U.S. Department of Justice

Executive Office for Immigration Review

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Name: ACOSTA QUIRCH, MARCOS AN... **A 044-971-669**

Date of this notice: 12/1/2017

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:
Pauley, Roger

Userteam: Docket

File: A044 971 669 – Miami, FL

Date: DEC - 1 2017

In re: Marcos Antonio ACOSTA QUIRCH

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Tammy J. Fox-Isicoff, Esquire

ON BEHALF OF DHS: Olga Villa
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from an Immigration Judge's decision, dated June 15, 2017, terminating removal proceedings against the respondent. The appeal will be dismissed.

The respondent, a native and citizen of Cuba and a lawful permanent resident of the United States, was convicted in 2012 of "simple vehicle flight" in violation of FLA. STAT. ANN. § 316.1935(2) (hereafter "section 316.1935(2)"). The issue on appeal is whether this conviction renders the respondent removable under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an alien convicted of a crime involving moral turpitude ("CIMT").[1] We review that legal issue *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

To determine whether section 316.1935(2) defines a CIMT, we employ the "categorical approach," which "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* (*Silva-Trevino III*), 26 I&N Dec. 826, 831 (BIA 2016) (citing *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)). To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state. *Id.* at 834. For CIMT purposes, a culpable mental state is one which requires deliberation or consciousness, such as intent, knowledge, willfulness, or recklessness. *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 849 (BIA 2016).

Section 316.1935(2) requires a culpable mental state—i.e., willfulness. Thus, the dispositive issue is whether the *actus reus* of the offense is "reprehensible" enough to make it a CIMT. Conduct is "reprehensible" in the pertinent sense if it is "'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.'" *Matter of Silva-Trevino III*, 26 I&N Dec. at 833.

[1] The respondent has several other convictions, but the Immigration Judge found that they do not render him removable. The DHS has not challenged that determination; thus, we confine our analysis to the respondent's conviction under section 316.1935(2).

At all relevant times, section 316.1935(2) has provided as follows:

> Any person who willfully flees or attempts to elude a law enforcement officer in an authorized law enforcement patrol vehicle, with agency insignia and other jurisdictional markings prominently displayed on the vehicle, with siren and lights activated commits a felony of the third degree....

As the United States Court of Appeals for the Eleventh Circuit has explained, "[t]he elements of the crime are: '(1) an officer in a law enforcement patrol vehicle, with its jurisdictional markings prominently displayed and its siren and lights activated, orders the motorist to stop; and (2) the motorist willfully flees or attempts to elude the officer.'" *See United States v. Coronado-Cura*, 713 F.3d 597, 598 (11th Cir. 2013) (citation omitted). The operative phrase "flees or attempts to elude" is not statutorily defined, but its ordinary meaning connotes active and deliberate evasion rather than passive non-cooperation. This distinction is confirmed by the fact that one who merely "refuse[s] or fails to stop" a vehicle in compliance with a police officer's order is guilty of a lesser, misdemeanor offense under section 316.1935(1).

The most relevant Board precedent in this context is *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011), which upheld a CIMT charge premised on a respondent's Washington conviction for driving a vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle. Like the Washington statute at issue in *Ruiz-Lopez*, section 316.1935(2) requires that the accused attempt to "elude" a pursuing police vehicle, not merely fail to stop when ordered. In other contexts, the Eleventh Circuit has repeatedly recognized the serious danger presented by such conduct. *See United States v. Coronado-Cura*, 713 F.3d at 599 (holding that section 316.1935(2) is a "crime of violence" aggravated felony and noting that "'vehicle flight from a law enforcement officer is an extraordinarily risky enterprise' because it ordinarily results in a 'dangerous confrontation between the offender and the law enforcement officer.'") (quoting in part *United States v. Petite*, 703 F.3d 1290, 1296-97 (11th Cir. 2013), *abrogated on other grounds by Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015)). Based on the intrinsic danger of vehicular flight from police, the DHS urges us to reverse the Immigration Judge and sustain the CIMT charge.

