft under this subheading.

Generally, jurors are not required to uniformly accept all of the evidence presented in order to arrive at a unanimous verdict. Some jurors unquestionably reject evidence that others accept in determining guilt or innocence. In short, the law requires unanimity only in the verdict, not in the rationale upon which the verdict is based. In the case *sub judice*, the statute sets forth various acts that constitute the crime of theft. As long as jurors unanimously agree that theft in some form was committed, nothing more is required.

*Id.* at 278 (internal citations and quotation marks omitted). The holdings and reasoning of *Rice* and *Craddock* make clear that theft under the Maryland Consolidated Theft Statute is a single offense that can be committed through a variety of means.

2. **In practice, juries are instructed on any form of theft for which there is some evidentiary support and are not required to agree unanimously on the form of theft that the defendant committed.**

In *Cardin v. Maryland*, 73 Md. App. 200 (1987), the defendant was charged with five counts of theft arising from various white collar, economic crimes. *Id.* at 207-9 (explaining the details of the five counts). The defendant asked the trial court to instruct the jury that it must be unanimous as to the form of theft that the defendant committed. Petition for Writ of Certiorari, *Cardin v. Maryland*, 1988 WL 1094610, *5 (U.S.), No. 87-2097 (denied). The trial judge rejected the defendant’s request, *id.* at *6, and instead instructed the jury that “[a]ll that is required is that all members of you, the jury, are convinced beyond a reasonable doubt that all elements of one or more forms of theft have been proven.” *Cardin*, 73 Md. App. at 210-11. The trial judge’s substantive instructions were as follows:
The defendant is charged with five counts of theft. A person commits the offense of theft when he willfully or knowingly obtains control which is unauthorized or exerts control which is unauthorized over the property of the owner and has the purpose of depriving the owner of the property or willfully or knowingly uses or conceals the property in such a manner as to deprive the owner of the property.

A person also commits the offense of theft when he willfully or knowingly uses deception to obtain and does obtain control over the property of the owner and has the purpose of depriving the owner of the property or willfully or knowingly uses, conceals or abandons the property in such manner as to deprive the owner of the property or uses, conceals or abandons the property knowing such use, concealment or abandonment probably will deprive the owner of the property.

A person also commits the offense of theft if he possesses stolen property knowing that it has been stolen or believing that it has probably been stolen or believing or have the purpose of depriving the owner of the property or willfully or knowingly uses, conceals or abandons the property in such manner as to deprive the owner of the property, or uses, conceals or abandons the property knowing such use, concealment or abandonment probably will deprive the owner of the property.

*These methods of theft may be proven in the alternative. The State need not prove that the defendant acted in all of these fashions to commit theft. It need only prove beyond a reasonable doubt that all of the elements of one or more forms of theft have been proven, nor need all of the members of this jury agree on which of these methods of theft were committed by the defendant. All that is required is that all members of you, the jury, are convinced beyond a reasonable doubt that all elements of one or more forms of theft have been proven.* [emphasis in original]

In this case, the defendant has been charged in each theft count with theft of $300 or more. *In order for the defendant to be guilty of these offenses, the State must prove, one, that Old Court Savings and Loan, Incorporated, Old Court Joint Venture, Incorporated, Old Court Investment Corporation, or Galleria Enterprises of Maryland, as the case may be, was the owner of certain properties; two, that the defendant willfully or knowingly obtained control that was unauthorized, used deception to obtain control or exerted unauthorized control over the property or received property knowing it was stolen or believing that it was probably stolen; three, that the defendant intended to deprive the owner of the property or knowingly used or concealed the property in such a manner as to deprive the owner of the property; and, four, that the value of the property was $300 or more.* [emphasis added]


In his closing argument, the prosecutor emphasized that there was no need for juror unanimity, stating,
As the Court has instructed you, your verdict must be unanimous but *it is not necessary that you all agree on which form of theft applies*. In other words, six of you may find that the crimes charged are theft by deception. Six others may find it is exerting unauthorized control. Your verdict would still be unanimous that the crime of theft had been committed, no matter what form of theft each of you may decide upon.

*Id.* at *7* (emphasis added). The jury convicted on all five counts without identifying the specific form of theft of which he was guilty. On appeal, the Court of Special Appeals rejected Cardin’s claim of instructional error, relying on *Craddock*, 64 Md. App. 269, *Whitehead*, 54 Md. App. 428, and *Rice*, 311 Md. 115. *Cardin* shows in practice, what the Court of Appeals has repeatedly said: juror unanimity is not required when a defendant is prosecuted on multiple theories of theft.

More recently, in *State v. Smith*, No. K-22-14-000333, Wicomico County, Md., October 14, 2014, the State accused Gary Lee Smith, Jr., of, *inter alia*, theft under $1,000. The charging document stated simply: “THAT GARY LEE SMITH JR., between the 25th day of April and 26th day of April, 2014, in Wicomico County, State of Maryland, did steal property of Richard Strautz having a value of less than $1,000.00, in violation of CR 7-104. . . .” See Appendix, Attachment C at 14.

