U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: SYHARATH, AMKHA

A 071-434-940

Date of this notice: 12/21/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John
Kendall Clark, Molly
Grant, Edward R.

Userteam: Docket

File: A071 434 940 – San Diego, CA Date: DEC 21 2017

In re: Amkha SYHARATH

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jonathan D. Montag, Esquire

APPLICATION: Reopening, termination

This case was last before us on July 26, 2002, when we dismissed the respondent's appeal from an Immigration Judge's decision denying his applications for relief. On April 10, 2017, the respondent filed an untimely motion to reopen seeking sua sponte reopening and termination of his proceedings due to a change in law. The record does not contain a response from the Department of Homeland Security (DHS). The respondent's motion to reopen will be granted, and the respondent's proceedings will be terminated.

The respondent is a native and citizen of Laos. He entered the United States as a refugee in 1990 and subsequently adjusted his status to that of a lawful permanent resident. In 1996 and again in 1997, he was convicted of vehicular burglary in violation of California Penal Code § 459 (Exh 1, 5A, 5C, 5D, and 7). The respondent's 1996 conviction included a firearms enhancement under California Penal Code § 12022(a). The DHS charged the respondent with removability under sections 237(a)(2)(A)(ii) and (C) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(ii) and (C), on the basis of his crimes.

During the respondent's hearing before the Immigration Judge, the DHS opted not to pursue the charge under section 237(a)(2)(C) of the Act, but the DHS does not appear to have withdrawn the charge (IJ at 2; Tr. at 2-3; Exh 1). The Immigration Judge found the respondent removable under section 237(a)(2)(ii) of the Act as an alien who had been convicted of two crimes involving moral turpitude and denied his applications for relief. We dismissed the respondent's appeal.

The respondent now argues that there has been a change in law relating to whether the crimes for which he was convicted constitute crimes involving moral turpitude. He asserts that, under the new framework, his crimes do not qualify as crimes involving moral turpitude. In support of his arguments he cites *Descamps v. U.S.*, 133 S.Ct. 2276 (2013), *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011), and *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014).

The respondent is correct that, since our prior decision in his case, the United States Supreme Court has clarified the categorical and modified categorical methods for evaluating whether a crime falls within a certain category of offenses. *See Descamps v. U.S*, 133 S.Ct. at 2283-85.[1] In

[1] In deciding *Descamps v. U.S.*, the Supreme Court addressed the statute at issue in this case, Cal. Penal Code § 459. The issue, however, was whether a conviction under the statute constituted a

addition, we issued *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016) setting forth the proper framework for evaluating whether an offense is a crime involving moral turpitude for immigration purposes.

Under the framework provided in *Matter of Silva-Trevino*, we employ the categorical approach by comparing the elements of the respondent's offense to those of the generic definition of a crime involving moral turpitude to determine if there is a categorical match. *Matter of Silva-Trevino*, 26 I&N Dec. at 831-833; *see also Escobar v. Lynch*, 846 F.3d 1019, 1024 (9th Cir. 2017). This approach requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the respondent's particular violation of that statute. *Matter of Silva-Trevino*, 26 I&N Dec. at 831; *see also Escobar v Lynch*, 846 F.3d at 1024.

Although the immigration statutes do not specifically define offenses constituting crimes involving moral turpitude, a crime involving moral turpitude is generally a crime that '(1) is vile, base, or depraved and (2) violates accepted moral standards.'" *Escobar v. Lynch*, 846 F.3d at 1023 (citations omitted); *see also Matter of Silva-Trevino*, 26 I&N Dec. at 834 ("To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state.").

The respondent argues that his crimes of burglary of a motor vehicle under Cal. Penal Code § 459 are not categorically crimes involving moral turpitude and that Cal. Penal Code § 459 is not divisible so the modified categorical approach is not applicable. Accordingly, he maintains that his proceedings should be reopened and terminated because he no longer is removable as charged.

