U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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18201 SW 12th St.
Miami, FL 33194

Name: RIOS VENTURA, JOSE GUILLER... **A 090-470-341**

Date of this notice: 2/20/2015

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:
Mullane, Hugh G.
Pauley, Roger
Malphrus, Garry D.

Userteam: Docket

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RIOS VENTURA, JOSE GUILLERMO
A090-470-341
C/O KROME SPC
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Name: RIOS VENTURA, JOSE GUILLER... **A 090-470-341**

Date of this notice: 2/20/2015

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Mullane, Hugh G.
Pauley, Roger
Malphrus, Garry D.

Userteam:

File: A090 470 341 - Miami, FL

Date: FEB 20 2015

In re: JOSE GUILLERMO RIOS-VENTURA a.k.a. Jose Guillermo Rios

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Virlenys H. Palma, Esquire

ON BEHALF OF DHS: Michele Drucker
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude (found)

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined at section 101(a)(43)(G)) (found)

APPLICATION: Termination; adjustment of status; waiver of inadmissibility

The respondent, a native and citizen of El Salvador, appeals from the Immigration Judge's March 19, 2014, decision denying his application for adjustment of status under section 245(a) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255(a), based on an approved Alien Relative Petition (Form I-130) filed on his behalf by his United States citizen son and sought in conjunction with a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). His appeal will be dismissed for the reasons outlined below.

We review findings of fact, including credibility findings, for clear error. 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The following facts are not in dispute. The respondent initially entered the United States without inspection but thereafter adjusted his status on December 1, 1990, to that of a lawful permanent resident through the Special Agricultural Worker program pursuant to section 210 of the Act, 8 U.S.C. § 1160 (I.J. at 1; Tr. at 5-9; Exh. 1). Thereafter, on September 28, 2010, the respondent was convicted of criminal mischief in violation of Florida Statute section 806.13(1)(b)(3) and operating an illegal chop shop in violation of Florida Statute section 812.16 (I.J. at 2, 5; Tr. at 5-9; Exhs. 1, 3). He was convicted again on September 24, 2012, of dealing in stolen property in violation of Florida Statute section 812.019(1) for which he was sentenced to a term of confinement of a year and a day (I.J. at 2-3; Tr. at 5-9; Exhs. 1-2).

Based on the foregoing, the Immigration Judge concluded that the respondent is deportable as charged, in that his criminal mischief and receipt of stolen property convictions (as charged on the Notice to Appear) both constitute crimes involving moral turpitude (I.J. at 4-5). In addition, the Immigration Judge found that the respondent's conviction for dealing in stolen property is an aggravated felony conviction within the scope of section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G), because it was a theft offense for which the respondent was sentenced to a term of confinement of a year or more (I.J. at 3). The Immigration Judge also found that the respondent did not carry his burden of proof in establishing extreme hardship for a waiver of inadmissibility under section 212(h) of the Act so as to establish his admissibility in qualifying for adjustment of status (I.J. at 6-7). Alternatively, he found that the respondent did not carry his burden of proof in establishing that he would not be inadmissible as a public charge, nor did he prove that he merits such relief in the exercise of discretion (I.J. at 6). *See* section 212(a)(4) of the Act (explaining that an alien is inadmissible if it is determined that it is likely he will become a public charge); *see also* section 213A of the Act, 8 U.S.C. § 1183a (setting forth the requirements for an affidavit of support in overcoming the public charge ground of inadmissibility). Finally, the Immigration Judge concluded that the respondent does not merit a waiver of inadmissibility or adjustment of status in the exercise of discretion (I.J. at 7).

On appeal the respondent maintains that the Immigration Judge erred as a matter of law in concluding that his conviction for dealing in stolen property is a theft offense (Resp. Brief at 6-9). As a result, he maintains that the Immigration Judge also erred in concluding that this offense was a crime involving moral turpitude and an aggravated felony (Resp. Brief at 6-9). Therefore, he asserts that he is not removable as charged on the Notice to Appear (Resp. Brief at 6-9). In the alternative, he asserts that he carried his burden of proof in establishing (1) extreme hardship to his qualifying relatives to prevail on his waiver of inadmissibility sought under section 212(h) of the Act, (2) he is not inadmissible as a public charge, and (3) he merits relief in the exercise of discretion (Resp. Brief at 9-12).

Starting with the issue of deportability for an aggravated felony conviction, we note that under Florida Statute section 812.019(1) a person is guilty of dealing in stolen property if he "traffics in, or endeavors to traffic in, property that he...knows or should know was stolen." In examining this statute in conjunction with the term "receipt of stolen property" as used at section 101(a)(43)(G) of the Act, we acknowledge that Congress did not specifically define the term. Therefore, it is appropriate for us to define the term "receipt of stolen property" with respect to the "ordinary, contemporary, and common meaning of the statutory words." *See Taylor v. United States*, 495 U.S. 575 (1990); *Matter of Bahta*, 22 I&N Dec. 1381, 1385 (BIA 2000).

The definition of receipt of stolen property has evolved considerably since common law. At common law it was a crime to buy or receive stolen goods knowing them to be stolen. *See* 4 W. Blackstone, Commentaries on the Laws of England 39, 133 (1769). American jurisdictions also "made receiving stolen property knowing it to be stolen a separate substantive offense." *See* W. LaFave & A. Scott, Substantive Criminal Law § 20.2 (2012). However, as recognized by LaFave, in "modern times," there has been a trend to broaden the scope of the offense's definition by including conduct like concealing and withholding stolen property with knowledge, by covering property obtained by embezzlement and false pretenses, and by requiring something less than actual knowledge of the stolen character of the property. *Id.*

On October 25, 1994, the Immigration and Nationality Technical Corrections Act of 1994 (ITCA) was passed, making various amendments to the Act by, inter alia, adding various burglary and theft offenses, including receipt of stolen property, within the class of aggravated felonies. When Congress passed the ITCA in 1994, the federal criminal code generally required proof beyond a reasonable doubt that an individual accused of receiving stolen property have subjective knowledge that the property was stolen. *See* 18 U.S.C. §§ 641, 659, 662, 1660, 1708, 2113(c), 2313, 2315, 2317 (1994). For example, to obtain a conviction under 21 U.S.C. § 841(d)(2) (1994), the United States must prove beyond a reasonable doubt that the defendant possessed or distributed certain chemicals "knowing or having reasonable cause to believe" that the chemicals would be used to make controlled substances.[1] *See also* 18 U.S.C. § 231(a)(2) (transportation of firearms offenses) (1994); 18 U.S.C. § 842(h) (dealing in explosive material offenses) (1994); 18 U.S.C. § 960(d) (1994) (importing or exporting certain chemicals).