As the Immigration Judge determined, however, *Ruiz-Lopez* is distinguishable here because section 316.1935(2) does not require that the accused flee or attempt to elude the pursuing officer by driving in "wanton or willful disregard for the lives or property of others." A driver who attempts to evade police pursuit is guilty of violating section 316.1935(2) even if he does not endanger others or drive recklessly. Indeed, as the Immigration Judge noted, it is precisely the absence of such aggravating factors that distinguishes *simple* vehicle flight under section 316.1935(2) from *aggravated* vehicle flight under section 316.1935(3) (IJ at 12, June 15, 2017).[2]

[2] Aggravated vehicle flight under section 316.1935(3) occurs when a driver flees or attempts to elude a pursuing marked police vehicle and, in the course of doing so, "[d]rives at high speed, or in any manner which demonstrates a wanton disregard for the safety of persons or property...."

In *Ruiz-Lopez*, we emphasized that our finding of moral turpitude resulted from a "building together" or accumulation of various elements, no one of which would necessarily have been sufficient in itself to establish the baseness of the offense. *See* 25 I&N Dec. at 556 (quoting in part *Matter of Lopez-Meza*, 22 I&N Dec. 1188, 1196 (BIA 1999)). We explained, "when a person deliberately flouts lawful authority *and* recklessly endangers the officer, other drivers, passengers, pedestrians, or property, he or she is 'engaged in seriously wrongful behavior' that violates the accepted rules of morality and the duties owed to society." *Id.* (emphasis added). The determinative question here, then, is whether a driver who "deliberately flouts lawful authority" *without* endangering anyone has so far deviated from the accepted rules of morality as to justify a CIMT charge. We think not.

Like the Washington statute at issue in *Ruiz-Lopez*, section 316.1935(2) is—at heart—a "resisting arrest" statute. *Accord Matter of Ruiz-Lopez*, 25 I&N Dec. at 555. And this Board and the Eleventh Circuit have recognized that resistance of or interference with a law enforcement officer is not "reprehensible" enough to qualify as a CIMT unless some aggravating element is present, such as the use or threatened use of violent physical force or a deadly weapon against the officer. *See Cano v. U.S. Att'y Gen.*, 709 F.3d 1052, 1054-55 (11th Cir. 2013); *Matter of Danesh*, 19 I&N Dec. 669, 670-73 (BIA 1988); *Matter of Logan*, 17 I&N Dec. 367, 368-69 (BIA 1980).

Simple vehicle flight is a serious crime and we have no wish to minimize the danger posed to police officers by uncooperative drivers. Indeed, we have no doubt that many individual violations of section 316.1935(2) involve moral turpitude. Under the categorical approach, however, we are concerned only with the elements of the offense and the *minimum* conduct that has a realistic probability of being prosecuted under them. When those elements are considered within the context of our precedents, we conclude that they do not define sufficiently reprehensible conduct to justify CIMT treatment. More precisely, the elements of section 316.1935(2) require neither the use of a deadly weapon against the officer—as in *Matter of Logan*—nor the use of force or violence upon the officer—as in *Cano* or *Matter of Danesh*—nor a "wanton or willful disregard for the lives or property of others"—as in *Matter of Ruiz-Lopez*. Accordingly, we will dismiss the DHS's appeal and affirm the Immigration Judge's decision terminating the removal proceedings.

The following order shall be issued.

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
KROME SERVICE PROCESSING CENTER
MIAMI, FLORIDA

IN THE MATTER OF:	)	
	)	
Marcos Antonio ACOSTA QUIRCH	)	**IN REMOVAL PROCEEDINGS**
A# 044-971-669	)	
	)	
RESPONDENT	)	
	)	

CHARGES: Section 212(a)(2)(A)(i)(I) of the Act, in that Respondent is an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.

ON BEHALF OF RESPONDENT
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ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Marcos Antonio Acosta Quirch (Respondent) is a native and citizen of Cuba who adjusted his status to Lawful Permanent Residency on June 30, 1996. *See* Exhibit 1, Notice to Appear (NTA).

