[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-10029

Non-Argument Calendar

GURPREET MICHAEL SINGH,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals
Agency No. A065-998-045

Before WILSON, LUCK, and ANDERSON, Circuit Judges.

PER CURIAM:

Gurpreet Singh, a native and citizen of India, petitions for review of the Board of Immigration Appeals's decision (1) dismissing his appeal of the immigration judge's order of removal and (2) denying his motion to remand. After careful consideration, we deny his petition.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2017, Singh entered the United States on a conditional permanent resident visa. Two years later, he pleaded nolo contendere to (1) traveling to meet a minor for illegal sexual contact, in violation of Florida Statutes section 847.0135, and (2) attempted lewd and lascivious battery on a child older than twelve but less than sixteen years old, in violation of Florida Statutes sections 777.04(1) (attempt) and 800.04(4)(a) (lewd and lascivious battery).

The government issued Singh a notice to appear, charging him as removable for having committed an "aggravated felony." *See* 8 U.S.C. § 1227(a)(2)(A)(iii). At his removal hearing, through counsel, Singh refused to concede that he had been convicted of an aggravated felony. The immigration judge asked whether Singh would be applying for relief from removal. Singh's counsel responded that he was considering an application under section 212(h)—codified at 8 U.S.C. section 1182(h)—for an "adjustment of status," but "aside from that," he conceded, "no other form of

relief." The immigration judge then asked whether "[Singh was] afraid of returning to India" and Singh's counsel replied that "[he] had discussed that with [Singh]. [Singh] do[es] not have a claim for asylum or withholding."

The immigration judge concluded that both of Singh's convictions were aggravated felonies. Because Singh was convicted within two years of his entry to the United States, the immigration judge held that he was statutorily barred from receiving an adjustment of status under section 212(h). The immigration judge also explained that both offenses were "particularly serious crimes," which disqualified Singh from applying for asylum. And because Singh testified that he did not fear returning to India, the immigration judge concluded, he was not eligible for asylum, withholding of removal, or protection under the Convention Against Torture.

Singh appealed to the board and made four arguments. First, he contended that the immigration judge had erred in deciding his convictions were aggravated felonies by relying on 18 U.S.C. section 16(b), which the Supreme Court had ruled unconstitutionally vague in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Second, Singh argued that the immigration judge had erred in denying him protection under the Convention Against Torture because his extended family would persecute him if he returned to India and his testimony that he didn't fear returning to India was "a result of the undue stress and duress of his current situation." Third, Singh maintained that the immigration judge hadn't properly concluded that his convictions were aggravated felonies. The immigration

judge erred, Singh said, by failing to consider whether his *least* serious crime constituted an aggravated felony. Singh also asserted his factual innocence and argued that his crime was victimless. Fourth, Singh argued that the immigration judge had violated his due process rights by not creating a full record for the board to review and by not allowing him to attend his removal hearing.

Singh also moved to supplement the record—which the board construed as a motion to remand—and asked the board to remand to allow him to apply for asylum, withholding of removal, deferral of removal, and relief under the Convention Against Torture. Singh argued that he was eligible for relief because his extended family would persecute him—falsely implicate him in crimes, torture him, or even kill him—to obtain his and his parent's share of a plot of family land.

The board dismissed Singh's appeal and denied his motion to remand. Relying on our prior decisions in *United States v. Lockley*, 632 F.3d 1238, 1244 n.6 (11th Cir. 2011) (attempt), *United States v. Padilla-Reyes*, 247 F.3d 1158, 1164 (11th Cir. 2001) (lewd and lascivious battery), and *Chuang v. U.S. Attorney General*, 382 F.3d 1299, 1301–02 (11th Cir. 2004) (same), the board concluded that Singh's conviction for attempted lewd and lascivious battery was categorically an aggravated felony. The board declined to address whether Singh's other conviction—for traveling to meet a minor for illegal sexual contact—was an aggravated felony. The board also noted that it could not "go behind" Singh's convictions to

reassess his claims of innocence or protestations that he had not victimized anyone.

