No.

In The
Supreme Court of the United States

FIEZEL MOHAMAD

Petitioner,

v.

WILLIAM BARR, ATTORNEY GENERAL
OF THE UNITED STATES

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

EMERGENCY MOTION FOR STAY OF REMOVAL JUSTICE CLARENCE THOMAS

Respectfully submitted,
David Stoller, Esquire
4445 S. Conway Rd.
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(407) 999-0088
Florida Bar No. 92797

Attorney for Petitioner

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Appendix has been sent on March 9, 2020 to the following :

Joseph O'Connell
Office of Immigration Litigation
PO Box 878, Ben Franklin Station
Washington, DC 20044

APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13971

FIEZAL MOHAMAD,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

Before MARTIN, JILL PRYOR, and BRANCH, Circuit Judges.

BY THE COURT:

Fiezal Mohamad seeks an emergency stay of removal pending the resolution of his Petition for Review. We previously temporarily stayed his removal for a period of 48 hours to allow the Court sufficient time to consider his motion. Now, after careful review, we conclude that he has failed to adequately demonstrate a likelihood of success on the merits of his appeal. See Nken v. Holder, 556 U.S. 418, 434, 129 S. Ct. 1749, 1761 (2009). His petition for an emergency stay of removal is therefore DENIED.

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13971

FIEZAL MOHAMAD,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

Before MARTIN, JILL PRYOR, and BRANCH, Circuit Judges.

MARTIN, Circuit Judge:

Fiezal Mohamad seeks an emergency stay of removal pending the resolution of his Petition for Review. Mr. Mohamad filed his motion at 1:42 pm Eastern Standard Time and the government has requested a ruling before the close of business today. In order to allow the court time to review the merits of Mr. Mohamad's motion, the court GRANTS Mr. Mohamad's motion in part and orders his removal STAYED for a period of 48 hours.

IN THE UNITED STATES CIRCUIT COURT
FOR THE ELEVENTH CIRCUIT
ATLANTA, GEORGIA

Fiezal Mohamad,
Petitioner,

vs.

William Barr, US Attorney General,
Respondent.
_____/

CASE No. : 19-13971

Alien Number : A 039-057-714

APPEAL FROM A DECISION OF THE
BOARD OF IMMIGRATION APPEALS

EMERGENCY MOTION

PETITIONER'S MOTION FOR EMERGENCY STAY OF REMOVAL

CUSTODY STATUS: DETAINED

Submitted by :
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C 1 of 1
Case No.: 19-13971

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I HEREBY CERTIFY that the following persons may have an interest in the outcome of this case:

1. William Barr, United States Attorney General;

2. Michael Meade, Operations Director, Enforcement and Removal Operations, Immigration and Customs Enforcement, Department of Homeland Security, Miami, Florida;

3. Thomas Hussey, Attorney, United States Department of Justice, Office of Immigration Litigation;

4. Joseph O'Connell, Attorney, United States Department of Justice, Office of Immigration Litigation;

5. Ana Mann, Member, Board of Immigration Appeals;

6. Nelson Perez, Chief Counsel, Department of Homeland Security, Miami, Florida ;

7. David Stoller, Esquire, Counsel for Petitioner.

By: /s/ David Stoller /s/
David Stoller, Esquire

INTRODUCTION AND POSITION OF PETITIONER

Pursuant to Federal Rule of Appellate Procedure 27 and Local Rule 27-1, Petitioner moves this Court to stay his removal. Petitioner has been informed that Immigration and Customs Enforcement ("ICE") will effectuate the final administrative order of removal entered against him on or before February 25, 2020.

Petitioner seeks an emergency stay of his removal to permit him to remain in the United States while this Court considers his Petition for Review of the Order of the Board of Immigration Appeals ("Board" or "BIA") dated September 9, 2019. This Order dismissed Petitioner's appeal of an Immigration Judge's ("IJ") decision determining that Petitioner is subject to deportation from the United States.

The undersigned's office contacted the Office of Immigration Litigation ("OIL") and spoken with Joseph O'Connell, counsel for Respondent. Mr. O'Connell could not confirm the information provided to the undersigned that Petitioner was at imminent risk of removal. Upon filing the instant request, the undersigned will contact Mr. O'Connell again to update Respondent on action taken with regards to the instant request for a stay of removal. The undersigned will thereafter update this tribunal with regards to the government's position on the request herein.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Petitioner is a citizen of Guyana who was issued a Form I-862, Notice to Appear ("NTA"), by the Department of Homeland Security ("Department").

Certified Administrative Record ("CAR") 674-676. The NTA charges Petitioner as being subject to deportation in accordance with : (1) 8 U.S.C. §1227(a)(2)(E)(i) (alien convicted of a crime of domestic violence, stalking or child abuse, child neglect or child abandonment); (2) §1227(a)(2)(A)(ii) (alien convicted of two or more crimes involving moral turpitude ("CIMT")) ; and (3) §1227(a)(2)(A)(iii) (alien convicted of an aggravated felony).[1]

These charges are based upon two convictions. The first was violation of 18 U.S.C. §641 (Theft of Government Property). CAR 597-601. The second was violation of Fla. Stat. §847.0135(4)(a) (Unlawful Travel to Meet a Minor). CAR 587-596.

On January 30, 2018, an Immigration Judge ("IJ") determined that Petitioner was subject to deportation in accordance with §1227(a)(2)(A)(ii) [conviction of two or more CIMT's after admission] and §1227(a)(2)(A)(iii) [conviction of an "aggravated felony"]. The IJ declined to sustain the §1227(a)(2)(E)(i) charge [crime of child abuse]. CAR 555-560. Petitioner appealed this decision to the Board of Immigration Appeals ("Board"). CAR 536-554.

On July 9, 2018, the Board requested supplemental briefing on the question of whether Petitioner was subject to removal on the three charges lodged in the NTA.

[1] This "aggravated felony" charge relates to 8 U.S.C. §1101(a)(43)(A), a law relating to murder, rape or sexual abuse of a minor.

CAR 487-488. The Board remanded proceedings to the IJ on September 14, 2018. CAR 459.

The Department thereafter filed a Form I-261, Additional Charges of Inadmissibility/Deportability ("Form I-261") and in so doing lodged provided two additional charges : (1) §1227(a)(2)(A)(iii) (alien convicted of an aggravated felony)[2] ; and (2) §1227(a)(2)(A)(iii) (alien convicted of an aggravated felony)[3]. CAR 240-241.

In a written decision dated April 15, 2019, the IJ concluded : (1) that Petitioner's conviction for violating Fla. Stat. §847.0135(4)(a) constituted "sexual abuse of a minor" ; (2) that Petitioner's convictions were both for CIMT's ; and (3) that Petitioner was ineligible for the relief described at 8 U.S.C. §1229b(a) because he had been convicted of an "aggravated felony." CAR 70-82.