Section 459 of the California Penal Code states, in pertinent part, "[e]very person who enters any . . . vehicle as defined by the Vehicle Code, when the doors are locked, with intent to commit grand or petit larceny or any felony is guilty of burglary." In considering whether crimes of burglary qualify as crimes involving moral turpitude for immigration purposes, the key question generally has been whether the crime accompanying the unlawful entry is turpitudinous. *Matter of J-G-D-F-*, 27 I&N Dec. 82, 86-87 (BIA 2017); *see also Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1019 (9th Cir. 2005), *abrogated on other grounds by Holder v. Martinez Gutierrez*, 566 U.S. 583 (2012). Nevertheless, we have held that burglary of a dwelling constitutes a crime involving moral turpitude regardless of the crime intended upon entry because the conscious and overt act of entering and remaining in an occupied dwelling with intent to commit a crime is inherently

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conviction for burglary under the Armed Career Criminal Act. The Court found that an unlawful entry was not an element of the crime defined in Cal. Penal Code § 459. Accordingly, the Court found that the California crime was not equivalent to "generic burglary" and the modified categorical approach was not applicable because the statute was not divisible with respect to that requirement. The statute instead was overbroad. The Court did not address the precise issues that arise in this case, namely, whether the statute is divisible with respect to the crime intended upon entry and whether the statute defines a crime involving moral turpitude.

reprehensible conduct committed with some form of scienter. *Matter of J-G-D-F-*, 27 I&N Dec. at 87-88.

In this case, the respondent was convicted of burglary of a vehicle, not burglary of a dwelling. Further, the United States Court of Appeals for the Ninth Circuit, the circuit in which this case arises, has held that Cal. Penal Code § 459 is not divisible with respect to the crime the perpetrator intends to commit upon entering a locked vehicle. *Rendon v. Holder*, 764 F.3d 1077, 1088-89 (9th Cir. 2014).[2] We therefore cannot apply the modified categorical approach to determine the specific intended offense.

An individual convicted under Cal. Penal Code § 459 nevertheless must have intended to commit grand or petit larceny or any felony. Accordingly, a conviction under Cal. Penal Code § 459 qualifies as a crime involving moral turpitude if entering a locked vehicle with the intent to commit grant or petit larceny or any felony is turpitudinous. The respondent claims that this conduct is not necessarily vile, base, depraved or in violation of accepted moral standards. We agree.

To begin, the offense of burglary of a vehicle as defined in Cal. Penal Code § 459 is distinguishable from the offenses involving burglary of a dwelling we found to be categorical crimes involving moral turpitude in *Matter of J-G-D-F-* and *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009). Section 810.02(3)(a) of the Florida Statutes, the statute at issue in *Matter of Louissaint*, required an unlawful entry. *Matter of Louissaint*, 24 I&N Dec. at 758. Section 164.225 of the Oregon Revised Statutes, the statute at issue in *Matter of J-G-D-F-*, also required a person to enter or remain unlawfully in a dwelling. *Matter of J-G-D-F-*, 27 I&N Dec. at 84-85. Cal. Penal Code § 459, however, does not require an unlawful entry. *See Descamps v. U.S.*, 133 S.Ct. at 2282.

Nevertheless, to be convicted of burglary of a vehicle under Cal. Penal Code § 459, an individual must enter a locked vehicle. *See People v. Mooney*, 193 Cal. Rprt, 381 (Ca. Ct. App. 1983). The Ninth Circuit has acknowledged that there are few legitimate, lawful reasons for entering a locked vehicle and that an individual entering lawfully (perhaps because she owns the vehicle but locked her keys inside) likely would not have the intent to be convicted under Cal. Penal Code § 459. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1104 n.16 (9th Cir. 2011). The absence of the "unlawful" requirement in Cal. Penal Code § 459 therefore might not be a meaningful distinction if considered on its own.

The differences between vehicular burglary, at issue here, and burglary of a dwelling at issue in *Matter of Louissaint* and *Matter of J-G-D-F-*, are more meaningful, particularly when considered in conjunction with the unlawful versus lawful entry distinction. In *Matter of*

[2] In *Rendon v. Holder*, the court addressed whether a conviction for burglary of a vehicle under Cal. Penal Code § 459 was a conviction for an attempted theft offense and therefore an aggravated felony under sections 101(a)(43)(G) and (U) of the Act, 8 U.S.C. § 1101(a)(43)(G) and (U). The court did not consider the issue presented in this case, namely, whether burglary of a vehicle is a crime involving moral turpitude.

Louissaint, we found that burglary of an occupied dwelling was categorically a crime involving moral turpitude because the conscious and overt act of unlawfully entering or remaining in an occupied dwelling with the intent to commit a crime is inherently reprehensible conduct committed with some form of scienter. By breaking into a dwelling of another for an illicit purpose, the burglar "tears away the resident's justifiable expectations of privacy and personal security and invites a violent defensive response from the resident." *Matter of Louissaint*, 24 I&N Dec. at 758-59.