Even though in federal cases, the United States must ultimately establish that the defendant had subjective knowledge that the property was stolen, the federal courts have recognized that, in the absence of a reasonable explanation supporting an innocent possession, a jury is entitled to draw a permissive inference that one who has possession of stolen goods also has the knowledge required to convict him of the crime in possessing the stolen goods knowing the same to have been stolen. *See United States v. Minieri*, 303 F.2d 550, 554 (2d Cir. 1962); *see also United States v. Smith*, 833 F.2d 213, 218 (10th Cir. 1987); *United States v. Parr-Pla*, 549 F.2d 660, 662 (9th Cir. 1977); *United States v. Cowden*, 545 F.2d 257, 264 (1st Cir. 1976); *United States v. Bamberger*, 456 F.2d 1119, 1134 (3d Cir. 1972); *United States v. Ross*, 424 F.2d 1016, 1020-21 (4th Cir 1970); *Hale v. United States*, 410 F.2d 147, 151 (5th Cir. 1969); *Aron v. United States*, 382 F.2d 965, 971 (8th Cir. 1967); *Pearson v. United States*, 192 F.2d 681, 689-90 (6th Cir. 1951). As recognized by the Supreme Court, "[p]ossession of fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and though only prima facie evidence of guilt, may be of controlling weight, unless explained by the circumstances or accounted for in some way consistent with innocence." *See Wilson v. United States*, 162 U.S. 613, 619 (1896).

At the time of enactment, 20 jurisdictions (19 states and the District of Columbia) had general receipt of stolen property statutes that required either subjective or objective knowledge

[1] Currently a circuit court split exists regarding the proper interpretation of the scienter standard in 21 U.S.C. § 841(c)(2). The Tenth Circuit interprets the statutory language as requiring the Government to prove the defendant's actual knowledge. *See United States v. Truong*, 425 F.3d 1282, 1289 (10th Cir. 2005); *United States v. Saffo*, 227 F.3d 1260, 1269 (10th Cir. 2000). However, the Eighth, Ninth, and Eleventh Circuits interpret the language to allow the Government to prove a defendant's actual knowledge or the knowledge of a reasonable person in the defendant's situation. *See United States v. Munguia*, 704 F.3d 596, 604-05 (9th Cir. 2012); *United States v. Galvan*, 407 F.3d 954, 957 (8th Cir. 2005); *United States v. Prather*, 205 F.3d 1265, 1271 (11th Cir. 2000); *see also United States v. Kaur*, 382 F.3d 1155, 1157-58 (9th Cir. 2004).

that the property was stolen.[2] For example, the 1994 version of the Wyoming statute provides criminal penalties for "a person who buys, receives, conceals, or disposes of property which he knows, believes, or has reasonable cause to believe was obtained in violation of law." *See* Wyo. Stat. § 6-3-403 (1994). Likewise, the 1994 Arkansas statute employs a standard requiring that the defendant act "knowing that [the item]...was stolen or having good reason to believe" the property received was stolen. *See* Ark. Code Ann. § 5-36-106(a) (1994). Only one state had a "reckless" requirement in establishing the general offense of receipt of stolen property.[3]

Pennsylvania and Tennessee had statutes appearing on their face to require subjective knowledge or belief, but which were in fact construed by the state courts to require only objectively reasonable grounds for belief. *See* 18 Pa. Cons. Stat. § 3925 (1994); Tenn. Code Ann. § 39-14-103 (1994); *but see Commonwealth v. Morrissey*, 654 A.2d 1049, 1054 (Pa. 1995) (explaining that a conviction can be secured where the Commonwealth establishes "possession of a stolen item and that the possessor knew, or had reason to know, that the item was stolen"); *Kessler v. State*, 414 S.W.2d 115, 117 (Tenn. 1967) (holding that "'the existence of guilty knowledge is to be regarded as established when the circumstances surrounding the receipt of the property were such as would charge a reasonable man with notice or knowledge or would put a reasonable man upon inquiry which if pursued would disclose that conclusion'") (citation omitted).

Several of the foregoing jurisdictions were divided between the know or should have known and reason to believe mens rea standards, and some jurisdictions essentially adopted both, using different mens rea standards for receipt of stolen property, generally, as opposed to receipt of stolen property involving a motor vehicle.[4]

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[2] *See, e.g.*, Ala. Code § 13A-8-16 (1994) ("reasonable grounds to believe"); Miss. Code Ann. § 97-17-70 (1994) (same); N.C. Gen. Stat. § 14-72 (1994) (same); Ariz. Rev. Stat. Ann. § 13-1802(A)(5) (1994) ("reason to know"); Minn. Stat. § 609.53(1) (1994) (same); Ark. Code Ann. § 5-36-106 (1994) ("good reason to believe"); La. Rev. Stat. Ann. § 14:69 (1994) (same); D.C. Stat. § 22-3831 (1994) ("reason to believe"); S.C. Code Ann. § 16-13-180 (1993) (same); W. Va. Code § 61-3-18 (1994) (same); Fla. Stat. Ann. § 812.019 (1994) ("should know"); Ga. Code Ann. § 16-8-7 (same); Idaho Code Ann. § 18-2403(4) ("under such circumstances as would reasonably induce...belie[f]..."); 720 Ill. Comp. Stat. 5/16-1 (1994) (same); Nev. Rev. Stat. § 205.275 (1993) ("under such circumstances as should have caused a reasonable man to know"); Iowa Stat. § 714.1(4)(1994) ("reasonable cause to believe"); Ohio Rev. Code Ann. § 2913.51 (1994) (same); Okla. Stat. Tit. 21 § 1713(1) (1994) (same); Or. Rev. Stat. § 164.095 (1994) ("good reason to know"); Wyo. Stat. § 6-3-403 (1994) ("believes or has reasonable cause to believe").

[3] *See* Alaska Stat. Ann. § 11.46.190 (1994) ("reckless disregard"). *See also* Ariz. Rev. Stat. § 13-207(A) (1994) (applying a "reckless" standard for trafficking in stolen property).

[4] For example, in 1994, Delaware required evidence of objective knowledge regarding receipt of stolen property generally, but only subjective knowledge or belief for receipt or possession of a stolen vehicle. *See* Del. Code Ann. Tit. 21, § 6704 (1994). Conversely, four states used an objective standard for receipt of stolen property generally, but an objective standard for receipt or possession of a stolen motor vehicle. *See* 625 Ill. Comp. Stat. § 5/4-103 (1994); N.C. Gen.