Petitioner filed a second appeal with the Board. CAR 49-69. The Board dismissed Petitioner's appeal on September 9, 2019. CAR 3-5. In so doing, the Board entered a final administrative order of removal. *See* 8 U.S.C.

[2] This "aggravated felony" charge relates to 8 U.S.C. §1101(a)(43)(U), an attempt or conspiracy to commit an offense described in 8 U.S.C. §1101(a)(43)(A) ["sexual abuse of a minor"].

[3] This "aggravated felony" charge relates to 8 U.S.C. §1101(a)(43)(U), an attempt or conspiracy to commit an offense described in 8 U.S.C. §1101(a)(43)(F) [a crime of violence].

§1101(a)(47)(B)(i).Petitioner sought review of the agency's decision by filing a Petition for Review with this tribunal.

The Board's order focuses exclusively on §1227(a)(2)(A)(ii). The question presented is whether violating Fla. Stat. §847.0135(4)(a) is categorically a CIMT. Petitioner submits that it is not. As such, the agency's order should be vacated and proceedings remanded to the agency for further proceedings. Deciding that the IJ was correct when he concluded that Petitioner was subject to removal on this ground, the Board affirmed the IJ's decision.

ARGUMENT

Adjudication of a motion for stay of removal requires the Court to consider four factors: (1) whether Petitioner has made a strong showing that he is likely to succeed on the merits, (2) whether Petitioner will be irreparably injured absent the granting of the stay of removal, (3) whether issuance of the stay of removal will injure other parties interested in these proceedings, and (4) where the public interest lies. Nken v. Holder, 556 U.S. 418, 434 (2009); *see also* Hand v. Scott, 888 F.3d 1206 (11th Cir. 2018); Philidor v. U.S. Att'y Gen., No. 09-14829 (11th Cir. 2010) (Unpublished). The Court may grant a stay of removal in the "exercise of discretion" based on "the circumstances of the case." Nken, *supra* at 433 (internal quotations and citation omitted). Petitioner submits that he satisfies each of the four factors and that the exercise of discretion on his behalf is warranted.

A. Petitioner is likely to succeed on the merits.

Petitioner submits he is likely to succeed on the merits of his Petition for Review because the agency erred when it determined that the Department had met its burden of proof in establishing that Petitioner was subject to deportation on the sole ground considered by the Board, 8 U.S.C. §1227(a)(2)(A)(ii).

The Board's order dated September 9, 2019 is the decision to be considered in these proceedings because the Board issued its own opinion during the proceedings below. Rodriguez Morales v. U.S. Att'y Gen., 488 F.3d 884 (11th Cir. 2007). Legal determinations made during the administrative proceedings are considered *de novo* by the Circuit Court. Diallo v. U.S. Att'y Gen., 596 F.3d 1329 (11th Cir. 2010).

"In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." 8 U.S.C. §1229a(c)(3)(A).[4]

This "clear and convincing" standard was discussed by the Supreme Court in Woody v. INS, 385 U.S. 276 (1966). There, the Court opined that

[4] "A[n] [alien] charged with deportability shall be found to be removable if the Service proves by clear and convincing evidence that the [alien] is deportable as charged." 8 C.F.R. §1240.8(a).

> "[i]n denaturalization cases, the Court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence. The same burden has been imposed in expatriation cases. That standard of proof is no stranger to the civil law.
>
> *No less a burden of proof is appropriate in deportation proceedings. The immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at least, result in expulsion from our shores. And many resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens*.
>
> We hold that no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." (emphasis added).

The portion of the Board's decision that is at issue herein states as follows[5] :

> "[w]ith respect to removability, we will not disturb the Immigration Judge's decision to sustain the charge of removability under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. §1227(a)(2)(A)(ii), as the respondent is an alien who, at any time after admission, was convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. There is little dispute that his 1994 conviction for Theft of United States Property in violation of 18U.S.C. §641 constitutes a first conviction for a crime involving moral turpitude.
>
> The respondent's arguments on appeal do not persuade this Board that his 2015 conviction for Unlawfully Travelling to Meet a Minor in violation of FL. STAT. §847.0135(4)(a),which arose from a separate scheme of criminal misconduct, does not constitutes [sic] a second conviction for a crime involving moral turpitude. The

[5] The remainder of the Board's decision discusses the propriety of Petitioner's request for cancellation of removal for certain permanent residents as set forth at 8 U.S.C. §1229b(a). Because this is a "discretionary" form of relief, judicial review is foreclosed. *See* 8 U.S.C. §1252(a)(2)(B)(i).

> respondent, on appeal, raises various claims regarding his conviction, such as that the victim of his offense was an undercover police officer. However, even if the victim of such crime was an undercover police officer posing as a child, if commission of the substantive crime involves moral turpitude, then so does the attempt, because moral turpitude inheres in the intent. The respondent has not identified any instances from Florida caselaw where FL. STAT. §847.0135(4)(a) was applied to criminal conduct which did not involve an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between men. Instead, a review of Florida caselaw indicates that the statute at issue is applied only to situations where a defendant engaged in inherently vile conduct.
>
> Overall, the respondent has not established that there is a realistic probability that FL.STAT. §847.0135(4)(a) is applied to reach conduct which is not morally turpitudinous. To the extent that the respondent argues that, in his own case, he did not know the age of his victim, this claim is refuted by the police report which indicates that he travelled to engage in sexual activities with an undercover police officer whom he believed was a 14-year-old child. Likewise, he readily admitted to the Immigration Judge that, before travelling to meet the police officer, "She said, 'I'm 14'"
>
> For the reasons set forth above, we will not disturb the Immigration Judge's decision to sustain the charge of removability under section 237(a)(2)(A)(ii) of the Act based upon the holding that the respondent's two aforementioned convictions constitute convictions for crimes involving moral turpitude." CAR 3-4 (internal citations omitted).

In Fajardo v. U.S. Att'y Gen., 659 F.3d 1303 (11th Cir. 2011), the Court stated that

> "[t]o determine whether a conviction for a particular crime constitutes a conviction of a crime involving moral turpitude, both this Court and the BIA have historically looked to "the inherent

> nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct." This framework has come to be known as a categorical approach.
>
> If the statutory definition of a crime encompasses some conduct that categorically would be grounds for removal as well as other conduct that would not, then the record of conviction—i.e., the charging document, plea, verdict, and sentence—may also be considered. This has been called the modified categorical approach. However, counts charging separate offenses, even if simultaneously charged, may not be combined and considered collectively to determine whether one or the other constitutes a conviction of a crime involving moral turpitude." (internal citations omitted).

In Itani v. Ashcroft, *supra*, this Court considered the question of whether an alien's conviction for Misprision of a Felony in violation of 18 U.S.C. §4 was a CIMT. Concluding that the offense itself "require[d] both knowledge of a crime and some affirmative act of concealment or participation," the Court opined that the offense is a CIMT "because it necessarily involves an affirmative act of concealment or participation in a felony, behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity."