On November 15, 2016, the Department of Homeland Security (DHS) filed a Notice to Appear (NTA) against Respondent. The filing of the NTA commenced proceedings and vested jurisdiction with the Court. 8 CFR § 1003.41.14(a). The NTA has been admitted into evidence as Exhibit 1.

The NTA alleges that Respondent is not a citizen or national of the United States and that he is a native and citizen of Cuba. Further, the NTA alleges that Respondent was accorded lawful permanent resident status on June 30, 1996 and that on September 11, 2016, Respondent arrived at the Miami International Airport and applied for admission. Allegations four (4) through eight (8) related to the following convictions:

Allegation 4: On November 2, 2005, Respondent was convicted in the Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County, Florida for Grand Theft 3rd Degree/Vehicle in violation of Fla. Stat. § 812.014(2)(C)(6) and Burglary/Unoccupied Conveyance in violation of Fla. Stat. § 810.02(4)(B). *See* Exhibit 2, Department of Homeland Security's November 28, 2016 Notice of Filing, pages 231-275.

Allegation 5: On March 16, 2006, Respondent was convicted in the Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County, Florida for Grand Theft 3rd Degree/Vehicle in violation of Fla. Stat. § 812.014(2)(C)(6) and Burglary/Unoccupied Conveyance in violation of Fla. Stat. § 810.02(4)(B). *Id.* at 169-230.

Allegation 6: On January 17, 2012, Respondent was convicted in the Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County, Florida for Burglary/Unoccupied Conveyance in violation of Fla. Stat. § 810.02(4)(B) and § 777.011, Petit Theft in violation of § 812.014(2)(E), and Criminal Mischief in violation of § 806.13(1)(B)(2) and § 777.011. *Id.* at 123-168.

Allegation 7: On January 12, 2012, Respondent was convicted in the Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County, Florida for Criminal Mischief in violation of § 806.13(1)(B)(3), Grand Theft 3rd Degree/Vehicle/Attempt in violation of Fla. Stat. § 812.013(2)(C)(6) and Fleeing/Elude PO/Lights + Sirens in violation of Fla. Stat. § 316.1935(2). *Id.* at 17-64.

Allegation 8: On January 12, 2012, Respondent was convicted in the Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County, Florida for Criminal Mischief in violation of § 806.13(1)(B)(3) and Grand Theft 3rd Degree/Vehicle in violation of Fla. Stat. § 812.013(2)(C)(6). *Id.* at 65-122.

DHS charged Respondent with removability under INA § 212(a)(2)(A)(i) for having been convicted of a crime involving moral turpitude.

At his master calendar hearing on November 28, 2016, Respondent admitted allegations one (1) through three (3) relating to Respondent's nationality, citizenship and adjustment of status, as well as allegation nine (9) relating to his arrival in the United States on September 11, 2016. However, Respondent denied allegations four (4) through eight (8) relating to the five (5) alleged criminal convictions. Respondent also denied inadmissibility under INA § 212(a)(2)(A)(i).

On February 1, 2017, Immigration Judge (IJ) Barry Chait found that DHS did not bear its burden of demonstrating by clear and convincing evidence that Respondent was inadmissible under INA § 212(a)(2)(A)(i) and terminated removal proceedings. DHS filed a timely appeal on March 1, 2017.

On May 19, 2017, the Board of Immigration Appeals (BIA) remanded the case to the Immigration Court. The BIA instructed the IJ to "apply the proper framework as set forth in *Mathis* and *Matter of Silva-Trevino* in determining whether the DHS has met its burden in establishing the respondent's removability for a crime involving moral turpitude as based on one (or more) of his convictions." *See* Decision of Board of Immigration Appeals, page 2.

This Court has reviewed DHS's and Respondent's briefs on appeal, as well as Respondent's May 26, 2017 Memorandum in Support of Termination of Proceedings and Addressing Categorical Analysis as it Pertains to the Remand by the BIA. *See* Exhibits 6-8.