(continued...)

In addition, in 1994, 30 states had general receipt of stolen property statutes which required subjective knowledge or belief that the goods were stolen.[5] The Model Penal Code (MPC) employed the same standard. *See* MPC 223.6 ("knowing...or...believing"). At least five of those 30 jurisdictions allowed juries to *infer* subjective knowledge or belief regarding the stolen character of the property at issue so long as the accused had actual knowledge of facts that put him "on notice" that the property was stolen. *See State v. Bandt*, 549 P.2d 936, 939-40 (Kan. 1976) (explaining that "[t]he offense [of receiving stolen property] simply requires proof by the state that the defendant at the time he received stolen property had a belief or a reasonable suspicion from all of the circumstances known to him that the property was stolen"); *State v. Currier*, 521 A.2d 295, 299 (Me. 1987) (requiring that "to prove the requisite [knowing or believing] mens rea for [theft by receiving], the State must show that the defendant was aware of circumstances that would cause him to entertain the subjective belief that the property was stolen"); *State v. Sizemore*, 858 P.2d 420, 424 (N.M. Ct. App. 1993) (providing that "[a] person has knowledge of stolen property if he or she...has his or her suspicions definitely aroused and refuses to investigate for fear of discovering that the property is stolen"); *State v. Ricci*, 472 A.2d 291, 300 (R.I. 1984) (holding that a trial judge in a receipt of stolen property case had properly instructed the jury on the element of knowledge when he said that the prosecution must demonstrate beyond a reasonable doubt that the accused "'knew that [the goods]...were stolen goods, or at the time of receiving the property he knew of facts sufficient to satisfy a reasonable

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(...continued)
Stat. § 20-108 (1994); Okla. Stat. Tit. 47, § 4-103 (1994); S.C. Code Ann. § 16-21-80 (1993). However, in one of these states—Illinois—the courts applied an objective standard for receipt of a stolen vehicle, notwithstanding the statutory language. *See People v. Whitfield*, 573 N.E.2d 1267, 1272 (Ill. App. Ct. 1991) (holding that, in receipt of stolen vehicle cases, a "[d]efendant's knowledge may be established by proof of circumstances that would cause a reasonable person to believe property had been stolen").

[5] Sixteen jurisdictions used a "knowing" standard in 1994 when the ITCA was implemented. *See, e.g.*, Cal. Penal Code § 496 (1994) ("knowing"); Haw. Rev. Stat. § 708-830(7) (1994) (same); Kan. Stat. Ann. §21-3701 (1994) (same); Ky. Rev. Stat. § 514.110 (1994) (same); Mass. Gen. Laws Ann. Ch. 266 § 60 (1994) (same); Mich. Comp. Laws § 750.535(1) (1994) (same); Mont. Code Ann. § 45-6-301(3) (1994) (same); N.Y. Penal Law § 165.54 (1994) (same); N.D. Cent. Code § 12.1-23-02(3) (1993) (same); R.I. Gen. Laws § 11-41-2 (1994) (same); Tenn. Code Ann. § 39-14-103 (1994) (same); Tex. Penal Code Ann. § 31.03(b) (1994) (same); Va. Code Ann. § 18.2-108 (same); Wash. Rev. Code § 9A.56.140 (1994) (same); Ind. Code § 35-43-4-2(b) (1994) ("knowingly or intentionally"); Wis. Stat. § 943.34 (1994) ("intentionally"). Another 14 jurisdictions used a knowing or believing standard. *See, e.g.*, Colo. Rev. Stat. § 18-4-410 (1994) ("knowing or believing"); Conn. Gen. Stat. § 53a-119(8) (1994) (same); Del. Code Ann. Tit. 11 § 851 (1994) (same); Me. Rev. Stat. Ann. Tit. 17-A § 359(1) (1994) (same); Md. Code Ann. Crim. Law Art. 27, § 342(c)(1) (1994) (same); Mo. Rev. Stat. § 570.080(1) (1994) (same); Neb. Rev. Stat. § 28-517 (same); N.M. Stat. § 30-16-11 (same); N.H. Rev. Stat. Ann. § 637:7(i) (1994) (same); N.J. Stat. Ann. § 2C:20-7 (1994) (same); Pa. Cons. Stat. Tit. 18, § 3925 (1994) (same); S.D. Codified Laws § 22-30A-7 (1993) (same); Utah Code Ann. § 76-6-408(1) (1994) (same); Vt. Stat. Ann. Tit. 13 § 2561 (same).

person that the property was stolen'"); *State v. Rockett*, 493 P.2d 321, 323 (Wash Ct. App. 1972) (providing that "[o]n the question of whether the defendant had knowledge that the [property was]...stolen, actual knowledge is unnecessary. It is sufficient if [the defendant]...had knowledge of facts sufficient to put him on notice that [the property was...] stolen.").

Given the diversity of approaches reflected in the various receipt of stolen property statutes, it is evident that both standards existed in 1994, and there appears to have been a fairly even split among the states about which standard was used. As explained above, Congress employed both standards in the federal criminal statutes. The term as it is used at section 101(a)(43)(G) of the Act should be given its common and ordinary meaning. We conclude that the common and ordinary meaning for section 101(a)(43)(G) of the Act regarding receipt of stolen property should be a mens rea that includes receipt of stolen property where the defendant knew, should have known, or had reason to believe that the property in question was stolen for the reasons outlined below. *See Taylor v. United States*, *supra*, at 598.

The primary reason we conclude that receipt of stolen property convictions based on "should have known" or "reason to believe" is because, at the time of enactment Congress and many states employed these standards. This is not a situation where there is a single state using an outlier standard. On the contrary, Congress itself, has used this more expansive standard for certain federal criminal statutes. Moreover, twenty jurisdictions (19 states and the District of Columbia) use the "should have known" or "reason to believe" standard. The prevalence of this standard means that it was within the common and ordinary meaning of the phrase "receipt of stolen property." We have never held that a numerical majority of states is necessary to meet the common and ordinary meaning standard. A contrary conclusion would render receipt of stolen property offenses in certain federal criminal statutes and statutes in twenty jurisdictions not covered by section 101(a)(43)(G). There is insufficient support to show that Congress intended this type of result. Given the variety of mens rea standards used for receipt of stolen property offenses (knowing, reasonable grounds to believe, reason to know, reason to believe, knowing or believing) in different jurisdictions we cannot conclude that Congress meant to exclude certain variations. Instead we conclude that Congress intended to include all of these different mens rea standards when it made receipt of stolen property an aggravated felony.