Petitioner was charged by Information and eventually convicted of violating §847.0135(4)(a) of the Florida Statutes. This statute provides, in pertinent part, that

> "[a]ny person who travels any distance either within this state, to this state, or from this state by any means, who attempts to do so, or who causes another to do so or to attempt to do so for the purpose of engaging in any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in other unlawful sexual conduct with a child or with another person believed by the person to be a child after using a computer online

> service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:
>
> (a) Seduce, solicit, lure, or entice or attempt to seduce, solicit, lure, or entice a child or another person believed by the person to be a child, to engage in any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in other unlawful sexual conduct with a child…
>
> commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084."

Speaking for the majority in Mathis v. United States, 579 U.S. --, 136 S. Ct. 2243 (2016), Justice Kagan wrote that

> "[t]o determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficient match the elements of generic burglary, while ignoring the particular facts of the case... 'Elements' are the 'constituent parts' of a crime's legal definition-the things the 'prosecution must prove to sustain a conviction." At a trial they are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty. Fact, by contrast, are the mere real-world things-extraneous to the crime's legal requirements… They are the 'circumstance[s]' or 'event[s]' having no "legal effect [or] consequence"; In particular, they need neither be found by a jury nor admitted by a defendant… A crime counts as 'burglary' under the Act if its *elements* are the same as, or narrower than, those of the generic offense. But if the crime of conviction covers any more conduct than the generic offense, then it is not a[] 'burglary-even if the defendant's actual conduct (i.e. the facts of the crime) fits within the generic offense's boundaries." (emphasis in original) (internal citations omitted).

The question of whether Fla. Stat. §847.0135(4)(a) is a CIMT turns upon the question of whether each "illegal act" described in chapters 794, 800 and 827 of the Florida Statutes is itself a CIMT.

Commission of the target offense requires two elements to be met, "use of an electronic means" and "travel." Various means through which each element can be committed are described in the pertinent Standard Jury instructions :

1. (Defendant) used a[n] [computer on-line service] [Internet service] [local bulletin board service] [device capable of electronic data storage or transmission] to [seduce] [solicit] [lure] [entice] [attempt to [seduce] [solicit] [lure] [entice]] a [child] [person believed by the defendant to be a child] to engage in [(insert illegal act in chapter 794, 800, or 827 as alleged in the charging instrument)] [unlawful sexual conduct].

2. (Defendant) then [traveled] [attempted to travel] [caused another to travel] [attempted to cause another to travel] [within this state] [to this state] [from this state] for the purpose of *[(insert violation of chapter 794, 800, or 827 as alleged in the charging instrument)] [unlawful sexual conduct]* with a [child] [person believed by the defendant to be a child]. (emphasis added).

Petitioner submits that the target statute does not categorically define a CIMT and refers to the language above in presenting this argument.

The vast majority of offenses discussed in chapters 794, 800 and 827 are themselves CIMT's. However, the language of Fla. Stat. §847.0135(4)(a) itself provides a "realistic probability" of committing an offense is *not* a CIMT. Petitioner points to Fla. Stat. §827.08, which states, in pertinent part,

> "[a]ny person who willfully misapplies funds paid by another or by any governmental agency for the purpose of support of a child … A person shall be deemed to have misapplied child support funds when such funds are spent for any purpose other than for necessary and proper home, food, clothing, and the necessities of life, which expenditure results in depriving the child of the above named necessities."

A "realistic probability" can be established in two ways: (1) show prosecution of an offense falling outside the generic definition, or (2) establish how the statute, on its face, creates a "realistic probability." "[W]hen a 'state statute's greater breadth is evidence from its text,' a [respondent] need not point to an actual case applying the statute of conviction in a nongeneric manner." Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007) (*quoting* United States v. Grisel, 488 F.3d 844 (9th Cir. 2007)).

In Ramos v. U.S. Att'y Gen., 709 F.3d 1066 (11th Cir. 2013), the Court opined that "to find a state statute creates a crime outside the generic definition … requires more than the application of legal imagination of the state statute's language." Stated another way, where the statutory language itself creates a "realistic probability" of prosecution under the statute there is no need to apply "legal imagination" and thus no reason to provide proof the statue would prosecute. Id.; *see also* Jean-Louis v. U.S. Att'y Gen., 709 F.3d 462 (3rd Cir. 2009); United States v. Grisel, *supra*. "The statute's language therefore creates the 'realistic probability' that it will punish crimes that do qualify as … offenses and crimes that do not." Ramos, *supra* at 1072. *See also* Matter of Sanchez Lopez, 27

I & N Dec. 256 (BIA 2018) ("the statutory text … establishes that there is a "realistic probability" that California would apply the statute to conduct falling outside the [federal] definition").

In Matter of Navarro Guadarrama, 27 I & N Dec. 560 (BIA 2019), the Board decided that Ramos was no longer of precedential value. Citing the *en banc* opinion issued in United States v. Vail-Bailon,[6] the Board suggested that "a majority of the Eleventh Circuit … declined to follow *Ramos*'s understanding of the realistic probability doctrine." The Board's analysis is flawed. Not only does Ramos remains good law, subsequent opinions from the Supreme Court discussing the "realistic probability" test support Ramos' jurisprudence. Moreover, the agency fails to acknowledge its own decision issued in Matter of Sanchez-Lopez is likewise consistent with Ramos.

In Bourtzakis v. U.S. Att'y Gen., 940 F.3d 616 (11th Cir. 2019), the panel states that

> "[t]o establish that realistic probability, an applicant for naturalization 'must at least point to his own case or other cases in which the state courts in fact did apply the statute in the [broad] manner for which he argues.' The only exception to this rule is when "*the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond'*

[6] 868 F.3d 1293 (11th Cir. 2017) (*en banc*), *cert. denied*, 138 S.Ct. 2680 (2018). Petitioner notes that this Court's *en banc* opinion in Vail-Bailon was published on August 25, 2017.

> *that proscribed by the federal Act*." (internal citations omitted) (emphasis added).

Insofar as the panel's opinion in Bourtzakis specifically refers to Moncrieffe v. Holder, 569 U.S. 184 (2013) and Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), the Board's suggestion that Ramos cannot be relied upon as good law is highly misplaced. *See also* Guillen v. U.S. Att'y Gen., 910 F.3d 1174 (11th Cir. 2018) ("[n]o deference is owed to [the Board's] construction of a state statute") ; United States v. Davis, 875 F.3d 592 (11th Cir. 2017) ("[a] petitioner does not engage in 'legal imagination' 'when the statutory language itself … creates the 'realistic probability' that a state would apply the statute' to the identified least culpable conduct," regardless of whether it actually has done so").

In Matter of Navarro Guadarrama, *supra*, the Board analyzed the alien's claim that his Florida convictions for possession of marijuana do not "relate to" a substance described in the Controlled Substances Act, 21 U.S.C. §802. The Board conceded that the state definition was broader than the federal definition such that an alien may be convicted in Florida for an offense that would not meet the federal definition.