II. SUMMARY OF THE EVIDENCE

The record in this proceeding consists of documentary exhibits one (1) through five (5). At this stage, the case turns on a purely legal issue, so no testimonial evidence has been provided. All documentary evidence have been considered in their entirety regardless of whether specifically mentioned in this decision.

A. Documentary Evidence

Exhibit 1:	NTA dated November 14, 2016 containing the sole charge of INA § 212(a)(2)(A)(i)
Exhibit 2:	DHS's Notice of Filing dated November 28, 2017 containing Form I-213 and records of conviction to support allegations four (4) through eight (8)
Exhibit 3:	Respondent's Motion to Terminate Removal Proceedings filed December 9, 2016
Exhibit 4:	DHS's Opposition to Motion to Terminate filed December 23, 2016
Exhibit 5:	Respondent's Response to DHS's Opposition to Motion to Terminate filed January 4, 2017
Exhibit 6:	Initial Brief on Appeal (filed by DHS with the BIA on April 17, 2017(
Exhibit 7:	Respondent's Brief in Support of the Decision of the Immigration Judge Terminating Removal Proceedings (filed with the BIA on April 28, 2017)
Exhibit 8:	Respondent's Memorandum in Support of Termination of Proceedings and Addressing the Categorical Analysis as it Pertains to the Remand by the BIA
Exhibit 9:	BIA's Decision Remanding to the Immigration Judge dated May 26, 2017

III. REMOVABILITY

A. Burden of Proof

DHS must prove by clear and convincing evidence that Respondent is subject to removal as charged. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. INA § 240(c)(3)(A).

B. Factual Findings on Allegations in Notice to Appear

Respondent admits allegations one (1) through three (3) and allegation nine (9) contained within the NTA. Respondent denies allegations four (4) through eight (8). *See* Exh. 1.

Exhibit two (2) unequivocally demonstrates that Respondent was convicted of the offenses listed in allegations four (4) through eight (8) and that the convictions are final. Based on the evidentiary record, I find that as a matter of fact, allegations four (4) through eight (8) are true by evidence that is clear and convincing.

C. Statement of Law on Removability

i. Burden of Proof

DHS alleges that Respondent is an arriving alien and he is inadmissible under INA § 212(a)(2)(A)(i) because he has been convicted of a crime involving moral turpitude (CIMT). DHS must prove by clear and convincing evidence that Respondent is subject to removal as charged. No decision on deportability shall be valid unless it is based on reasonable, substantial, and probative evidence. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a).

ii. Ground of Removability - § 212(a)(2)(A)(i)

The BIA has described a CIMT as a "nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) (citation omitted). A finding that a crime is a CIMT requires "reprehensible conduct committed with some degree of scienter," whether specific intent, deliberateness, willfulness, or recklessness. *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009); *see also Matter of Silva-Trevino*, 26 I&N Dec. 550, 553 n.3 (AG 2015).

To determine whether a particular conviction is a CIMT, the Court must apply the categorical approach. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Donawa v. U.S. Attorney Gen.*, 735 F.3d 1275, 1280 n.3 (11th Cir. 2013). Under the categorical approach, the Court determines whether the state statute defining the crime of conviction categorically fits within the generic definition CIMT, rather than the facts of the particular prior case. *Moncrieffe*, 133 S. Ct. at 1684 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007) (citing *Taylor v. United States*, 495 U.S. 575, 599–600 (1990)); *see also Gelin v. U.S. Att'y Gen.*, 837 F.3d 1236, 1241 (11th Cir. 2016) (Under the categorical approach, we consider only the fact of

conviction and the statutory definition of the offense, rather than the specific facts underlying the defendant's case). Thus, a state offense is a categorical match to a generic federal offense only if a conviction under the state statute necessarily involved facts equating to the generic of the federal offense. *Id.*

The Court conducts the categorical approach by comparing the elements of the statute forming the basis of the respondent's conviction with the elements of the generic definition of a CIMT. *See United States v. Lockett*, 810 F.3d 1262, 1266 (11th Cir. 2016). The elements of an offense are the "constituent parts of a crime's legal definition"—what the jury must find beyond a reasonable doubt or what a defendant necessarily admits when pleading guilty. *Mathis*, 136 S. Ct. 2243, 2248 (2016). In contrast, facts "need neither be found by a jury nor admitted by a defendant." *Id.* Where a statute covers any more conduct than the generic offense, it is not a categorical match. *Id.* However, there must be a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. *Moncrieffe*, 133 S. Ct. at 1685; *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)); *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014).