Moreover, a requirement that receipt of stolen property be defined with respect to the absolute knowledge mens rea present at common law is unduly restrictive, as "[t]he arcane distinctions embedded in the common law definition have little relevance to modern law enforcement concerns." *See Taylor v. United States*, *supra*, at 593-94. Notably, the ITCA amendments to the Act were motivated, in part, by Congressional dissatisfaction with this country's immigration laws to criminal aliens and an intent to expand the classes of aliens deportable as aggravated felons. This sentiment is further reflected in *Matter of Bahta*, *supra*, when the Board concluded that receiving stolen property should be defined to include a number of closely related offenses, as opposed to a limited number of "traditional" offenses.

Narrowly defining "receipt of stolen property" to only include offenses which require the state to prove beyond a reasonable doubt that a person accused of receiving stolen property had subjective knowledge that the property was stolen would immunize aliens, like this respondent, who have committed serious crimes in states which choose to more broadly define receipt of stolen property. Application of such a narrow definition would further lead to inconsistent

results, as an alien who receives stolen property in a jurisdiction employing the more expansive definition would avoid deportation, whereas essentially the same conduct in a jurisdiction using the more narrow definition would result in the alien's deportation. *See Taylor v. United States*, *supra*, at 591 (citing *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119-20 (1983) (recognizing that absent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law, "because the application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control")). Our immigration laws should not be construed to lead to such unwarranted inconsistencies among jurisdictions where the immigration proceedings arise. *See Taylor v. United States*, *supra*, at 595 (recognizing that construing "burglary" to mean common law burglary would come close to nullifying that term's effect in the statute).

Second, a generic definition of "receipt of stolen property" which includes a "reason to believe standard" and does not require a showing that the defendant intended to deprive the owner is reasonable. It may well be that a "knowing" standard is too demanding in this context, especially in light of the fact that the receiver will be especially careful not to learn the truth. *See* W. LaFave & A. Scott, Substantive Criminal Law § 20.2 (2012). Even in *Commentaries on Laws of England*, published in 1769, the author recognized that, in larceny cases, the facts may become so mingled that it is impossible to recount all the facts which may evidence a felonious intent, wherefore they must be left to the due and attentive consideration of the court and jury. *See* 4 W. Blackstone, Commentaries on the Laws of England 133 (1769). Expanding a state's receipt of stolen property statute to encompass "reason to believe" cases is a rational and logical tool to defeating a criminal's willful ignorance to the origin of suspect property.

Third, even though the "reason to believe" standard is facially a lower burden of proof than the "actual knowledge" standard, it does not appear that, in actual practice, the "reason to believe" standard requires the state to present less evidence of a defendant's guilt. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (recognizing the importance of considering how a state realistically applies its laws when considering the immigration consequences of a criminal conviction). Despite employing a "reason to believe" standard, several state courts have reversed convictions where the evidence was insufficient to establish a defendant's guilt. *See, e.g.*, *Thomas v. State*, 386 S.W.3d 536 (Ark. Ct. App. 2011) (holding that possession of property which was stolen approximately 7 months after it went missing was insufficient to demonstrate that the defendant had "reason to believe" that the property was stolen); *In re Siler*, No. 2006-A-0050, 2007 WL 1731729 (Ohio Ct. App. June 15, 2007) (reversing a delinquency adjudication upon concluding that an "illegitimate" purchase of a handgun was insufficient to impute a "reason to believe" that it was stolen); *State v. Brown*, 641 S.E.2d 850, 852-53 (N.C. Ct. App. 2007); *cf. States v. Roberts*, 659 S.E.2d 99 (N.C. Ct. App. 2008) (unpublished) (holding that the evidence was sufficient to allow a jury to conclude that a defendant had reason to believe a car was stolen due to an extremely low rental fee, the fact that the transaction was conducted with a drug dealer, and the fact that the car was not located in a car rental lot or normal place of business where a car might be rented). As discussed above, several of the states that employed a subjective knowledge that the property was stolen allowed juries to infer knowledge. Likewise, in federal cases, a jury is entitled to draw a permissive inference that one who has possession of stolen goods has also the knowledge required to convict him of the crime of possessing the stolen goods knowing the same to have been stolen. Thus, even though a minority of the states expressly employed some form of the "reason to believe" standard in 1994,

it appears that the minimum amount of evidence needed to satisfy such standard would also be sufficient to support a conviction for receipt of stolen property in an overall majority of states.

In light of the foregoing, we conclude that the ordinary meaning of the term "receipt of stolen property" includes the defendant's actual knowledge or "reason to believe" that such property is stolen.[6] Accordingly, we agree with the Immigration Judge's conclusion that the respondent was convicted of an aggravated felony as it relates to his conviction for receipt of stolen property, and thus, the respondent is removable as charged under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (I.J. at 3). Therefore, although the respondent also argues that he is not removable as charged for having been convicted of two crimes involving moral turpitude after admission, we need not reach that issue for purposes of determining whether the respondent was properly the subject of the instant removal proceedings (Resp. Brief at 8-9).

In addition, we conclude that we need not ultimately resolve whether the respondent's convictions are for crimes of moral turpitude in assessing whether he requires a waiver of inadmissibility in conjunction with his application for adjustment of status, as we agree with the Immigration Judge's determination that the respondent does not merit adjustment of status in the exercise of discretion (Resp. Brief at 8-9; I.J. at 7). Where an applicant for adjustment of status under section 245 of the Act presents adverse discretionary information, it is necessary for him to offset this negative information with countervailing positive equities, including evidence of family ties in the United States, hardship if the application is not granted, and the length of the applicant's residence in the United States, among other things. *See Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970).

Upon de novo review, we agree with the Immigration Judge that various, significant negative discretionary considerations are at issue in this case. For instance, the respondent sustained two recent, serious convictions involving criminal mischief in 2010 and dealing in stolen property in 2012 (I.J. at 2; Tr. at 38-42, 59-66; Exhs. 1-3). In addition, notwithstanding his convictions, the respondent was unable to accept responsibility for his conduct, thus evidencing an absence of rehabilitation (I.J. at 7; Tr. at 40-41, 60-65; Exhs. 1-3).