In *Matter of J-G-D-F-*, we found that this reasoning extended to the crime punishable under Or. Rev. Stat. § 164.225, namely, burglary of a regularly or intermittently occupied dwelling.[3] In doing so, we noted that the requirement of regular or intermittent occupancy of the dwelling involved raised the probability of a person's presence at the time of the crime. Accordingly, we found that the perpetrator of an offense under Or. Rev. Stat. § 164.225 violated the same justifiable expectation of privacy and personal security as an individual who committed burglary of an occupied dwelling. *Matter of J-G-D-F-*, 27 I&N Dec. at 88. We therefore found that burglary of a regularly or intermittently occupied dwelling under Or. Rev. Stat. § 164.225 was morally turpitudinous regardless of whether a person was actually present at the time of the offense and regardless of the crime intended upon entry. *Id.*

The reasoning of *Matter of J-G-D-F-* and *Matter of Louissaint* does not extend to the present case. Vehicular burglary generally does not involve the risk of face to face confrontation between perpetrator and victim and does not involve the same expectations of privacy and personal security.[4] Accordingly, we cannot rely on the reasoning of *Matter of J-G-D-F-* and *Matter of Louissaint* to conclude that the act of entering a locked vehicle with the intent to commit a felony is inherently reprehensible and categorically a crime involving moral turpitude.

Moreover, the wide range of conduct covered by the phrase "with intent to commit grand or petit larceny or any felony" and the decisions of the Ninth Circuit addressing both burglary and crimes involving moral turpitude in general weigh against a finding that vehicular burglary as defined in Cal. Penal Code § 459 is categorically a crime involving moral turpitude. Both the Supreme Court and the Ninth Circuit have held that vehicular burglary as defined in Cal. Penal

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[3] The statute at issue in *Matter of Louissaint* required proof that the burglary took place in a dwelling occupied by another person at the time the offender entered or remained. The statute at issue in *Matter of J-G-D-F* did not require the victim's presence at the time of the offense but did require that the dwelling be regularly or intermittently occupied. *Matter of J-G-D-F*, 27 I&N Dec. at 88.

[4] The distinction between burglary of a dwelling and burglary of a vehicle is further emphasized by the fact that both the Ninth Circuit and the United States Supreme Court have concluded that vehicular burglary does not constitute "burglary" under the generic, uniform definition of the crime. *Ye v. INS*, 214 F.3d 1128, 1131-33 (9th Cir. 2000) (finding that vehicular burglary is not "burglary" as that term is used in section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G)); *Taylor v. United States*, 495 U.S. 575 (1990) (discussing the uniform definition of "burglary" in the context of the Career Criminals Amendment Act).

Code § 459 is not "generic burglary." *Taylor v. U.S.*, 495 U.S. at 591, 599; *Ye v. INS*, 214 F.3d at 1131-33. Accordingly, even if we could conclude that "generic burglary" as defined in *Taylor v. U.S.* is, by its nature, a crime involving moral turpitude, we could not conclude that vehicular burglary constitutes a generic burglary and therefore a crime involving moral turpitude.

In addition, as the respondent has noted, the Ninth Circuit recently has concluded that commercial burglary as defined in Cal. Penal Code § 459 is not a categorical match to theft, attempted theft or any other established crimes involving moral turpitude. *Hernandez-Cruz v. Holder*, 651 F.3d at 1107-1109. After concluding that a conviction under Cal. Penal Code § 459 was not categorically a conviction for a crime involving moral turpitude because the statute did not punish conduct that is per se reprehensible, the Ninth Circuit compared the elements of the offense of commercial burglary under Cal. Penal Code § 459 to the elements of established crimes involving moral turpitude and determined that the elements did not match. The Ninth Circuit therefore found that Hernandez-Cruz had not been convicted of a crime involving moral turpitude and was not removable on this basis. *Id* at 1109.[5]

As in this case, commercial burglary as defined in Cal. Penal Code § 459 does not involve an unlawful entry and does not involve a dwelling or a residence. The comparison of the elements of commercial burglary to those of established crimes involving moral turpitude, while not identical to a comparison of the elements of vehicular burglary, is instructive and not meaningfully distinguishable.[6] We therefore see no persuasive argument to support a conclusion that the respondent's offense of vehicular burglary under Cal. Penal Code § 459 is categorically a crime involving moral turpitude. *See generally Ramirez-Contreras v. Sessions*, 858 F.3d 1298, 1303-4 (9th Cir. 2017) (discussing the meaning of "crime involving moral turpitude"); *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1212-13 (9th Cir. 2013) (same); *Cuevas-Gaspar v. Gonzales*, 430 F.3d at 1019 (agreeing with this Board that the act of entering, in a burglary offense, is not itself "base, vile or depraved" and that it is the intended offense that determines whether a burglary involves moral turpitude).