As to Singh's motion to remand to file applications for asylum and cancellation of removal, the board concluded that remand was unnecessary because Singh's conviction for an aggravated felony made him statutorily ineligible. As to Singh's motion for remand to apply for withholding of removal and relief under the Convention Against Torture, the board noted that Singh had previously had the opportunity to apply for withholding of removal and Convention Against Torture relief before the immigration judge and Singh was bound by his attorney's representation that he did not have valid claims. The board also noted that Singh hadn't argued that circumstances had materially changed since his removal hearing. As to Singh's due process argument, the board explained that, contrary to Singh's claim, he was present at his immigration hearing and he hadn't shown prejudice from any potential failure to develop the record.

STANDARD OF REVIEW

We review the board's decision as the agency's final decision, except to the extent it expressly adopted the immigration judge's opinion or reasoning. *Perez-Zenteno v. U.S. Att'y Gen.*, 913 F.3d 1301, 1306 (11th Cir. 2019). We review de novo the agency's conclusions of law. *Adefemi v. Ashcroft*, 386 F.3d 1022, 1026–27 (11th Cir. 2004) (en banc). We review de novo constitutional challenges. *Lonyem v. U.S. Att'y Gen.*, 352 F.3d 1338, 1341 (11th Cir. 2003). And we review the board's denial of a motion to

remand or to reopen for an abuse of discretion. *Ali v. U.S. Att'y Gen.*, 643 F.3d 1324, 1329 (11th Cir. 2011) ("We construe a motion to remand that seeks to introduce new evidence as a motion to reopen."); *Jiang v. U.S. Att'y Gen.*, 568 F.3d 1252, 1256 (11th Cir. 2009) ("We review the denial of a motion to reopen an immigration petition for an abuse of discretion.").

DISCUSSION

Singh makes three arguments on appeal. First, he argues that the board erred in concluding that his conviction for attempted lewd and lascivious battery was an aggravated felony. Second, he contends that the board abused its discretion in denying his motion to remand. And third, he asserts that the immigration judge violated his due process rights.

Attempted Lewd and Lascivious Battery on a Minor is an Aggravated Felony

The government may deport—or "remove"—noncitizens who commit certain crimes. *Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275, 1278–79 (11th Cir. 2013) (citing 8 U.S.C. § 1227(a)). If a noncitizen commits "an aggravated felony," he also may be ineligible for discretionary relief from removal. *Id.* The definition of "aggravated felony" includes "attempted sexual abuse of a minor." 8 U.S.C. § 1101(a)(43)(A), (U). Singh argues that his conviction under Florida Statutes sections 777.04(1) and 800.04(4)(a) for attempted lewd and lascivious battery on a minor is not an aggravated felony.

We use the categorical approach to determine whether a state court conviction qualifies as an aggravated felony. *Donawa*, 735 F.3d at 1280. Under the categorical approach, we consider the statutory definition of the offense, not the facts of the case. *Id.* We ask only "whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony." *Id.* A state offense is an aggravated felony only if it necessarily involves elements equating to the generic federal offense. *Id.*

Singh's conviction qualifies as an aggravated felony because it satisfies the federal definition of attempted sexual abuse of a minor. First, as to the "attempt" portion of his conviction, we've explained that Florida's attempt statute—section 777.04(1)—is generic, meaning an attempt at a Florida crime necessarily qualifies as an attempt at the corresponding federal crime. *Lockley*, 632 F.3d at 1244 n.6 ("Section 777.04(1) thus falls within the generic, contemporary meaning of attempt.").

As to the substantive portion of Singh's conviction—lewd and lascivious battery on a child older than twelve but less than sixteen years old—we've held that earlier and broader versions of the same statute satisfied the generic federal version of sexual abuse of a minor. We have defined the generic federal crime "sexual abuse of a minor" as "a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification." *Chuang*, 382 F.3d at 1301 (citing *Padilla-Reyes*, 247 F.3d at 1163).