The respondent's positive equities include his lengthy residence in the United States, particularly the fact that he has been a lawful permanent resident of this country for nearly 25 years (I.J. at 2; Tr. at 5-9, 36; Exh. 1). In addition, he has significant family ties in this country, including his three United States citizen children, although two of his children are self-sufficient adults (I.J. at 6; Tr. at 38, 42-47, 54-55, 57-61, 68-69; Exhs. 4A, 4E, 4G, 5). Although the respondent testified that his youngest child was having some problems in school as a result of the respondent's detention, he further explained that his son and the respondent's partner would accompany the respondent to El Salvador should he be ordered removed (I.J. at 6-7; Tr. at 45-48, 68; Exh. 5). Although an alien's gainful employment may also be a positive discretionary consideration, the Immigration Judge here noted that the respondent did not provide any

[6] By "reasons to believe" we mean that any of the variants such as reason to know or believing will also be covered.

persuasive evidence establishing that he has been consistently, gainfully employed in operating a legitimate business (I.J. at 7; Tr. at 37, 46-47, 50-53, 58-60, 65-66).

In balancing the respondent's recent and serious criminal record against his positive equities, we ultimately conclude that he does not merit a favorable exercise of discretion. Because we conclude that the respondent is not otherwise eligible for adjustment of status, we decline to address the respondent's arguments regarding whether the Immigration Judge erred in finding he was inadmissible as a public charge (Resp. Brief at 11-12; I.J. at 6). Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

File: A090 470 341 – Miami, FL

Date: FEB 20 2015

In re: JOSE GUILLERMO RIOS VENTURA

DISSENTING OPINION: Roger A. Pauley, Board Member

I respectfully dissent. Contrary to the majority, I agree with the respondent's argument on appeal that the Immigration Judge erred as a matter of law in finding that his conviction for dealing in stolen property, secured under Florida Statute section 812.019(1), categorically qualifies as an aggravated felony theft offense under section 101(a)(43)(G) of the Immigration and Nationality Act (Act), 8 U.S.C. § 101(a)(43)(G) (Resp. Brief at 6).

The term "receipt of stolen property" is explicitly included within the scope of section 101(a)(43)(G) of the Act, but it is not merely a subset of more general theft offenses and need not contain all the elements of a generic "theft" to qualify as an aggravated felony under this provision. However, receipt of stolen property and theft, as these offenses are defined by section 101(a)(43)(G) of the Act, share some important similarities, including a requirement that each offense embody an intent to deprive the owner of this property. *See, e.g., Matter of Sierra*, 26 I&N Dec. 288 (BIA 2014); *Matter of Cardiel*, 25 I&N Dec. 12 (BIA 2009); *see also Jaggernauth v. United States Attorney General*, 432 F.3d 1346, 1353 (11th Cir. 2005).

Accordingly, as we explained in *Matter of Cardiel*, *supra*, where a receipt offense includes an intent to deprive, even where this intent is not explicitly stated in the statute and is only implied or inferred, the offense contains the requisite "knowing" scienter, so as to qualify as an offense within the ambit of section 101(a)(43)(G) of the Act. *See id.* at 16, *citing Randhawa v. Ashcroft*, 298 F.3d 1148, 1154 (9th Cir. 2002); *see also Morissette v. United States*, 342 U.S. 246 (1952) (explaining that the mere omission of any mention of intent from a statute punishing an individual who knowingly converts government property will not be construed as eliminating the element of intent).

However, where a receiving offense only requires a mental state of "reason to believe" that the property was stolen, no valid inference can be drawn that the offender intended to deprive the true owner of the rights and benefits of ownership as he need not be actually aware of the stolen character of the item received in order to be convicted of the offense and instead the prosecution need only establish that he should have been aware of the fact that such property is stolen when considering the circumstances presented. *See Matter of Sierra*, *supra*, at 292 (distinguishing a conviction for receipt in Nevada, requiring knowledge or a reason to believe, from a conviction under the California counterpart, where knowledge is inferred, in finding that the former conviction does not fall within the ambit of section 101(a)(43)(G) of the Act within the jurisdiction of the United States Court of Appeals for the Ninth Circuit but that the latter does).

Here, the statute in question may result in a conviction where an individual either knowingly receives stolen items, as governed by *Matter of Cardiel*, *supra*, or under a lesser culpable mens rea involving reason to believe, as discussed in *Matter of Sierra*, *supra*.

See Haugabrook v. State, 827 So.2d 1065, 1068 (Fla. Ct. App. 2002) *citing B.S. v. State*, 320 So.2d 459 (Fla. Ct. App. 1975) (observing that the "should know" requirement in the current Florida receiving statute and its predecessor are equivalent to a "reason to believe" standard). Although *Matter of Sierra*, *supra*, applies explicitly within the Ninth Circuit, I believe that the approach taken in that case is appropriate here in finding that the Florida statute in question does not categorically qualify as the type of receiving stolen property offense covered by section 101(a)(43)(G) of the Act for the reasons outlined below. Accordingly, I would take this opportunity to explicitly extend *Matter of Sierra*, *supra*, and to apply it to all cases under the Board's jurisdiction, rather than limiting its application to only those cases arising within the Ninth Circuit.[1]

When looking at all of the statutes that Congress had before it when it enacted the aggravated felony provision at issue here, I observe that, for immigration purposes, Congress did not cross-reference a federal statute in defining the term "receipt of stolen property."[2] As such, like the majority, I deem it appropriate to define the relevant offense based upon the "ordinary, contemporary, and common meaning of the statutory words" then in use. *See Taylor v. United States*, 495 U.S. 575 (1990); *Williams v. Taylor*, 529 U.S. 420 (2000). As a result, federal law is not the only consideration.[3] *See, e.g., Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). Thus, like the majority, the approach I propose here is the one the Supreme Court followed in *Taylor v. United States*, *supra*, requiring examination of the federal and state statutes and the MPC provisions in effect at the time that the version of section 101(a)(43)(G) of the Act, including receipt of stolen property, was enacted in defining this species of offenses and in determining whether there is a general understanding as to the requisite level of scienter. However, although I agree with the majority with respect to the methodology to apply, I disagree with the result reached by the majority in applying this approach.

Under the federal laws then in effect when the current version of section 101(a)(43)(G) of the Act was enacted, generally, the prosecution was required to establish the defendant had

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[1] Notably, the Fifth and Seventh Circuits have also held that a theft offense, including possession of stolen property, involves an intent to deprive the owner of the rights and benefits of ownership. *See Burke v. Mukasey*, 509 F.3d 695 (5th Cir. 2007); *Hernandez-Mancilla v. INS*, 246 F.3d 1002 (7th Cir. 2001).

[2] Receipt of stolen property offenses were added to the list of aggravated felonies pursuant to section 222 of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305, 4321 (October 25, 1994).

