



Removal Defense

Online Course

American Immigration Lawyers Association

Module 4: Criminal Removability with the Categorical

and Modified Categorical Approach

Exercise: Just the Basics: Rapid Analyses of Statutes of Convictions

Faculty Response

Case Facts

Mr. William McDonald is originally from South Africa and immigrated to the United States in 2002. He holds lawful permanent resident status through the diversity lottery. He is fondly known as Greenskeeper Billie at the local elementary school in the state of Iowa. Unfortunately, Billie also enjoys drinking excessively which leads to him often finding himself in bad situations and in trouble with the law.

It was 2010. During one of his drunken escapades at 8pm, he tried to open the door to his car but it wouldn't open and his key wouldn't work. He used his past expertise in South Africa to "break" into his car. Immediately upon entering the car, he falls asleep and wakes up at 8am. Clear headed and sober, he notices that a lot of the items in the car aren't his. Billie decides it didn't matter that it was not his car. He wants to go home and will just use this car since he doesn't know where he parked his car.

So, he uses his past "skills" again to get the car started. Billie does not realize that a homeowner noticed all this taking place and calls the police. Before Billie is able to get the car started, the police show up and arrest Billie.

During his arraignment, Billie just wants to put this behind him and go back to work. He waives his public defender and doesn't want a lawyer. So, he pleads guilty to Iowa Code § 713.1 for burglary.

Iowa Code § 703.1 Burglary Defined

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's



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right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

[C51,§2608,2611;R60,§4232,4235;C73,§3891,3894;C97,§4787,4791,4792,4794;C24,27,31,35,39,§12994,13001–13004;C46,50,54,58,62,66,71,73,75,77,§708.1,708.8–708.11;C79,81,§713.1]

84 Acts, ch 1247, § 2

Referred to in § 229A.2

Definition of occupied structure, § 702.12

Definitions, § 702.12 Occupied Structure

An “occupied structure” is any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purposes of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is an “occupied structure” whether or not a person is actually present. However for purposes of chapter 713, a box, chest, safe, changer, or other object device which is adapted or used for the deposit or storage of anything of value but which is too small or not designed to allow a person to physically enter or occupy it is not an “occupied structure.”

[C79, 81, § 702.12]

84 Acts, ch 1247, § 1

Referred to in § 712.6

Question:

Analyzing the Iowa statute for burglary with the categorical approach, is this a conviction for immigration purposes triggering a removal ground?

Faculty Response

Burglary is listed under aggravated felonies in INA § 101(a)(43)(G). We look to see whether the Iowa statute is match with the generic definition of burglary by reviewing whether the “elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case.” *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). In *Taylor v. United States*, 495, U.S. 575, 598 (1990), the Supreme Court decided that generic burglary contains the elements of “an unlawful or unprivileged entry into, or remaining in, a



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building or other structure, with intent to commit a crime,” but found that a vehicle was not included in the terms “building or other structure.”

Next, what is the minimum conduct required to violate the Iowa statute. Look at the actual statute, the *expressed* language to see if it is overbroad. If isn’t on its face overbroad you can prove there is a *realistic probability* that someone can be prosecuted for committing the minimum conduct. In this exercise, the express language of the Iowa statute states “vehicles,” so an argument is made that the minimum prosecuted conduct includes burglary of a vehicle. If your circuit court or the BIA doesn’t accept the express language rule, then you should find cases of people prosecuted for burglary of a vehicle to demonstrate realistic probability.

The Iowa statute is not a categorical match with the generic definition. A person convicted under the Iowa statutes for illegally entering a vehicle with the intent to commit a crime could not be convicted of generic burglary because the generic definition does not include vehicles. **Therefore, the statute is overbroad.**

Is the Iowa statute “divisible”? Following *Mathis v United States*, the answer is no. The Iowa statute does set out multiple statutory alternatives because it states burglary of a building or vehicle. Not all the alternatives are a categorical match to the generic definition. Specifically, the burglary of a building matches the generic definition of burglary but not the burglary of a vehicle. The statutory alternatives do not set out different offenses with different elements. Read *Mathis* to understand the concept of elements or means.

Since the case is indivisible, that means that the conviction does not trigger removal grounds. This statute is both overbroad and indivisible and no conviction under it ever amounts to generic burglary. That means that Billie is eligible to apply for LPR cancellation.

**Note: If the statute was found to be divisible, we’d go to the modified categorical approach and the immigration judge may look to the client’s record of conviction to identify which offense the person was convicted of. If that were the case here, then the judge would be able to look at Billie’s record of conviction to see if he was convicted for burglarizing a building versus a vehicle.*