In *Padilla-Reyes*, we said that the 1987 version of Florida's lewd and lascivious battery statute (section 800.04) qualified as sexual abuse of a minor and therefore constituted an aggravated felony under federal law. 247 F.3d at 1164. That version of the statute applied to anyone who:

> (1) Handle[d], fondle[d] or ma[de] an assault upon any child under the age of 16 years in a lewd, lascivious, or indecent manner;
>
> (2) Commit[ted] an act defined as sexual battery under [section] 794.011(1)(h) upon any child under the age of 16 years; or
>
> (3) Knowingly commit[ted] any lewd or lascivious act in the presence of any child under the age of 16 years without committing the crime of sexual battery is guilty of a felony of the second degree, punishable as provided in [section] 775.082, [section] 775.083, or [section] 775.084.
>
> Neither the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section.

Id. at 1162 n.4 (citing Fla. Stat. § 800.04 (1987)). Then, in 1993, the Florida legislature added another subsection criminalizing:

> Commit[ting] actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates

> that sexual battery is being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act;

Fla. Stat. § 800.04 (1993). In *Chuang*, we reasoned that the 1993 amendments did not change whether lewd and lascivious battery was categorically an aggravated felony. 382 F.3d at 1302. This was because the new subsection did not criminalize any conduct that was not *also* done for a purpose associated with sexual gratification. *Id.* In other words, the newly proscribed conduct also constituted sexual abuse of a minor. *Id.* So, because all of the conduct proscribed in the 1993 version of the statute qualified as sexual abuse of a minor, a conviction under the statute was categorically an aggravated felony. *Id.*

The 2014 version of lewd and lascivious battery—the version that Singh violated—is narrower than the earlier versions and covers the same conduct that we categorially found to be an aggravated felony in *Padilla-Reyes* and *Chuang*. *Padilla-Reyes*, 247 F.3d at 1164; *Chuang*, 382 F.3d at 1302. The 2014 version criminalizes only

> 1. Engaging in a sexual activity with a person under 12 years of age or older but less than 16 years of age; or

> 2. Encouraging, forcing, or enticing any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity.

Fla. Stat. § 800.04(4)(a) (2014). Unlike the 1993 version, which prohibited handling, fondling, or assaulting a minor, the 2014 version prohibits only oral, anal, or vaginal penetration of a minor. Oral, anal, and vaginal penetration of a minor were prohibited by the earlier versions of Florida's lewd and lascivious battery statute that we found to be categorically aggravated felonies in *Padilla-Reyes* and *Chuang*. *Padilla-Reyes*, 247 F.3d at 1164; *Chuang*, 382 F.3d at 1302. That same conduct must also be categorically an aggravated felony under the newer and narrower version of the statute.

In response, Singh offers the following syllogism involving the Double Jeopardy Clause and the categorical approach. He points out that he pleaded guilty to *both* unlawful traveling to meet a minor in violation of Florida Statutes section 847.0135 *and* also to lewd and lascivious battery in violation of Florida Statutes section 800.04(4)(a). Therefore, he argues, because (1) "it is Double Jeopardy to be charged with two crimes for the same offense"; (2) "[his] conviction rests upon nothing more than the least of the acts criminalized"; and (3) the least serious offense—traveling to meet a minor for sex—is not an aggravated felony, he is not guilty of an aggravated felony.

But Singh's argument mischaracterizes the categorical approach. Under the categorical approach, we determine whether

"the least of the acts criminalized" by the statute would qualify as a generic federal offense. *Donawa*, 735 F.3d at 1280–81. It doesn't mean that, where a noncitizen is convicted of *multiple* crimes, we consider only the least serious one. Here, even the least serious act criminalized by section 800.04(4)(a) is categorically an aggravated felony, so the categorical approach doesn't help Singh. *See Chuang*, 382 F.3d at 1302.