Based on the foregoing, we agree with the respondent that his convictions for vehicular burglary under Cal. Penal Code § 459 are not categorically convictions for crimes involving moral turpitude. Further, due to recent changes in the law, including the Supreme Court's decision in *Descamps v. U.S.*, and the Ninth Circuit's ruling in *Rendon v. Holder*, the modified categorical approach is not applicable in his case. Cal. Penal Code § 459 is not divisible with respect to the crime intended upon entry. The statute instead is overbroad in that there is a realistic probability,

[5] The Ninth Circuit issued *Hernandez-Cruz v. Holder* before the Supreme Court issued *Descamps*. The Ninth Circuit therefore applied the categorical and modified categorical approaches as it understood them before *Descamps*. The Ninth Circuit's analysis of what acts constitute crimes involving moral turpitude nevertheless is instructive and applicable here.

[6] Further, in a footnote in an unpublished decision, the Ninth Circuit withdrew from an earlier statement that vehicular burglary as defined in Cal. Penal Code § 459 was a crime involving moral turpitude by noting that the statement was cursory, not central to the court's holding, and distinguishable as nonbinding dicta. *Casas-Castrillon v. Mukasey,* 265 Fed. Appx. 659, 661 n.1 (9th Cir. 2008). The Ninth Circuit ultimately remanded the case for this Board to address the issue.

not a theoretical possibility, that California would apply the statute to conduct that falls outside the generic definition of a crime involving moral turpitude. *Escobar v Lynch*, 846 F.3d at 1024

The respondent therefore is not removable under section 237(a)(2)(A)(ii) of the Act, as an alien who has been convicted of a crime involving moral turpitude, and he is entitled to reopening of his proceedings and reversal of the Immigration Judge's contrary finding. *Matter of G-D-*, 22 I&N Dec. 1132, 1134-35 (BIA 1999) (discussing circumstances under which this Board will reopen proceedings *sua sponte* due to a change in law). Accordingly, we will grant his motion to reopen, and we will vacate the Immigration Judge's finding of removability under section 237(a)(2)(A)(ii) of the Act.

As we noted above, it is not clear from the record whether the DHS withdrew the other charge of removability, a charge under section 237(a)(2)(C) of the Act. This charge was based on a firearms enhancement under California Penal Code § 12022(a) to the respondent's 1996 vehicular burglary conviction.

Even if not withdrawn, however, the firearms charge is not sustainable under our decisions in *Matter of Martinez-Zapata*, 24 I&N Dec. 424 (BIA 2007) and *Matter of Rodriguez-Cortes*, 20 I&N Dec. 587 (BIA 1992). The respondent's conviction and sentence enhancement occurred in 1996, well before *Apprendi v. New Jersey*, 530 U.S. 466 (2000). His case therefore is governed by *Matter of Rodriguez-Cortes* in which we held that the sentence enhancement provision of Cal. Penal Code § 12022(a) did not create a separate offense but rather imposed additional punishment. We therefore held that a firearms enhancement under Cal. Penal Code § 12022(a) did not constitute a conviction under California law and did not make an alien deportable under then section 241(a)(2)(C) of the Act, 8 U.S.C. § 1251(a)(2)(C) (Supp. III 1991). *Matter of Rodriguez-Cortes*, 20 I&N Dec. at 590; *Matter of Martinez-Zapata*, 24 I&N Dec. at 430-31 (noting that *Matter of Rodriguez-Cortes* is superseded in cases involving sentencing determinations made subsequent to *Apprendi v. New Jersey*).

Accordingly, we are constrained by statute and case law to conclude that the respondent is not removable under sections 237(a)(2)(A)(ii) or (C) of the Act and considering the totality of the circumstances in this case, we will exercise our sua sponte authority to reopen and, because there are no sustainable charges of removability against the respondent, terminate these proceedings.

ORDER: The respondent's motion to reopen is granted and his proceedings are terminated.

FOR THE BOARD