At trial, the State presented evidence that, on April 25, Richard Strautz called the police to report that property of his had been stolen from his car. Several days later, on the night of April 28, the defendant was found in possession of the property that Strautz previously reported stolen. To support the charge of theft under $1,000, the State proceeded on two alternative theories: (1) that Smith had taken the items from the car, or (2) that Smith was in possession of stolen property.

The trial judge instructed the jury on both theories, stating first:

To convict the defendant of theft, the State must prove: that the defendant willfully or knowingly obtained or exerted unauthorized control over property belonging to [the
victim]; that the defendant had the purpose of depriving [the victim] as the owner of that property; and that the property was worth less than [$1,000].

*Id.* at 9. He then instructed the jury that, alternatively, someone is guilty of theft if he:

is found to be in the exclusive possession of recently stolen property, unless there is some reasonable explanation, that may be evidence of theft. If you find that the defendant was in possession of property shortly after it was stolen and the defendant’s possession is not otherwise explained by the evidence, you may but are not required to find the defendant guilty of theft.

*Id.* at 10-11. The jury convicted the defendant of theft under $1,000, but did not indicate pursuant to which theory it found him guilty. *Id.* at 16.

*Cardin* and *Smith* are just two examples of cases that reflect the practical application of the legislature’s intent in enacting the Consolidated Theft Statute: to streamline theft prosecutions and ensure that defendants do not escape conviction on the basis of a technical charging mistake.

**D. The prohibition on double jeopardy prevents an individual who is acquitted or convicted under § 7-104 from being prosecuted again for theft of the same property or services, even under a different theory.**

Because the consolidated theft statute “comprises the single crime of theft,” a defendant once convicted of theft “is protected from further prosecution for stealing the property particularized in the indictment.” *Jones*, 303 Md. at 341. The prohibition on double jeopardy prevents the state from retrying a defendant for violating the theft statute with regard to the same property or services, even under a different theory. *Id.; State v. Boozer*, 304 Md. 98, 110 (1985) (“[T]here can be no more than one conviction for the same taking of a person’s property.”).

Maryland state case law is clear that the state’s consolidated theft statute criminalizes the single crime of theft and provides a list of methods by which the theft statute may be violated. The legislature that enacted the statute wanted to simplify theft law by relieving prosecutors of the need to commit themselves to a single theory of theft. The statute was intended to minimize
the possibility that, due solely to a charging technicality, culpable conduct would go unpunished. Since it was enacted, the consolidated theft statute has functioned as intended: prosecutors use generic charging language; jurors need not agree on the method by which theft was committed to convict a defendant under § 7-104; and a conviction or acquittal under § 7-104 puts the defendant in jeopardy as to a prosecution for theft of the same property on any theory of theft. The history of the statute and its current use demonstrate that the consolidated theft statute does not establish multiple crimes consisting of different elements. Rather, it establishes a single, non-divisible crime – the crime of theft – and identifies a variety of ways in which the elements of the crime of theft might be proved.

II. MARYLAND’S CONSOLIDATED THEFT STATUTE IS OVERBROAD.

A. As described in Maryland. Criminal Law Article § 7-104(b) and as prosecuted by the state, Maryland’s theft offense includes theft by deception.

Under Maryland Criminal Law Article § 7-104(b), a defendant can be convicted of theft without the element of a non-consensual taking, as required under the generic federal definition. More specifically, under this section an individual can be convicted of theft by deception in Maryland in situations were the defendant takes property with the consent (albeit fraudulently obtained) of the victim.

For example, in State v. Burroughs, the Court of Appeals upheld a theft conviction where the defendant had fraudulently obtained the consent of the victims. 636 A.2d 1009 (Md. 1992). There, under the appearance of advising the victims for a retirement plan, the defendant did not perform as promised with the victim’s money after the victims willingly transferred the proceeds of a loan and other moneys to him. Id. Likewise, in Lane v. State, the defendant was convicted of theft even though he fraudulently obtained consent of the victim. 483 A.2d 369, 370 (Md. Ct. Spec. App. 1984). In that case, the defendant obtained control of the property of a mortgage
company by “procuring and inducing people to certify falsely to mortgage company that they were home purchasers and future residents of properties when they would not have individually qualified for respective mortgages.” *Id.* at 370.

In a more recent case, the State charged the defendant with theft in violation of § 7-104 using the statutory short form charging language, and the trial judge found her guilty of that count on the theory that she obtained possession of a car from a dealership by submitting fraudulent pay stubs. *State v. Ltanya Divers*, No. K-13-1327, Circuit Court for Charles County, Maryland, June 4, 2014 (charging document and transcript of verdict). Appendix, Attachment D at 17 *et seq*.

In sum, unlike under the generic federal definition, for a defendant to be convicted of theft in Maryland, the state need not prove the element of a non-consensual taking. Rather, a conviction for “theft” can be had with proof of theft by deception. Therefore, the Maryland consolidated “theft” statute is overbroad.