Singh's other arguments are meritless. First, he argues that the board erred in relying on the since-ruled-unconstitutionally-vague 18 U.S.C. section 16(b). But the board didn't rely on section 16(b)—it relied on the "aggravated felony" provision in 8 U.S.C. section 1227(a)(2)(A)(iii)—so Singh's argument misses the mark. Second, Singh takes issue with the board's "finding" that his convictions were for "particularly serious crimes." But because the board did not address—or adopt—this aspect of the immigration judge's decision, we do not review it. *See Perez-Zenteno*, 913 F.3d at 1306 ("We review the [board's] decision as the final judgment, unless the [board] expressly adopted the [immigration judge's] opinion."). Third, Singh's arguments about the factual circumstances underlying his conviction are irrelevant because we are concerned only with the fact of conviction and the elements of the crime. *See Donawa*, 735 F.3d at 1280 ("Under the categorical approach . . . [w]e do not consider the facts of the case[.]").

Motion to Remand

The board denied Singh's motion to remand so that he could apply for discretionary relief because he was either ineligible for the

relief or he had waived the opportunity to apply. Singh argues that the board abused its discretion in doing so.

After an immigration judge finds a noncitizen removable, he can appeal to the board, or, as relevant here, file either a motion to reconsider (for errors of fact or law) or a motion to reopen (to submit new evidence). 8 U.S.C. § 1229a. The board treated Singh's motion as a motion to reopen and so will we. "[T]here [are] 'at least' three independent grounds on which the [board] might deny a motion to reopen—[1] failure to establish a prima facie case for the relief sought, [2] failure to introduce previously unavailable, material evidence, and [3] a determination that even if these requirements were satisfied, the movant would not be entitled to the discretionary grant of relief which he sought." *INS v. Doherty*, 502 U.S. 314, 323 (1992) (quoting *INS v. Abudu*, 485 U.S. 94, 104–05 (1988)).

Here, the board did not abuse its discretion by denying Singh's motion to remand. Singh sought remand so he could apply for asylum, cancellation of removal, withholding of removal, and protection under the Convention Against Torture. But because Singh was convicted of an aggravated felony, he was not eligible for asylum or cancellation of removal. *See* 8 U.S.C. §§ 1158(B)(i), 1229(b)(1)(C). And Singh, through counsel, admitted at his removal hearing that he had no claim for protection under the Convention Against Torture because he did not fear returning to India. That admission is binding on Singh here. *See Dos Santos v. U.S. Att'y Gen.*, 982 F.3d 1315, 1319 (11th Cir. 2020) ("[T]he general rule

[is] that a[] [noncitizen] is bound by h[is] attorney's concession."). Further, Singh's proffered evidence—affidavits attesting to threats made by his family against him should he return to India—was previously available and could have been presented to the immigration judge at or before his removal hearing. Thus, because the proffered affidavits are not "previously unavailable, material evidence," the board did not abuse its discretion in denying Singh's motion. *See Doherty*, 502 U.S. at 323, 326 (explaining that "it was well within [the Attorney General's] broad discretion in considering motions to reopen to decide that the material adduced by respondent could have been foreseen or anticipated at the time of the earlier proceeding").

Due Process

Singh finally argues that the board violated his due process rights by not creating a full record, by not conducting a removal hearing in compliance with the statute, and by not allowing him to attend his removal hearing. Singh was not deprived of due process.

The immigration judge held a removal proceeding at which Singh was present. Singh was represented by counsel and was given an opportunity to present any evidence he had and to ask for any relief he sought. The hearing was transcribed and the immigration judge issued an order explaining his decision. Singh had a full opportunity to appeal, did so, and the board issued an order explaining its decision. Singh got all the process he was due. *See Lapaix v. U.S. Att'y Gen.*, 605 F.3d 1138, 1143 (11th Cir. 2010) ("Due process requires that [noncitizens] be given notice and an

opportunity to be heard in their removal proceedings."). And Singh has not argued that he was prejudiced in any way. *See id.* ("To establish a due process violation, the petitioner must show that she was deprived of liberty without due process of law and that the purported errors caused her substantial prejudice. To show substantial prejudice, [a noncitizen] must demonstrate that, in the absence of the alleged violations, the outcome of the proceeding would have been different.") (internal citation omitted).

PETITION DENIED.