When comparing the state statute against the generic federal definition of a CIMT, the Court "must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized" by the statute. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (alterations in original) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). If the statute punishes only actions that involve moral turpitude, then it is categorically a CIMT. *See Matter of Ortega-Lopez*, 26 I&N Dec. 99, 100 (BIA 2013). However, if a situation exists in which the relevant statute may apply to conduct that does not involve moral turpitude, the Court may not categorically treat all convictions arising under that statute as CIMTs. *See Duenas-Alvarez*, 549 U.S. at 185-88, 193.

When a Court finds that a statute is not categorically a CIMT, then the Court must determine whether the statute is divisible. *See Lockett*, 810 F.3d at 1266. A statute is divisible "when a statute lists multiple, alternative elements, and so effectively creates 'several different . . . crimes[.]'" *Descamps v. United States*, 133 S.Ct. 2276, 2285 (2013) (quoting *Nijhawan v. Holder*, 129 S. Ct. 2294, 2302 (2009)); *see also Spaho v. United States*, 837 F.3d 1172, 1177 (11th Cir. 2016) ("A state statute is divisible when it lists a number of alternative elements that effectively create several different crimes.") (citation and quotation omitted). When determining whether a statute is divisible, the Court must turn to state case law to determine if the alternatives in a statute are essential elements prescribed by the statute. *See United States v. Howard*, 742 F.3d 1334, 1346 (11th Cir. 2014) ("[C]ourts conducting divisibility analysis in this circuit are bound to follow any state Court decisions that define or interpret the statute's substantive elements . . . ."). If the statute is not divisible, then the inquiry ends and there can be no finding of a CIMT. *See Lockett*, 810 F.3d at 1267; *see also Fajardo*, 659 F.3d at 1305-06.

If the statute is "divisible," the Court applies the "modified categorical approach." *Mathis*, 136 S. Ct. at 2249; *Descamps*, 133 S. Ct. at 2281, 2283; *see Chairez*, 26 I&N Dec. at 822-24. A statute is divisible if it sets out one or more elements of the offense in the alternative and not all of the alternatives meet the generic federal definition. *Descamps*, 133 S. Ct. at 2281. Under the modified categorical approach, the Court may examine the record of conviction, which includes the charging document, plea, verdict or judgment, and sentence. *Id.* at 2284-85. This examination allows the Court to determine what crime, with what elements, a [respondent]

was convicted of. *Mathis*, 136 S. Ct. at 2249. The Court then compares that particular crime to the generic offense. *Id.*

The Court will apply the aforementioned analytical framework to Respondent's convictions.

iii. Grand Theft in the Third Degree – Fla. Stat. § 812.014(2)(C)(6)

Respondent was convicted of grand theft in the third degree in in violation of Fla. Stat. § 812.014(2)(C)(6) on three (3) occasions. *See* Exhibit 2, pages 17, 65, 213. The statute states, in relevant part:

> A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently (a) [d]eprive the other person of a right to the property or a benefit from the property [or] (b) appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

Fla. Stat. § 812.014(1) (2016).

From the plain words of the statute, it is evident that section Fla. Stat. § 812.014(1) captures permanent and temporary takings. *Id.*; *Daniels v. State*, 587 So. 2d 460, 462 (Fla. 1991) (finding that "the specific intent necessary for theft is the intent to steal, not the intent to permanently deprive an owner of his property" (internal quotation marks and citation omitted)); *see also Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 852 n.8 (BIA 2016) (acknowledging that Florida expressly permits a conviction for theft on a showing of intent to temporarily deprive). The Court therefore presumes that Respondent's conviction rested upon the least culpable conduct criminalized by the statute—theft committed with the intent to *temporarily* deprive the owner of property. Accordingly, the Court examines whether Florida theft, when committed with the intent to temporarily deprive, is a CIMT. *See Gelin*, 837 F.3d at 1240–41.