**B. As described in Maryland Criminal Law Article § 7-104(e) and as prosecuted by the state, Maryland’s theft offense includes theft of services, which lacks the “property” element of generic theft.**

An individual also can be convicted of theft of services under § 7-104, which is outside the generic federal definition of theft. Maryland law provides that theft of services is obtaining the services of another that are available only for compensation by deception or with knowledge that the services are provided against the individual’s will. The Maryland state code distinguishes property from services, defining them separately. According to Maryland Criminal Law Article § 7-101(k), “service” includes: (1) labor or professional service; (2) telecommunication, public utility, toll facility, or transportation service; (3) lodging, entertainment, or restaurant service; and (4) the use of computers, data processing, or other equipment. Maryland Criminal Law Article. § 7-101(k) (LexisNexis 2014).
Charges and convictions for stealing of services are common under § 7-104. Attachments E and F in the Appendix are statements of charges in recent Maryland prosecutions for theft of services. In the first case (Attachment E), the government has alleged that the defendant attempted to steal services provided by a medical facility by passing a counterfeit bill. The state then charged defendant with theft under § 7-104 for stealing services of a medical facility, having a value of less than $1000.00. See, Statement of Charges for Theft of Medical Services under Md. Crim. § 7-104. Attachment E at 24. In the second case (Attachment F), the government alleges that the defendant attempted to use Metro services without paying the established fare. The defendant has been charged with theft under Md. Crim. § 7-104 for stealing “service of public transportation facilities having a value of less than $100.00” See, Statement of Charges for Theft of Transportation Services under Md. Crim. § 7-104 (emphasis added). Attachment F at 27.

Because it encompasses theft of services, the Maryland consolidated theft statute is overbroad.

III. MARYLAND’S CONSOLIDATED THEFT STATUTE IS CATEGORICALLY NOT AN AGGRAVATED FELONY BECAUSE IT IS NON-DIVISIBLE AND OVERBROAD.

In a recent case, a panel of this Board correctly held that Maryland’s consolidated theft statute is categorically not an aggravated felony because it is non-divisible and sweeps more broadly than the federal generic definition of theft. Clayton Hugh Anthony Stewart, A043 399 408 (BIA, 2/11/2015), Appendix, Attachment A at 4.

As held by the Board in that case and as demonstrated supra, Maryland’s consolidated theft statute is non-divisible. Id. Although the statute lists a number of alternative means by which the “single offense” of theft can be committed, state law is very clear that a jury is not required to distinguish between those means in order to convict under the statute. Id., citing
Crispino v. State, 7 A.3d 1092, 1102 (Md. 2010); Rice v. State, 532 A.2d at 1367; and Cardin v. State, 533 A.2d at 933-34. Because there is no requirement that a jury agree unanimously on which of the subsections of the statute was violated, the Maryland statute is non-divisible and must be analyzed with a strict categorical approach. Id., at 3; see also Chairez I, 26 I&N Dec. at 354.

When the categorical analysis is used, it is clear that the Maryland theft statute is overbroad, criminalizing a broader swath of conduct than the federal generic definition of theft. In re: Stewart, Appendix, Attachment A at 3. While the federal generic definition of theft is limited to unauthorized takings and physical property, the Maryland theft offense includes both theft by deception (§ 7-104(b)) and theft of services (§ 7-104(e)), both of which fall outside the federal definition of theft. Id., citing Garcia-Madruga, 24 I&N Dec. at 440. See also Soliman v. Gonzales, 419 F.3d at 282; and Huerta-Guevara v. Ashcroft, 321 F.3d at 887.

The categorical analysis requires that in order to qualify as an aggravated felony under the INA, a state offense must have elements that match or are more narrowly drawn than the elements of the federal generic definition. Chairez I, 26 I&N Dec. at 351; see also Descamps, 133 S.Ct. at 2283. Because the Maryland consolidated theft statute is non-divisible and overbroad when compared with the federal generic definition of theft, it is categorically not an aggravated felony under INA 101(a)(43)(G) and cannot serve as the basis for a charge of removability under INA 237(a)(2)(A)(iii).

CONCLUSION

WHEREFORE, the Board should issue a published decision in this matter holding that Md. CR 7-104 is categorically not an aggravated felony and should terminate these proceedings.
REQUEST FOR ORAL ARGUMENT

Given the importance of the categorical analysis at issue in this case and the frequency with which the government institutes removal proceedings on the basis of convictions under this Maryland theft statute, Amici request that the Board hear oral argument in this matter and that Amici be permitted to designate one of their counsel to present argument, pursuant to § 8.7(d)(xiii) of the BIA Practice Manual.

Respectfully submitted this 27th day of April, 2015,

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BOARD OF IMMIGRATION APPEALS

In the Matter of:

Vera SAMA

Respondent.

File No. A076 581 488

PROOF OF SERVICE

I, Maureen A. Sweeney, hereby certify that on April 27, 2015, I served a copy of this BRIEF OF AMICI CURIAE and APPENDIX and any attached pages to Alan Parra, Esq. and to the ICE Office of Chief Counsel at the following addresses:

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