[3] There are many federal statutes defining "receipt of stolen property" in different contexts. Further, state criminal codes, as well as the Model Penal Code (MPC), provide a wide variety of different standards for the term "receipt of stolen property." Therefore, we find it proper and necessary to examine all of these statutes in order to determine the meaning of the term "receipt of stolen property" and whether the "reason to believe" mens rea is sufficient to establish a "receipt of stolen property" aggravated felony under section 101(a)(43)(G) of the Act.

knowledge that the property in question was stolen property.[4] *See* 18 U.S.C. §§ 641, 659, 662, 668, 880, 1660, 1708, 2113(c), 2313, 2314, 2317; *see also United States v. Fields*, 466 F.2d 119 (2d Cir. 1972); *United States v. Werner*, 160 F.2d 438 (2d Cir. 1947); *Wolf v. United States*, 290 F. 738 (2d Cir. 1923). This knowledge or knowing standard was also used in 16 state jurisdictions.[5]

Section 223.6 of the MPC defines the offense of "receiving stolen property," in pertinent part, as "purposely receiving, retaining, or disposing of movable property of another knowing it has been stolen, or *believing that it has probably been stolen.*" *See* MPC § 236.6(1) (emphasis added). When section 101(a)(43)(G) of the Act was enacted, fourteen jurisdictions mirrored the language used in the MPC in their general receiving stolen property statutes.[6] Thus, I consider these states as falling within a category of jurisdictions requiring a "knowing" state of mind to commit the underlying offense, as, like knowledge, belief requires an awareness of the stolen nature of the property, with the difference only relating to the degree of certainty attached to such belief. By contrast, a "reason to believe" state of mind implies no actual knowledge or even belief as to the stolen character of the items received, but only a showing that the offender *should* have been so aware from the circumstances. In sum, of 51 jurisdictions, excluding federal law but including the District of Columbia, in effect at the time section 101(a)(43)(G) of the Act was enacted, 20 general receiving stolen property statutes used a "reason to believe" or similar standard while 30 employed a knowing or belief state of mind, and one used a reckless standard.[7]

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[4] We recognize that 18 U.S.C. § 922(j) contains an exception, providing that "[i]t shall be unlawful for any person to receive...any stolen firearm or stolen ammunition...knowing or *having reasonable cause to believe* that the firearm or ammunition was stolen" (emphasis added).

[5] *See* Cal. Penal Code § 496 (1994) ("knowing"); Haw. Rev. Stat. § 708-830(7) (1994) (same); Kan. Stat. Ann. § 21-3701 (1994) (same); Ky. Rev. Stat. § 514.110 (1994) (same); Mass. Gen. Laws Ann. Ch. 266 § 60 (same); Mich. Comp. Law § 750.545(I) (1994) (same); Mont. Code Ann. § 45-6-301(3) (1994) (same); N.Y. Penal Law § 165.54 (1994) (same); N.D. Cent. Code § 12.1-23-02(3) (1993) (same); R.I. Gen. Laws § 11-41-2 (1994) (same); Tenn. Code Ann. § 39-14-103 (1994) (same); Tex. Penal Code Ann. § 31.03(b) (1994) (same); Va. Code Ann. § 18.2-108 (same); Wash. Rev. Code § 9A.56.140 (1994) (same); Ind. Code § 35-43-4-2(b) (1994) ("knowingly or intentionally"); Wis. Stat. § 943.34 ("intentionally").

[6] *See e.g.*, Colo. Rev. Stat. § 18-4-410 (1994) ("knowing...or...believing"); Conn. Gen. Stat. § 53a-119(8) (1994) (same); Del. Code Ann. Tit. 11 § 851 (1994) (same); Md. Code Ann. Crim. Law Art. 27, § 342(c)(1) (1994) (same); Me. Rev. Stat. Ann. Tit. 17-A § 359(1)(A) (1994) (same); Mo. Rev. Stat. § 570.080 (1994) (same); Neb. Rev. Stat. § 28-517 (same); N.H. Rev. Stat. Ann. § 637:7(I) (1994) (same); N.J. Stat. Ann. § 2C:20-7 (1994) (same); N.M. Stat. § 30-16-11 (same); Pa. Cons. Stat. § 3925 (1994) (same); S.D. Codified Laws § 22-30A-7 (1994) (same); Utah Code Ann. § 76-6-408(1) (1994) (same); Vt. Stat. Ann. Tit. 13 § 2561 (same).

[7] For statutes involving the reason to believe or similar standards, *see* Ala. Code § 13A-8-16 (1994) ("reasonable grounds to believe"); Miss. Code Ann. § 97-17-70 (1994) (same); N.C. Gen.

(continued...)

Thus, on their face, the statutes of 20 jurisdictions, including the District of Columbia, and one federal statute used the lesser standard of "reason to believe" or something similar in their receiving statutes at the time that the ITCA was passed, while 30 state receiving statutes, 11 federal statutes, and the MPC used an elevated standard of "knowledge" or "belief." Accordingly, I disagree with the majority's assertion that Congress contemplated "reason to believe" as representing the mens rea used within the ordinary meaning of the term "receipt of stolen property." Instead, only a substantial minority of jurisdictions utilized the lower "reason to believe" (or similar) standard, as does Florida in the statute at issue here, such that the lesser "reason to believe" standard was outside the mainstream in defining the offense of "receipt of stolen property" in 1994. Thus, in applying the *Taylor* approach in arriving at a definition, I conclude that the "ordinary, contemporary, and common meaning" of the statutory words "receipt of stolen property" for purposes of section 101(a)(43)(G) of the Act strongly supports use of the view embodied in the majority of jurisdictions, including all but one federal statute, as the Congressional intent. *See id.* As a result, I conclude that the mens rea of "knowledge or belief" is an essential element of a "receipt of stolen property" aggravated felony and does not include a "reason to believe" or equivalent scienter. *See id.*

I thus conclude that a mental state of "reason to believe" or the equivalent (such as "should know") is insufficient to qualify an offense as a receipt of stolen property aggravated felony within the scope of section 101(a)(43)(G) of the Act. Moreover, although the Florida statute in question includes both the heightened knowledge standard and the lower reason to believe standard, assuming the statute is divisible and applying the modified categorical approach in this case does not assist the Department of Homeland Security (DHS) in meeting its burden of proof with respect to the aggravated felony charge. *See Fajardo v. United States Attorney General*, 659 F.3d 1303, 1305 (11th Cir. 2011). Instead, the judgment of conviction and criminal information in this case do not specify which portion of the statute specifically supports the respondent's conviction (Exhs. 1-2). As a result, I cannot agree with the majority's conclusion that the respondent has been convicted of an aggravated felony, and thus, that he is removable on this basis.