Despite conceding the target statute's overbroad language, the Board nevertheless required the alien to establish a "realistic probability that the State

would actually apply the statute to an offense involving a substance that was not federally controlled."[7]

The Board reasoned that

> "[u]ltimately, the decisions of the Supreme Court and the Eleventh Circuit control and support our approach in this case. The Court has broadly stated that there must be a realistic probability of a State applying a statute beyond the Federal definition for the State law "to fail the categorical inquiry," and that whether such a probability exists depends on if the State "actually" prosecutes the offense in a manner broader than the Federal law. Moncrieffe, 569 U.S. at 205-06. Thus, according to Moncrieffe, the realistic probability test is required, even where a State statute is facially broader than its Federal counterpart. Id. at 206 (employing that test in determining whether a State firearms statute that had no exception for antique firearms was applied more broadly than the Federal statute, which included such an exception)." Matter of Navarro Guadarrama, *supra*, at 566-567

The Board's opinion relies upon the following language in Moncrieffe, *supra*,

> "[f]inally, the Government suggests that our holding will frustrate the enforcement of other aggravated felony provisions, like [8 U.S.C.] §1101(a)(43)(C), which refers to a federal firearms statute that contains an exception for "antique firearm[s]," 18 U. S. C. §921(a)(3). The Government fears that a conviction under any state firearms law that lacks such an exception will be deemed to fail the categorical inquiry. But Duenas-Alvarez requires that there be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." 549 U. S., at 193. To defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense

[7] Petitioner notes that there is only one "substance" at issue in these proceedings, "marijuana." Petitioner is unable to explain the agency's discussion of substances that are controlled by federal law and substances that are not. The issue here is one dealing with different "means" of possessing the same controlled substance.

> in cases involving antique firearms. Further, the Government points to §1101(a)(43)(P), which makes passport fraud an aggravated felony, except when the noncitizen shows he committed the offense to assist an immediate family member. But that exception is provided in the INA itself. As we held in Nijhawan, a circumstance-specific inquiry would apply to that provision, so it is not comparable. 557 U.S., at 37-38."

The Board's analysis is flawed. The issue in Navarro Guadarrama, *supra*, is that the state statute is broader than its federal counterpart and thus there is no categorical match. The analysis ends with the concession.

With regards to the "antique" firearms question discussed in Moncrieffe, the same analysis applies insofar as the target statute defines "firearm" and a federal counterpart defines "firearm." The target statute lacks an "antique firearms" exception like the one described at 18 U.S.C. §921(a)(3).

The difference between these two scenarios is that one state statute *includes* terms left out of the corresponding federal definition while the other state statute fails to *exclude* terms written out of the corresponding federal statute. As to the former, the very language of the statute actually proscribes conduct not proscribed by its federal counterpart. As to the latter, the alien bears the burden of establishing the "realistic probability" that the state statute is actually employed more broadly.

A "realistic probability" exists that Fla. Stat. §847.0135(4)(a) can be violated through commission of an offenses that is not a CIMT. This conclusion does not

depend upon the "legal imagination," rather it is based on the very language of the statute itself (e.g. reference to Fla. Stat. §827.08 as the underlying offense). Accordingly, the government could not meet its burden has not established that Petitioner is subject to removal in accordance with §1227(a)(2)(A)(ii). *See* 8 C.F.R. §1240.8(a).

B. Absent a Stay of Removal, Petitioner faces irreparable harm.

1. Deportation to Guyana would irreparably harm Petitioner.

A showing of irreparable injury is "dependent upon the circumstance of the particular case." Nken, 556 U.S. at 433 (internal quotations and citation omitted). Petitioner will soon celebrate his 47th birthday and has resided in the United Statrs since he was twelve. Removing him to Guyana would leave him alone in his country of citizenship, a country he does not know. Removing Petitioner could place him in a potentially life-threatening scenario from which he may not recover.

2. The Department's return policy does not provide Petitioner with effective relief if he prevails.

The Supreme Court found that removal was not "categorically irreparable" as a matter of law. Nken, 566 U.S. at 435. Any eventual victory on the merits of the petition for review, however, will ring hollow because there is no reliable, fair or binding policy in place to ensure Petitioner's return to the United States.

The Supreme Court finding relied upon the Solicitor General's ("SG") assurance that individuals who prevail on their Petition for Review "can be afforded

effective relief by facilitation of their return along with restoration of the immigration status they had upon removal."[8] Id. However, ICE does not maintain an effective or consistent return policy for those who found success with a petition for review.

Following the publication of Nken, the SG informed the Supreme Court that it was "not confident that the process of returning removed aliens, either at the time the brief was filed or during the intervening three years, was consistently effective as the statute in its brief in Nken implied." Letter from Michael R. Dreeben, Deputy Solicitor General, to William K. Suter, Clerk of the Supreme Court, at 4 (Apr. 24, 2012).[9] The SG acknowledged "significant impediments" face erroneously deported noncitizens seeking return and explained that

> "[t]hose difficulties stemmed in part from the absence of a written, standardized process for facilitating return; the resulting uncertainty in how to achieve that objective in field offices, U.S. embassies and consulates, and other agencies involved in the process; and the lack of clear and publicly accessible information for removed aliens to use in seeking to return if they received favorable judicial rulings." Id. at 3-4.

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[8] "By policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, inter alia, facilitating the alien's return to the United States by parole under 8 U.S.C. § 1182(d)(5) if necessary, and according them the status they had at the time of removal." Id. (citing Resp. Br. at 44, Nken v. Holder, 556 U.S. 418, No. 08-861 (Jan. 2009)).

[9] *Available at* http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/OSG%20Letter%20to%20Supreme%20Court,%20Including%20Attachments%20-%20April%2024%202012.pdf.

Not only is Petitioner returning to a country he does not know, the government has been less than credible with the Courts with regards to its policies in this regard.

3. Respondent cannot ensure that Petitioner will be restored to his pre-removal status if the Court denies his Stay of Removal and he later prevails on his Petition for Review.

On or about February 24, 2012, ICE issued a general policy directive advising how aliens in certain limited sets of cases would be returned to the United States after removal. *See* ICE Policy Directive Number 11061.1: Facilitating the Return of the United States of Certain Lawfully Removed Aliens ("ICE Policy Directive"). The policy directive was supplemented by "Frequently Asked Questions" being posted by the Department. Even if Respondent could ensure that the policy would be applied in Petitioner's case, the policy would be wholly inadequate to provide complete restoration to Petitioner if he prevails. This concern is even more an issue if Petitioner falls upon difficulties following his removal.

4. The current policy is untested, non-binding and imposes costs on Petitioner if he prevails.

The current ICE Policy Directive is non-binding and "is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." ICE Policy Paragraph 8. The ICE Policy Directive was not promulgated through "notice and comment" procedures and is unlikely to be enforced. Nothing

preventing the current administration from changing this policy, potentially leaving Petitioner stranded in Guyana if he were to prevail.