Until recently, the BIA held that in order for a taking to be a theft offense that involved moral turpitude, the relevant inquiry was whether a permanent taking was intended. *See Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."); *see also Matter of R-*, 2 I&N Dec. 819, 828 (BIA 1947) ("It is settled law that the offense of taking property temporarily does not involve moral turpitude."); *see generally Diaz-Lizarraga*, 26 I&N Dec. at 849–50 (discussing the history of the Board's theft CIMT jurisprudence). The BIA ordinarily required "a literal intent to permanently deprive in order for a theft offense to be a crime involving moral turpitude." *Diaz-Lizarraga*, 26 I&N Dec. at 854. Temporary takings were therefore not considered CIMTs. *See Grazley*, 14 I&N Dec. at 333.

However, in a pair of recent decisions, the BIA clarified its jurisprudence and held that a theft offense is a CIMT "if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded." *Diaz-Lizarraga*, 26 I&N Dec. at 853; *Matter of Obeya*, 26 I&N Dec. 856, 859 (BIA 2016). The BIA clarified that an offense may be a CIMT despite the fact that it "does not require the accused to intend a *literally* permanent taking." *Diaz-Lizarraga*, 26 I&N Dec. at 852. A "temporary"

taking may constitute a CIMT if the offense encompasses a substantial erosion of the owner's property rights. *Id.* at 853. Consequently, the BIA's new approach focuses on whether a taking is substantial or de minimis, with only the former constituting a CIMT. *Id.* at 854. To illustrate the distinction, the BIA used the examples of joyriding and short-term borrowing of jewelry as de minimis takings that do not involve an intent to permanently deprive. *Id.* at 853–54. By contrast, the BIA views "more serious cases in which property is taken 'temporarily' but returned damaged or after its value or usefulness to the owner has been vitiated" as CIMTs based on the owner's substantially eroded property rights. *Id.* at 854; *see also Obeya*, 26 I&N Dec. at 858.

Turning to the Florida theft statute, the Court therefore must analyze if a "temporary" taking in Florida constitutes a theft offense such that it encapsulates only "circumstances where the owner's property rights are substantially eroded." *Diaz-Lizarraga*, 26 I&N Dec. at 853. In other words, the Court must determine whether Fla. Stat. § 812.014(1) captures de minimis offenses like joyriding or borrowing a ring for a short time, which would establish that the least culpable conduct necessary to sustain a conviction does not categorically match to a theft CIMT. *See Silva-Trevino*, 26 I&N Dec. at 831; *Diaz-Lizarraga*, 26 I&N Dec. at 853–54; *see also Gelin*, 837 F.3d 1240–42.

A review of Florida case law establishes that Florida prosecutes and convicts de minimis takings, where a substantial erosion of property rights did not occur, under Flat Stat. § 812.014(1), such as in the case of joyriding a vehicle, the temporary use of a bike for one hour, or the temporary use of another's fire extinguisher.[1] *See, e.g.*, *State v. Dunmann*, 427 So. 2d 166, 167 (Fla. 1983); *R.C. v. State*, 481 So. 2d 14, 15 (Fla. Dist. Ct. App. 1986); *Peoples*, 760 So. 2d at 1143. Notably, in *State v. Dunmann*, the Florida Supreme Court determined that Florida's prior joyriding statute had been subsumed under section 812.014, the current theft statute. 427 So. 2d at 167; *see also Stephens v. State*, 444 So. 2d 498, 499 (Fla. Dist. Ct. App. 1984) ("*Dunmann*'s holding that the 'joyriding' statute has been subsumed within the omnibus theft statute necessarily means that the offenses of theft and temporary unauthorized use of a motor vehicle possess identical elements."). Consequently, unlike the generic CIMT theft offenses under *Diaz-Lizarraga*, the Court concludes that Florida's theft statute does not require the prosecutor to prove the defendant had "an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded." *Diaz-Lizarraga*, 26 I&N Dec. at 853. Therefore, as the Florida theft statute includes de minimis takings (as part of the intent to temporarily deprive), the least culpable conduct criminalized by the statute is not morally turpitudinous and the statute is thus categorically overbroad. *See Silva-Trevino*, 26 I&N Dec. at 831.