(...continued)
Stat. § 14-72 (1994) (same); Ariz. Rev. Stat. Ann. § 13-1802(A)(5) (1994) ("reason to know"); Minn. Stat. § 609.53(1) (1994) (same); Ark. Code Ann. § 5-36-106 (1994) ("good reason to believe"); La. Rev. Stat. Ann. § 14:69 (1994) (same); D.C. Stat. § 22-3831 (1994) ("reason to believe"); S.C. Code Ann. § 16-13-180 (1994) (same); W. Va. Code § 61-3-18 (1994) (same); Fla. Stat. Ann. § 812.019 (1994) ("should know"); Ga. Code Ann. § 16-8-7 (same); Idaho Code Ann. § 18-2403(4) ("under such circumstances as would reasonably induce belief"); 720 Ill. Comp. Stat. 5/16-1 (1994) (same); Nev. Rev. Stat. § 205.275 (1993) ("under such circumstances as should have caused a reasonable man to know"); Iowa Stat. § 714.1(4)(1994) ("reasonable cause to believe"); Ohio Rev. Code Ann. § 2913.51 (1994) (same); Okla. Stat. Tit. 21 § 1713(1) (1994) (same); Or. Rev. Stat. § 164.095 (1994) ("good reason to know"); Wyo. Stat. § 6-3-403 (1994) ("believes or has reasonable cause to believe"). For the statute involving reckless disregard, *see* Alaska Stat. Ann. § 11.46.190 (1994).

Turning to the moral turpitude charge brought under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii), I would likewise conclude that the respondent's conviction for receipt of stolen property is not a crime involving moral turpitude. Specifically, our case law establishes that receiving stolen property is a crime involving moral turpitude where the offense includes an element of knowing that the property is stolen. *See Matter of Salvail*, 17 I&N Dec. 19 (BIA 1979); *Matter of Patel*, 15 I&N Dec. 212, 213 (BIA 1975). Although a conviction may be secured under the Florida statute for knowingly receiving stolen property, it may also be secured, alternatively, where the respondent only should know of the property's stolen nature. As explained in the aggravated felony analysis, however, the record of conviction does not specify what mens rea supports the respondent's conviction, and thus, the DHS did not carry its burden of proof in establishing that this was a conviction for a crime involving moral turpitude. *See, e.g., Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G 2008) (holding that moral turpitude requires a mental state of at least recklessness).

However, the respondent has not meaningfully contested the Immigration Judge's determination that his conviction for criminal mischief, as charged on the Notice to Appear (NTA), is a crime involving moral turpitude (I.J. at 5; Exhs. 1, 3). Moreover, although this is the only additional crime involving moral turpitude charged on the NTA, the Immigration Judge also found that the respondent was convicted of a crime involving moral turpitude when he was convicted under Florida Statute section 812.16 for operating an illegal chop shop (I.J. at 5; Exh. 3). Accordingly, under the circumstances, I would remand the record to the Immigration Court to allow the DHS an opportunity to lodge additional factual allegations in support of the charge under section 237(a)(2)(A)(ii) of the Act, should the agency choose to pursue this course of action.

Roger A. Pauley
Board Member

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
MIAMI, FLORIDA

File: A090-470-341 March 19, 2014

In the Matter of

JOSE GUILLERMO RIOS VENTURA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act) - convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act; 237(a)(2)(A)(ii) of the Act - convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

APPLICATIONS: Adjustment of status in conjunction with a waiver of inadmissibility.

ON BEHALF OF RESPONDENT: VIRLENYS H. PALMA

ON BEHALF OF DHS: MICHELE H. DRUCKER

ORAL DECISION OF THE IMMIGRATION JUDGE

The Department of Homeland Security (Department) issued a Notice to Appear on or about January 23, 2013 which was filed with the Immigration Court on or about April 5, 2013 placing the respondent in removal proceedings. This document alleges that the respondent is not a citizen or national of the United States and that he is a native and citizen of El Salvador. It further alleges that when he initially came into United States he entered the country illegally without being properly inspected by a

United States Immigration Officer.

It further alleges that his status was adjusted to that of a lawful permanent resident effective on or about December 1, 1990. And this is under Section 210(A) of the Act.

It fFurther alleges that on September 24, 2012 the respondent was convicted in the 13th Judicial Circuit Court in and for Hillsboro, County, state of Florida, for dealing in stolen property, in violation of Florida Statute 812.019 under case 2012-CF-007369.

It fFurther alleges that on September 28, 2010 he was convicted in the 13th Judicial Circuit Court in and for Hillsboro, County, state of Florida for the offense of criminal mischief, in violation of Florida Statute 806.13 under case 2010-CF-000548.

Lastly, it alleges that these convictions are crimes involving moral turpitude and that they did not arise out of a single scheme of criminal misconduct.

They charged the respondent with being removable pursuant to the aforementioned sections of law.

The respondent on or about April 22, 2013 admitted alienage but denied the convictions listed in the Notice to Appear. In support of the contested allegations and charges the Department submitted several conviction records which can be found at Exhibits 2 and 3. After a careful review of these conviction records the Court has sustained all of the allegations and the two charges of removability.

As to relief from removal the respondent submitted an application for adjustment of status pursuant to Section 245 of the Act, in conjunction with a waiver of inadmissibility pursuant to Section 212(h) of the Act.

Statement of the law

The respondent is seeking to adjust his status to that of a permanent

resident pursuant to Section 245 of the Act. Respondent's adult son filed an alien relative petition Form I-130 on respondent's behalf, and that petition was granted by the Department of Homeland Security. As a result the respondent has an immigrant visa immediately available to him, therefore he wishes to adjust his status to that of a permanent resident. The respondent must show that an immigrant visa is available to him. He must also establish that he is admissible to the United States, that there are no grounds of inadmissibility, and also that the application should be granted in the exercise of discretion.

Respondent has also filed a waiver of inadmissibility pursuant to Section 212(h) of the Act. This is to waive the crimes involving moral turpitude. This waiver is under Section 212(h)(1)(B) of the Act, also known as the hardship waiver. Here he has to have a qualifying relative, which he does have, and he has three U.S. citizen children, so he does have the qualifying relative for that. He also has to establish that his removal from the United States would be an extreme hardship to that qualifying relative. Factors used in determining whether an applicant has established extreme hardship include but are not limited to: lawful permanent resident or U.S. citizen family ties to the United States; the qualifying relative's family ties outside the United States; the conditions in the country the qualifying relative would relocate and the extent of the qualifying relative's ties there; the financial impact of departure from the United States; and significant conditions of health. See Matter of Cervantes, 22 I&N Dec. 560 (BIA 1999).