Because this practice is wholly dependent on the coordination of several agencies not party to these proceedings, it would require Petitioner to bear the costs of return. These costs themselves could prove to be irreparable harm for Petitioner as he has been held in a detention center since the initiation of his removal proceedings.

The ICE Policy Directive requires Customs and Border Protection ("CBP") to allow Petitioner to return to the United States through a port-of-entry, however no CBP policy contemplating the return of a Petitioner is mentioned. Each of these difficulties is avoided were the stay of removal requested herein granted. Indeed, Petitioner may be placed in a position of having no other alternative but to return to this Court to pursue an order mandating the Department's compliance with this Court's order granting his Petition.

C. The issuance of a stay will neither injure the Government nor is it contrary to public interest.

The Nken Court found that the remaining two factors for a stay of removal, (1) injury to other parties in the litigation and (2) the public interest as being merged in immigration cases because the government is both the opposing party and the representative of public interest. Nken, 556 U.S. at 435. The Court found these considerations to be heightened where the alien is "particularly dangerous" or where

the alien has stayed in the United States a "substantially prolonged" amount of time "abusing the process provided to him." Nken, 566 U.S. at 436. Petitioner submits that there are no factors that exist that would suggest that the government has any interest in Petitioner's removal beyond the general interests noted in Nken.

Although Petitioner has a criminal history, his interactions with law enforcement are non-violent in nature. Petitioner was twelve years old when he arrived in the United States and would encounter difficulty establishing himself anew in Guyana. Petitioner would leave behind his entire immediate family in the United States were he removed.

The Nken Court also recognized the "public interest in preventing aliens from being wrongfully removed," which must be heavily weighed by this Court in its consideration to of Petitioner's request. Nken, 556 U.S. at 436. Petitioner submits that Respondent cannot show how granting a stay of removal would result in substantial injury to the government or conflict with public interest such that either consideration would outweigh the hardship to Petitioner if he were wrongfully removed from the United States.

CONCLUSION

WHEREFORE, Petitioner respectfully requests this Court to:

1. GRANT the instant Emergency Motion for Stay of Removal; and
2. Take any other action this Court deems just and proper given the circumstances presented.

RESPECTFULLY SUBMITTED this 24th day of February, 2020:

/s/ David Stoller /s/
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Case No.: 19-12367

EXHIBIT LIST

Exhibit 1 : Order of the Board of Immigration Appeals;

Exhibit 2 : Philidor v. US Att'y Gen., No. 09-14829 (11th Cir. June 22, 2010) (unpublished);

Exhibit 3 : ICE Policy Directive Number 11061.1: Facilitating the Return of the United States of Certain Lawfully Removed Aliens.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because this motion contains 5,179 words, excluding the exempted parts of the motion. This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in 14-point Times New Roman font.

/s/ David Stoller /s/
David Stoller, Esquire
David Stoller, PA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioner's Initial Brief was uploaded to the Court's CM/ECF system, which will send electronic notice to the following on this 24th day of February, 2020.

Joseph O'Connell
U.S. Department of Justice
Office of Immigration Litigation
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450 5th Street NW
Washington, DC 20001

/s/ David Stoller /s/
David Stoller, Esquire
David Stoller, PA

APPENDIX 3

APPENDIX 4

No. 19-13971

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FIEZAL MOHAMAD,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION FOR A STAY OF REMOVAL

Agency No. A039-057-714

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ATTORNEYS FOR RESPONDENT

Fiezal Mohamad v. U.S. Att'y Gen., 11th Cir. No. 19-13971,
A039-057-714

AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that, in addition to the individuals named in Petitioner's Certificate of Interested Persons, the following persons also have an interest in the outcome of this case:

1. FERRIER, Cindy, Assistant Director, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, D.C.;
2. HUNT, Joseph H., Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, D.C.;
3. MANN, Ana, Board Member, Board of Immigration Appeals, Falls Church, Virginia;
4. MOHAMAD, Fiezal, Petitioner, Orlando, FL;
5. O'CONNELL, Joseph A., Attorney for Respondent, Trial Attorney, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, D.C.
6. OPACIUCH, Adam, Immigration Judge, Miami, Florida;
7. STOLLER, David, Petitioner's Attorney, Orlando, Florida.

s/ *Joseph A. O'Connell*
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No. 19-13971

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FIEZAL MOHAMAD,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS
Agency No. A039-057-714

BRIEF FOR RESPONDENT

STATEMENT OF JURISDICTION

Petitioner Fiezal Mohamad seeks a stay of removal pending the Court's adjudication of his petition for review of a final order of the Board of Immigration Appeals ("Board") dated September 9, 2019, dismissing his administrative appeal from an Immigration Judge's ("IJ") decision ordering him removed to Guyana. *See* Certified Administrative Record ("AR") 3-5, 54-65; *see also* Motion for Stay of Removal, filed on February 24, 2019 ("Stay Motion"). Respondent, the U.S.

Attorney General, through the undersigned counsel, herein opposes Petitioner's motion.

BACKGROUND

Mohamad is a native and citizen of Guyana. AR 572, 676. He was admitted to the United States on May 31, 1985, as a lawful permanent resident. *Id*. Mohamad has been convicted of a number of crimes in the United States following his admission. On March 1, 1994, Mohamad was convicted in the United States District Court in Orlando, Florida, for the offense of Theft of United States Property, in violation of 18 U.S.C. § 641. AR 572, 676; *see* AR 597-601 (conviction documents). He was sentenced to one year of probation, and ordered to pay restitution in the amount of $11,107.11, jointly and severally. *Id*. AR 572, 676; *see* AR 600.

Additionally, on September 15, 2015, Mohamad was convicted in the 18th Judicial Circuit Court for Seminole County, Florida, for the offense of Unlawfully Traveling to Meet a Minor, in violation of Fla. Stat. § 847.0135(4)(a). AR 572, 676; *see* AR 587-96 (conviction documents). He was sentenced to 32 months in prison, followed by a period of five years on "Sex Offender Probation." AR 589.

The Department of Homeland Security ("DHS") placed Mohamad into removal proceedings on November 9, 2017, by filing a Notice to Appear with the

Miami Immigration Court. AR 674-76. The DHS charged Mohamad with being subject to removal under three alternative grounds: (1) under 8 U.S.C. § 1227(a)(2)(E)(i), for having been convicted of a crime of child abuse; (2) under 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony, law relating to the Sexual Abuse of a Minor; and (3) under 8 U.S.C. § 1227(a)(2)(A)(ii), for having been convicted of two CIMTs not arising out of a single scheme of criminal misconduct. AR 676.

Mohamad filed an application for cancellation of removal for permanent residents. AR 323-29. On March 20, 2019, Mohamad testified in support of his cancellation application. *See* AR 129-93. Mohamad testified that he entered the United States in 1985, when he was twelve years old, as a lawful permanent resident. AR 132. He said he has been arrested and convicted on five separate occasions in the United States. AR 150.

