

Lorraine Woodwark
Attorneys United for a Secure America
25 Massachusetts Ave. NW, Suite 335
Washington, D.C. 20001
Tel. (202) 591-0962
Fax (202) 464-3590

Attorney for Amicus Curiae for Attorneys United for a Secure America

BOARD OF IMMIGRATION APPEALS

In the Matter of

Amicus Invitation No. 21-15-03,
Iowa's Theft Statute

Amicus Invitation No. 21-15-03

**REQUEST TO APPEAR AS AMICUS CURIAE
AND BRIEF FOR AMICUS CURIAE ATTORNEYS
UNITED FOR A SECURE AMERICA**

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REQUEST TO APPEAR AS *AMICUS CURIAE*

Attorneys United for a Secure America (AUSA), respectfully requests leave to file this *amicus curiae* brief at the invitation of the Board of Immigration Appeals. See Amicus Invitation No. 21-15-03. The *amicus curiae* brief is submitted with this request.

INTEREST OF *AMICUS CURIAE*

AUSA is a nationwide network of attorneys, law students, and paralegals who support strong immigration law enforcement. AUSA is a project of the Immigration Reform Law Institute (IRLI), a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. AUSA members have filed briefs in many immigration-related cases before federal courts and administrative bodies, including *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020), *Gomez v. Trump*, 485 F. Supp. 3d 145 (D.D.C. 2020), *Make the Road New York v. Cuccinelli*, 2020 U.S. App. LEXIS 913 (2d Cir.), *Matter of Reyes*, 28 I&N Dec. 52 (B.I.A. 2020), *Texas v. United States*, No. 6:21-cv-00003, 2021 U.S. Dist. LEXIS 14116 (S.D. Tex. 2021), and *Florida v. United States*, No. 8:21-cv-00541 (M.D. Fla. 2021). AUSA believes immigration policies must be reformed to serve the national interest. Specifically, AUSA seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. Therefore, AUSA respectfully requests leave to file the brief accompanying this motion to assist the Board with the issue presented.

ISSUE PRESENTED

The issue presented in this case is:

Whether Iowa's theft statute, which is codified at Iowa Code § 714.1, is divisible as to thefts by takings and thefts by fraud, pursuant to the approach set forth in *Mathis v. United States*, 136 S.Ct. 2243 (2016), and *Descamps v. United States*, 570 U.S. 254 (2013), in light of the Iowa state court decisions in *State v. Nall*, 894 N.W. 2d 514 (Iowa 2017), *State v. Conger*, 434 N.W. 2d 406 (Iowa Ct. App. 1988), and *State v. Williams*, 328 N.W. 2d 504 (Iowa 1983).

SUMMARY OF THE ARGUMENT

The Supreme Court in *Descamps v. United States*, 570 U.S. 254, 254 (2013) affirmed that a statute is divisible when it sets out one or more elements of an offense in the alternative. A court can then compare the elements of the crime of conviction with the elements of the generic crime. The Iowa statute is divisible as it has multiple alternate elements for the offense of theft. Among the elements included the statute are the elements of “fraud” and “takings”. In fact, the statute defines seven ways in which a theft may be committed. For example, the Iowa Code §714.1 provides “[a] person commits theft when the person does any of the following: Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.” The Iowa theft statute’s elements can be compared with the elements of the relevant generic crime.

ARGUMENT

A STATUTE IS DIVISIBLE WHEN IT CREATES ELEMENTS TO COMPARE TO THE GENERIC OFFENSE.

In *Descamps*, the United States Supreme Court acknowledged that it had “previously approved . . . one or more elements of an offense in the alternative... [use of] the ‘modified categorical approach’ when a prior conviction is for violating a so-called ‘divisible statute.’” *Descamps v. United States*, 570 U.S. 254, 254 (2013). The Court explained that a divisible “statute sets out one or more elements of an offense in the alternative...” and the “[t]he court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime.” *Id.*

Unlike the Iowa theft statute, the statute in *Descamps* contained a “single, indivisible set of elements”. *Id.* at 258. The Supreme Court found that the district court and the Ninth Circuit

“erred when “they used the modified categorical approach . . . in search of record evidence that he actually committed the generic offense of burglary. The modified approach did not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one, and did not apply to statutes like §459 that contained a single, indivisible set of elements.”

Iowa Code §714.1 contains the element of “fraud”. The *Nall* Court stated “[t]hat the single offense of theft may be *performed* in a number of ways necessarily requires that [it] be *defined* in a number of ways. Otherwise, theft could be committed in only one way, which is plainly not the case.”). *State v. Nall*, 894 N.W.2d 514, 523 (Iowa 2017) (regarding theft by fraud). The modified approach retains the categorical approach’s focus on the elements.

The modified approach acts “... not as an exception, but instead as a tool. It retains the categorical approach’s central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach’s basic method: comparing those elements with the generic offense...” All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and that effectively creates several different crimes. *Descamps, supra*.

The elements of the crime in *Descamps* were not separate crimes and were therefore “indivisible” unlike the Iowa theft statute. In *State v. Conger*, the court emphasized that the “two alternatives used in this case are consistent in that they merely describe different situations that are considered theft.” *State v. Conger*, 434 N.W.2d 406, 407 (Iowa Ct. App. 1988) (regarding theft by taking). Further, in *State v. Williams*, the court noted that “Iowa Code §714.1 defines seven ways in which theft may be committed.” *State v. Williams*, 328 N.W.2d 504, 504 (Iowa 1983) (regarding theft by taking), Iowa Code §714.1 *et seq.* The key sentence in the Iowa statute is: “[a] person commits theft when the person does any of the following...” The Iowa legislature’s inclusion of the word “any” is what defines the statute as divisible as it creates alternative elements of a crime. *See* Iowa code §714.1 *et seq.* Both the *Williams* and *Conger* cases emphasized the divisible elements of the statute.

In comparison to *Descamps*, a single statute may list elements in the alternative, and thereby define multiple crimes. In *Shepard*, the court “... approved the ‘modified categorical approach’ for use with statutes having multiple alternative elements.” *See, e.g., Shepard v. United States*, 544 U. S. 13 (2005). The court can then “... compare that crime, as the categorical approach commands, with the relevant generic

offense.” *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). The use of the word “or” in a statute creates alternate elements for several different crimes that can then be compared to a generic crime.

CONCLUSION

For the foregoing reasons, Iowa’s theft statute is divisible as to thefts by takings and thefts by fraud as they are defined as alternate elements to create separate crimes that a court may use to determine the criminal offense.

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Lorraine Woodward
Attorneys United for a Secure America
25 Massachusetts Ave. NW, Suite 335
Washington, D.C. 20001
Phone: (202) 591-0962
Fax: 202-464-3590
Email: lwoodwark@IRLI.org
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2021, I submitted the forgoing amicus curiae brief the Board of Immigration Appeals via courier service sent three (3) copies to the Amicus Clerk of the Board of Immigration Appeals Clerk's Office, 5107 Leesburg Pike, Suite 2000, Falls Church, VA 22041 for distribution to the parties.

Serraine Woodward, Attorneys United for a Secure America

Name/Title