This application is also a discretionary one in that the respondent must also show that a grant of the application would be in the best interest of the United States. See Matter of Mendez, 21 I&N Dec. 296 (BIA 1996).

Findings of fact

First the Court wants to just go over the grounds of removability. As mentioned earlier, there are two charges of removability. One is under Section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act, which in turn relates to a theft offense which includes the receipt of stolen property or a burglary offense for which there is a term of imprisonment of at least one year.

Here the respondent was convicted of dealing in stolen property in violation of Florida Statute 812.019. For this offense the respondent was sentenced to I believe a year and one day. So this conviction is an offense that relates to receipt of stolen property. And again, the sentence imposed was greater than one year, and therefore the Court finds that this constitutes an aggravated felony under Section 101(a)(43)(G) of the Act.

Respondent has another conviction for operating a chop shop as well as for criminal mischief.

The other charge on the Notice to Appear is under Section 237(a)(2)(A)(ii) of the Act, two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. The two offenses listed in the Notice to Appear occurred on different days and pertain to different types of offenses, and so therefore there is no single scheme of criminal misconduct present. The issue is: are these crimes involving moral turpitude? The Court does find that dealing in stolen property would constitute crime involving moral turpitude. A crime involving moral turpitude involves both an intent to commit the crime and also the conduct has to be reprehensible, something that society considers to be reprehensible. The Court is aware of a very old precedent Board decision, Matter of K-, 2 I&N Dec. 90 (BIA 1944), where the Board held that under, I believe it was a German statute, the receipt of stolen property was not a CIMT

because the statute had some language like one must assume that it was stolen. Here in Florida the person has to know that it's stolen or there's a reason to believe that it was stolen. I believe that the Florida statute falls closer to other precedent Board decisions such as Matter of Salvail, 17 I&N Dec. 19 (BIA 1979), and also Matter of Z-, 7 I&N Dec. 253 (BIA 1956), where they found that dealing in or being convicted of possessing stolen goods the person believes is stolen is also a crime involving moral turpitude. So I do believe that his conviction for dealing in stolen property constitutes a crime involving moral turpitude.

The operation of a chop shop would also constitute a crime involving moral turpitude, because again, you have to knowingly operate or assist in operating a shop that deals with stolen parts and altering parts that have been stolen. So I do believe that categorically this is a crime involving moral turpitude. The Court will also go as far as saying that the other conviction for criminal mischief which is a felony does not fall under the petty offense exception. It would ~~as~~ also be a crime involving moral turpitude because the intent is present and the conduct involves the intentional destruction of property. So the Court does find that respondent is removable as charged.

As to the application for adjustment of status, it does appear from the record that the respondent, well, that he has a visa immediately available to him, his U.S. citizen son, who is over the age of 21, petitioned for him, and that petition was granted by Department of Homeland Security. But as I mentioned earlier, he also has to show that he is admissible to the United States. He has to show that he will not become a public charge. Becoming a public charge is a ground of inadmissibility. To cure that the respondent submitted an affidavit of support prepared by his son, the petitioner of the alien relative petition. However, the income presented there is

insufficient to show that the respondent would not become a public charge. It did include the asset of the family home. However, it is unclear as to whether or not that involves a family home. We do not have a copy of the title to the property ~~owner~~, the deed to the property. We do not know who actually owns that property, nor do we know the net value of that home at this stage. So unfortunately, I do not believe that he has established that he is admissible and that he will not become a public charge.

As to the waiver of inadmissibility, I don't believe that the respondent has established that the qualifying relatives would face or experience extreme hardship should he be removed from the United States. The common-law spouse would not be a qualifying relative, but his children definitely are. He has two adult sons and one son that is under the age of 21. The two oldest are self-sufficient. They are older. They are not dependent on the respondent as far as the Court can see. The oldest has his own family, has I believe several children that he is caring for, lives separate and apart from the respondent's home. The middle child is the one who petitioned for the respondent. He also is over the age of 21, is gainfully employed, and assisting his mother in the home. His girlfriend also lives with them and is also working. So there are a number of gainfully employed people in the household that will continue on should the respondent be removed. It is obvious that there will be emotional hardship to these family members should the respondent be removed, but this type of hardship occurs in all removal cases. It has been testified to by respondent and his witnesses that should he be removed that the common-law spouse and the youngest child would accompany him to El Salvador, but there is no evidence in the background material that this in and of itself would constitute extreme hardship. We do not have the current country conditions in El Salvador that would cause a problem. Respondent has family members still there that might, if not give financial support, would still provide emotional support for him. The

family would still be together. The youngest child apparently, according to the letter from the school official, has problems in school, perhaps problems due to the absence of respondent in the household. But being together, that might assist him with that type of depression. The respondent has vast experiences in the agricultural field, which I believe is transferrable to El Salvador, or I should say there is no evidence that he cannot transfer that skill there. So I just do not see the required extreme hardship to a qualifying relative.

There is also the issue of discretion. You know, the Court understands that this respondent has been here for quite some time, and that is a positive factor for him in that he has family ties here, which is another positive factor. But those are the only real positive factors that the Court sees. On the Negative side, obviously he has several felony convictions which are recent. The respondent has denied any guilt in these offenses which shows no rehabilitation in the Court's opinion. There is no documentation showing that he was gainfully employed. We do not know how he conducted this business of, you know, buying and selling produce. There is not anything from the state showing he had a legitimate business doing that, no indication of any tax returns that were actually filed on his behalf or on behalf of the business that he was running. He has been convicted of operating a chop shop, dealing in stolen car parts, truck parts, which again he has denied. These are significant negative factors for this Court anyway, and I do not believe that the positive factors outweigh the negative factors that are present in this case, and I just do not believe that the application should be granted in the exercise of discretion.

For all the forgoing reasons, the following orders shall be entered:

ORDER

IT IS HEREBY ORDERED that respondent's application for adjustment of

status pursuant to Section 245 of the Act be denied;

IT IS FURTHER ORDERED respondent's application for a waiver of inadmissibility pursuant to Section 212(h) of the Act be denied;

IT IS FURTHER ORDERED respondent be removed from the United States to El Salvador pursuant to the two charges contained in the Notice to Appear.

Please see the next page for electronic signature

ADAM OPACIUCH
Immigration Judge

//s//

Immigration Judge ADAM OPACIUCH

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