Since Florida's theft statute is not a categorical match, the Court next determines whether Fla. Stat. § 812.014(1) is divisible to determine if there are alternative elements which may

[1] The Court recognizes that on one occasion, in *T.L.M. v. State*, 755 So. 2d 749, 751–52 (Fla. Dist. Ct. App. 2000), the Court stated, "We do not agree with the state, that a momentary taking, for only a second or two, constitutes the specific intent necessary to temporarily appropriate the School Board's property as defined under section 812.014(1)." However, in that case, the momentary taking was exceptionally de minimis: a child grabbing a fire extinguisher off the wall and throwing it at someone. *Id.* Significantly, in a later case, the Court found a temporary taking sufficient where the defendant used a fire extinguisher to beat a corrections officer. *Peoples v. State*, 760 So. 2d 1141, 1143 (Fla. Dist. Ct. App. 2000).

categorically match as a CIMT. *See Lockett*, 810 F.3d at 1266. However, state case law dictates that the intent to temporarily or permanently deprive constitutes a single indivisible element under Fla. Stat. § 812.014. *See Daniels*, 587 So. 2d at 462 (finding that "the specific intent necessary for theft is the intent to steal, not the intent to permanently deprive an owner of his property" (internal quotation marks and citation omitted)); *see also* Fla. Std. Jury Instr. (Crim.) 14.1 (1999). Moreover, under Florida law, a jury need not determine whether the deprivation or appropriation was temporary or permanent. *See T.L.M. v. State*, 755 So. 2d 749, 751 (Fla. Dist. Ct. App. 2000). Accordingly, the disjunctive "temporarily or permanently" language in the statute presents alternative *means* rather than *elements* of the offense which must be proven beyond a reasonable doubt; thus, Fla. Stat. § 812.014 is not divisible and the court may not proceed to the modified categorical approach. *See Descamps*, 133 S. Ct. at 2284–86, 2290; *see also Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

Since Fla. Stat. § 812.014(1) punishes conduct that does not involve moral turpitude and is not divisible, the court finds that Respondent's convictions under Fla. Stat. § 812.014(2)(b) are not a CIMTs. *See Descamps*, 133 S. Ct. at 2290; *Lockett*, 810 F.3d at 1266.

iv. Burglary of an Unoccupied Conveyance – Fla. Stat. § 810.02(4)(b)

Respondent was convicted of burglary of an unoccupied conveyance in violation of Fla. Stat. § 810.02(4)(b) on two (2) occasions. *See* Exh. 2, pages 123, 231. The statute states in relevant part that:

> (4) Burglary is a felony of the third degree . . . if, in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:
>
> . . . .
>
> (b) Conveyance, and there is not another person in the conveyance at the time the offender enters or remains.

Fla. Stat. § 810.02(4)(b) (2016). Section 810.02(1) of the Florida Statutes defines a "burglary" occurring after July 1, 2001, as "[e]ntering a dwelling, a structure, or a conveyance with the intent to commit an offense therein . . . ." Fla. Stat. § 810.02(1)(b). In addition, Fla. Stat. § 810.011(3) defines "conveyance" as "any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car."

The BIA has long held that burglary may or may not involve moral turpitude. *See Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946) (explaining, for example, that placing one's foot across a threshold would constitute burglary, but this act is not inherently base, vile, or deprave). As such, burglary under Fla. Stat. § 810.02(4)(b) is not categorically a CIMT because it is overly broad and delineates presumably any "offense," thus including offenses that do not involve moral turpitude.[2] *See Ortega-Lopez*, 26 I&N Dec. at 100 (noting that if the statute punishes *only*

[2] The Court notes that, in the case of a burglary of an occupied dwelling, the BIA has held that the "conscious and overt act of unlawfully entering or remaining in an *occupied dwelling* with the intent to commit [any] crime" is

actions that involve moral turpitude, then it is categorically a CIMT); *see also Duenas-Alvarez*, 549 U.S. at 185-88, 193 (noting that when a statute applies to conduct that does not involve moral turpitude, the Court cannot categorically treat all convictions arising under that statute as CIMTs).