Mohamad's first arrest occurred in March 1993, when he was apprehended stealing bags of money from a tractor trailer. AR 150-51, 170. Mohamad pled guilty to Theft of United States Property, in violation of 18 U.S.C. § 641. AR 153, 173-75; *see* AR 572, 676; AR 597-601. He was sentenced to one year of probation, and ordered to pay restitution in the amount of $11,107 dollars. AR 173-75. Mohamad was arrested a second time in 1998 or 1999 for driving with a suspended license and failing to pay traffic tickets. AR 153. He was given

a fine and placed on probation. AR 154. He was arrested a third time in July 1999 for possession of marijuana. AR 155. He was again given a fine and probation. *Id*. He was arrested a fourth time in 2005 for solicitation of prostitution. AR 155-56. He was placed on probation again. AR 156.

Mohamad's fifth arrest came in March 2014, when Mohamad was 41 years old. AR 157. Mohamad said he was texting with an individual on a dating website. AR 157. In fact, the individual was an undercover police officer, who was impersonating a 14-year-old girl, and explicitly indicated as much to Mohamad. AR 187-88. During the course of their interaction, Mohamad indicated that he would perform oral sex on this individual, and then proceeded to drive to meet this person in another area. AR 158, 189-90. Mohamad was arrested by law enforcement officials upon his arrival. AR 159. He was later convicted by a jury of Unlawfully Traveling to Meet a Minor by a jury, and sentenced to thirty-two months in prison. AR 190-91. Mohamad was also placed on "Sex Offender Probation," is required to register as a sex offender every year, and must stay away from minors. AR 192-93; *see* AR 589.

On April 15, 2019, the IJ issued a written decision. AR 54-65. The IJ first determined that Mohamad's conviction for Traveling to Meet a Minor constitutes an aggravated felony / "sexual abuse of a minor," and that Mohamad was subject to removal on that basis. AR 57-58. The IJ also concluded, in the alternative, that

Mohamad's convictions for Theft of Government Property and Traveling to Meet a Minor both constituted crimes involving moral turpitude not arising out of a single scheme of misconduct, and that Mohamad was also subject to removal on that basis. AR 59-60.

The IJ then addressed Mohamad's application for cancellation of removal. AR 61-64. The IJ concluded that Mohamad was not statutorily eligible to apply for cancellation of removal because Mohamad's conviction for Traveling to Meet a Minor was also an aggravated felony. AR 61-62; *see* 8 U.S.C. § 1229b(a)(3). Alternatively, the IJ denied Mohamad's cancellation application as a matter of discretion. AR 62-64. In doing so, the IJ noted that Mohamad's criminal convictions, "especially the seriousness and nature of his traveling to meet a minor offense," outweighed any of the positive equities. AR 63-64. Accordingly, the IJ denied Mohamad's cancellation application, and ordered him removed from the United States to Guyana. AR 65.

Through counsel, Mohamad appealed the IJ's decision to the Board. AR 8-27. Mohamad argued that his conviction for Unlawfully Traveling to Meet a Minor was neither a "crime of child abuse, nor an aggravated felony / "sexual abuse of a minor." AR 21-22. He also argued that he was *prima facie* eligible for cancellation of removal because none of his criminal convictions constituted

aggravated felonies, and because he warranted a favorable exercise of discretion despite his criminal convictions. *See* AR 22-25.

On September 9, 2019, the Board issued a decision. AR 3-5. The Board refused to disturb the IJ's determination that Mohamad is removable for having been convicted of two CIMTs not arising out of a single scheme of criminal misconduct. AR 3-4. First, the Board noted that there was little dispute that Mohamad's Theft of United States Property conviction constituted a CIMT. AR 3. Next, the Board concluded, like the IJ, that Mohamad's conviction for Unlawfully Traveling constituted a CIMT as well. AR 3-4. In that regard, the Board noted that Mohamad did not identify any instances of Florida case law where the statute in question was not applied to conduct that is morally turpitudinous. *Id.* Accordingly, the Board concluded that Mohamad did not show a "realistic probability" that this statute reaches conduct that is not morally turpitudinous. AR 4.

The Board also refused to disturb the IJ's denial of Mohamad's application for cancellation of removal as an exercise of discretion. AR 4. In doing so, the Board noted that Mohamad's numerous criminal arrests outweighed any positive equities. *Id.* Finally, because these determinations were dispositive of Mohamad's removability and eligibility for cancellation of removal, the Board declined to reach the issue of whether Mohamad "has been convicted of an aggravated felony

or is otherwise subject to removal from the United States." *Id*. (citing *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (per curiam)). Accordingly, the Board dismissed Mohamad's administrative appeal. AR 5.

Mohamad filed a petition for review of the Board's decision and, on February 24, 2020, he filed a motion requesting a stay of removal. For the reasons that follow, this Court should deny that motion.

ARGUMENT

THE COURT SHOULD DENY MOHAMAD'S MOTION FOR A STAY OF REMOVAL BECAUSE HE HAS NOT ESTABLISHED THAT HE IS ELIGIBLE FOR SUCH EXTRAORDINARY RELIEF

A. Legal Standard For Evaluating A Motion For A Stay Of Removal

The applicable legal standard for evaluating an alien's request for a stay of removal pending adjudication of his petition for review was clarified by the Supreme Court in *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749 (2009). In *Nken*, the Supreme Court held that such requests should be analyzed using a four-part test that substantially overlaps with the traditional test for granting preliminary injunctive relief. *Id.* at 434. This four-part test consists of the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties

interested in the proceeding; and (4) where the public interest lies." *Id*. (*quoting Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

The four-part test does not involve balancing interdependent factors against one another, such that the failure to satisfy one element may be excused by a particularly strong showing on a different factor. *See Nken*, 556 U.S. at 435. Instead, these four factors are independent elements, each of which the alien must satisfy to meet his burden of proof in establishing that a stay of removal is warranted. *Id*. (holding that "[o]nce an applicant satisfies the first two factors[,]" then the Court must examine the harm to the opposing party and the public interest); *see also id.* at 1763 (Kennedy, J., concurring op.) ("the alien must show both irreparable injury and a likelihood of success on the merits, in addition to establishing that the interest of the parties and the public weigh in his or her favor."); *see also Philidor v. U.S. Att'y Gen.*, 384 F. App'x 876, 878-79 (11th Cir. 2010) (unpublished) ("[the petitioner is] unable to meet the first element of *Nken's* syllabus, rendering him ineligible for a stay of removal.").

B. Mohamad Has Not Made An Adequate Showing That He Is Likely To Succeed On The Merits Of His Petition

With regard to the first factor, the *Nken* Court declared that "[i]t is not enough that the chance of success . . . be better than negligible" or that the alien have a "mere possibility" of obtaining the relief sought. *Nken*, 556 U.S. at 434. Mohamad has not met this standard.

As noted, the DHS charged Mohamad with being subject to removal under, among other grounds, 8 U.S.C. § 1227(a)(2)(A)(ii), for having been convicted of two CIMTs not arising out of a single scheme of criminal misconduct. AR 676. The first conviction is for Theft of U.S. Government Property. AR 572, 676; *see* AR 597-601. The Board noted that there was little dispute as to whether this conviction constitutes a CIMT, AR 3, and Mohamad does not contest this determination in his Stay Motion. *See generally* Stay Motion.

This leaves Mohamad's 2015 conviction for Unlawfully Traveling to Meet a Minor, in violation of Fla. Stat. § 847.0135(4)(a). AR 572, 676; *see* AR 587-96 (conviction documents). The question presented in this case is whether this conviction constitutes a CIMT.

The language of the statute is as follows:

> (4) Traveling to meet a minor.--Any person who travels any distance either within this state, to this state, or from this state by any means, who attempts to do so, or who causes another to do so or to attempt to do so for the purpose of engaging in any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in other unlawful sexual conduct with a child or with another person believed by the person to be a child after using a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:
>
> > (a) Seduce, solicit, lure, or entice or attempt to seduce, solicit, lure, or entice a child or another person believed by the person to be a child, to engage in any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in other unlawful sexual conduct with a child;

Fla. Stat. Ann. § 847.0135(4)(a).

As the Florida courts have established, Unlawfully Traveling to Meet a Minor includes the four elements: "(1) knowingly traveling within this state, (2) for the purpose of engaging in any illegal act (in violation of chapters 794, 800, or 827, or other unlawful sexual conduct) with the victim after using a computer or other electronic data storage transmission to contact a child, (3) the victim was a child or person believed by the defendant to be a child, and (4) the defendant seduced, solicited, lured, enticed or attempted to do so to engage in the illegal act or unlawful sexual conduct."[1] *Hartley v. State*, 129 So. 3d 486, 491 (Fla. Dist. Ct.

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[1] One Florida decision separated the second element into two separate elements. *See Byun v. State*, No. 2D17-3838, 2019 WL 1050888, at *2 (Fla. Dist. Ct. App. Mar. 6, 2019). Moreover, in 2017, the Florida Supreme Court has approved of the combination of the first two elements and the latter two elements, providing as follows:

> To prove the crime of Traveling to Meet a Minor, the State must prove the following two elements beyond a reasonable doubt:
>
> > 1. (Defendant) used a[n] [computer on-line service] [Internet service] [local bulletin board service] [device capable of electronic data storage or transmission] to [seduce] [solicit] [lure] [entice] [attempt to [seduce] [solicit] [lure] [entice]] a [child] [person believed by the defendant to be a child] to engage in [(insert illegal act in chapter 794, 800, or 827 as alleged in the charging instrument)] [unlawful sexual conduct].
> >
> > 2. (Defendant) then [traveled] [attempted to travel] [caused another to travel] [attempted to cause another to travel] [within this state] [to this state] [from this state] for the purpose of [(insert violation of chapter

App. 2014) (citing In re Standard Jury Instructions In Criminal Cases-Report No. 2008-08, 6 So. 3d 574, 584 (Fla. 2009), available on Westlaw); *see also Holt v. State*, 173 So. 3d 1079, 1082 (Fla. Dist. Ct. App. 2015) (identifying the same four elements).

To determine whether a criminal conviction constitutes a CIMT, the Courts employ the categorical approach.[2] *Pierre v. U.S. Att'y Gen.*, 879 F.3d 1241, 1251 (11th Cir. 2018). This approach asks whether the elements of the convicting statute meet the generic definition of moral turpitude. *Id.* The Court considers the question *de novo* but defers to the Board when an Immigration and Nationality Act (the "Act") "term or provision is undefined or ambiguous, and the [Board] has interpreted that term or provision in a published, precedential decision." *Id.* at 1249 (citing *Chevron v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984)).

> 794, 800, or 827 as alleged in the charging instrument)] [unlawful sexual conduct] with a [child] [person believed by the defendant to be a child].

In re Standard Jury Instructions in Criminal Cases-Report 2017-01, 228 So. 3d 87, 92 (Fla. 2017). Again, however, these distinctions have no bearing on the outcome of this case, and Respondent will rely on the elements of the offense as they existed at the time of Mohamad's conviction in 2015.

[2] The agency resolved this case without resort to the modified categorical approach. *See* A.R. 2-4. Should the Court disagree with the agency's analysis, it should remand to the agency for it to consider in the first instance any remaining questions.

Because the Act does not define the term "crime involving moral turpitude," *Pierre*, 879 F.3d at 1251, and the Board gives the term meaning through case-by-case adjudication, *see INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999), the Court accords deference to the Board's construction of the generic definition of moral turpitude. *See, e.g.*, *Gonzalez v. U.S. Att'y Gen.*, 761 F. App'x 984, 988 (11th Cir. 2019) ("We do accept the IJ's and the BIA's conclusion that a violation of Fla. Stat. § 316.1935(2) constitutes a CIMT is not 'arbitrary, capricious, or manifestly contrary to the statute;' therefore, we defer to the agency's interpretation."); *see also Sosa-Martinez v. U.S. Att'y Gen.*, 420 F.3d 1338, 1341 n.2 (11th Cir. 2005) ("This Court reviews questions of statutory interpretation *de novo*, but defers to the BIA's interpretation if it is reasonable."); *accord Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (en banc).

"Moral turpitude is conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed to other persons." *Matter of Tejwani*, 24 I&N Dec. 97 (BIA 2007); *see also Pierre*, 879 F.3d at 1251 ("This Court has concluded that moral turpitude 'involves an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.'") (quoting *Cano v. U.S. Att'y Gen.*,

709 F.3d 1052, 1053 (11th Cir. 2013)). Generally, to involve moral turpitude, "a crime requires two essential elements: reprehensible conduct and a culpable mental state." *Matter of Silva-Trevino*, 26 I&N Dec. 826, 834 (BIA 2016).

In this case, the Board noted that Florida case law reveals that "the statute at issue is applied only to situations where a defendant engaged in inherently vile conduct." AR 4 (citations omitted). Indeed, in each of the cases cited by the Board, the defendant traveled to engage in sexual acts with undercover police officers posing as children. *See Lee v. State*, 258 So. 3d 1297 (Fla. 2018), reh'g denied, No. SC17-1555, 2018 WL 6787405 (Fla. Dec. 26, 2018) ("The investigator promptly informed Lee that 'Matt' was only fourteen years old. But even after learning that 'Matt' was a minor, Lee continued the communications [and] Lee proposed that the two engage in various sexual acts."); *Assanti v. State*, 227 So. 3d 679, 680 (Fla. Dist. Ct. App. 2017) ("Assanti offered to buy 'Ashley' drinks and teach her a 'lesson,' discussed oral sex, and arranged a meeting place. Assanti began to travel in the late evening of January 30 and was arrested with condoms in his pocket in the early hours of January 31 at the arranged meeting spot, which was the undercover operation's target house."); *Dettle v. State*, 226 So. 3d 285, 286 (Fla. Dist. Ct. App. 2017) (denying rehearing) (Bilbrey, J., dissenting) (noting that "[t]he evidence adduced at trial included multiple communications between

Appellant and the Alachua County Sheriff's deputy posing as the minor, several of which were sufficient to prove solicitation of unlawful sexual conduct . . . .").

In his Stay Motion, Mohamad argues that a conviction under this statute does not categorically constitute a CIMT, suggesting that there is a "realistic probability" that a defendant can be convicted under the statute for engaging in the unlawful conduct described in Fla. Stat. § 827.08. Stay Motion at *10-11. As noted, as an element, the state must prove that the defendant had the "the purpose of engaging in any illegal act (in violation of chapters 794, 800, or 827, or other unlawful sexual conduct) with the victim after using a computer or other electronic data storage transmission to contact a child[.]" *Hartley*, 129 So. 3d at 491 (emphasis added); *see Holt*, 173 So. 3d at 1082. In turn, under Fla. Stat. Ann. § 827.08, a defendant is guilty of the offense of Misuse of Child Support Money, where the defendant "willfully misapplies funds paid by another or by any governmental agency for the purpose of support of a child . . . ." In other words, Mohamad is arguing that there is a "realistic probability" that a defendant can be guilty of Unlawfully Traveling to Meet a Minor where the underlying unlawful activity is the misapplication of child support money. Stay Motion at *10-11.

Putting aside the strained attempt to maneuver his conviction out of the realm of moral turpitude, Mohamad did not advance this argument to the Board in his administrative appeal. *See generally* AR 9-27 (Mohamad's brief to the Board).

To be sure, a final order of removal may be reviewed only if the applicant "has exhausted all administrative remedies available to [him]." 8 U.S.C. § 1252(d)(1). This Court has found this requirement to be jurisdictional and that any claims not raised to the Board should be dismissed for lack of jurisdiction. *See Amaya-Artunduaga v. U.S. Atty. Gen.*, 463 F.3d 1247, 1250 (11th Cir. 2006); *Sundar v. INS*, 328 F.3d 1320, 1325 (11th Cir. 2003); *Fernandez-Bernal v. Attorney General*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001).

As noted, the Immigration Judge first determined that Mohamad's conviction for Traveling to Meet a Minor constitutes an aggravated felony / "sexual abuse of a minor," and that Mohamad was subject to removal on that basis. AR 57-58. The IJ also concluded, as an alternative ground of removability, that Mohamad's convictions for Theft of Government Property and Traveling to Meet a Minor both constituted crimes involving moral turpitude, and that Mohamad was *also* subject to removal under 8 U.S.C. § 1227(a)(2)(A)(ii), for having been convicted of two CIMTs not arising out of a single scheme of criminal misconduct. AR 59-60; *see* AR 676.

In his brief to the Board, Mohamad argued that his conviction for Unlawfully Traveling to Meet a Minor was neither a "crime of child abuse, nor an

aggravated felony / "sexual abuse of a minor."[3] AR 21-22. In terms of challenging the IJ's CIMT-removability finding, Mohamad only stated as follows: "Since Mohamad has denied the first charge of the NTA [relating to a "crime of child abuse"], logic dictates that [the] third charge is also denied, since even assuming that the theft charge is found to be a CIMT, it will only amount to one and not two (2) convictions for a CIMT."[4] AR 22. Thus, Mohamad's only arguments challenging the CIMT-finding (which was only incorporated by reference), were that he could not have been convicted a CIMT because he had no physical contact with any minors, and because he informed the police officers that he was unaware that the child he believed he was communicating with was 14 years old. AR 21. This is the extent of Mohamad's challenge to the IJ's CIMT-determination. *See* AR 21-22. At no point did he argue that Fla. Stat. Ann.

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[3] He also argued that he was *prima facie* eligible for cancellation of removal because none of his criminal convictions constituted aggravated felonies, and because he warranted a favorable exercise of discretion despite his criminal convictions. *See* AR 22-25.

[4] Notably, the Immigration Judge's April 15, 2019 decision did not sustain – or even analyze – the DHS's charge of removability under 8 U.S.C. § 1227(a)(2)(E)(i), relating to convictions that constitute a "crime of child abuse." *See* AR 54-65. Thus, Mohamad's arguments to the Board that he was not convicted of a "crime of child abuse" were wholly inapposite to his administrative appeal.

§ 847.0135(4)(a) is categorically broader than the definition of CIMT because a defendant may hypothetically be convicted under that statute where the underlying unlawful activity is the misapplication of child support money. *See generally* AR 9-27 (Mohamad's brief to the Board). Accordingly, he cannot advance new claims for the first time in this Court in this petition for review, including his claim that he can be convicted of Fla. Stat. Ann. § 847.0135(4)(a) – a crime which requires Mohamad to register on a yearly basis as a sex offender, AR 192-93 – where the underlying criminal activity is for the misapplication of child support money.

Accordingly, Mohamad has not established a likelihood of success on the merits of this petition for review and the Court should deny his motion for a stay of removal. *See Philidor*, 384 F. App'x at 878-79 ("[the petitioner is] unable to meet the first element of *Nken's* syllabus, rendering him ineligible for a stay of removal.").

C. Mohamad Has Not Made An Adequate Showing That Granting Him A Stay Of Removal Would Be In The Public Interest

The final two factors – the harm to the opposing party and the public interest – merge when the Government is the opposing party. *Nken*, 556 U.S. at 436. The fact that the Government is the Respondent in every removal proceeding "does not make the public interest in each individual [case] negligible." *Nken*, 556 U.S. at 436. The Court cannot "simply assume that ordinarily the balance of hardships will weigh heavily in the [alien's] favor." *Id*. (internal quotation

omitted). Indeed, "[t]here is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and 'permit[s] and prolong[s] a continuing violation of United States law.'" *Nken*, 556 U.S. at 436 (internal quotation omitted). In other words, the public interest generally favors the removal of aliens who have been found removable from the United States, even if those aliens are challenging their removal orders in court. Indeed, "[a] stay of removal is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right." *Nken*, 556 U.S. at 437 (Kennedy, J., concurring).

Furthermore, "[t]he interest in prompt removal may be heightened by the circumstances" of the case, such as where "the alien is particularly dangerous." *Nken*, 556 U.S. at 436. As noted, Mohamad has a number of criminal convictions in the United States. The public interest would therefore not be served by granting him a stay of removal.

CONCLUSION

For all of the foregoing reasons, the Court should deny Mohamad's motion for a stay of removal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure, the foregoing motion is proportionally spaced, has a typeface of 14 points or more and contains 4,354 words.

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CERTIFICATE OF SERVICE

I certify that on February 24, 2020, I electronically filed the foregoing "Brief for Respondent" with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I further certify that Petitioner's counsel will be served by that system.

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