Since the Florida burglary statute is not categorically a CIMT, the court must determine whether the statute is divisible. *See Lockett*, 810 F.3d at 1266. In determining divisibility, the Court focuses "primarily on the statutory text." *Id.* (citing *Howard*, 742 F.3d at 1346). Fla. Stat. § 810.02 states, in relevant part, that a defendant may be convicted if he intended to commit *any* offense after entering a conveyance. *See* Fla. Stat. § 810.02(1)(b) (stating that burglary means "entering . . . a conveyance with the intent to commit *an* offense therein.") (emphasis added). The plain language of the statute does not delineate alternative elements, which means the statute is indivisible. *Cf. Spaho*, 837 F.3d at 1177 (noting the statute had six alternative elements and was therefore divisible). The Florida burglary statute is not divisible; therefore, there are no alternative separate crimes that could constitute a CIMT and the Court may not proceed to the modified categorical approach. *See Lockett*, 810 F.3d at 1267; *see also Fajardo*, 659 F.3d at 1305-06.

Since Fla. Stat. § 810.02(4)(b) punishes conduct that does not involve moral turpitude and is not divisible, the Court finds that Respondent's convictions under Fla. Stat. § 810.02(4)(b) are not CIMTs. *See Descamps*, 133 S. Ct. at 2290; *Lockett*, 810 F.3d at 1266.

v. Criminal Mischief – Fla. Stat. § 806.13

Respondent was convicted of criminal mischief in violation of Fla. Stat. § 806.13 on three (3) occasions, which states in relevant part that:

> (1)(a) A person commits the offense of criminal mischief if he or she willfully and maliciously injures or damages by any means any real or personal property belonging to another . . . .

Fla. Stat. § 806.13 (2002). To obtain a conviction under Fla. Stat. § 806.13, the state must prove the following elements: (1) "the defendant injured or damaged specified property," (2) "the property belonged to another," and (3) "the injury or damage was inflicted willfully and maliciously." *Sanchez v. State*, 909 So. 2d 981, 984–85 (Fla. Dist. Ct. App. 2005); Fla. Std. Jury Instr. (Crim.) 12.4.

The BIA has held that the damage to or destruction of property with malicious intent involves moral turpitude. *Matter of N-*, 8 I&N Dec. 466, 467–68 (BIA 1959); *Matter of M-*, 3 I&N Dec. 272, 274 (BIA 1948); *Matter of C-*, 2 I&N Dec. 716, 719 (BIA 1947). In contrast, damage to or destruction of property with a *mens rea* of mere negligence, carelessness, or

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presumed to be morally turpitudinous because a burglar's intrusion "invites a violent defensive response from the resident." *Matter of Louissaint*, 24 I&N Dec. 754, 758–59 (BIA 2009) (finding that burglary of an occupied dwelling under Florida law is a CIMT) (emphasis added). However, in the instant case, Respondent's conviction is with regard to burglary of an unoccupied conveyance, and not an occupied dwelling, and thus the rationale of *Louissant* does not apply. *See* Fla. Stat. § 810.02(4)(b); see also *Louissaint*, 24 I&N Dec. at 758–59. Where burglary does not involve an occupied dwelling, however, it may only still be classified as a CIMT if the crime that the alien intended to commit during the burglary is a CIMT. *See M-*, 2 I&N Dec. at 723 (BIA 1946) (citations omitted).

recklessness does not involve moral turpitude. *Matter of N-*, 8 I&N Dec. at 468; *Matter of M-*, 3 I&N Dec. at 274; *Matter of B-*, 2 I&N Dec. 867, 868–69 (BIA 1947); *Matter of C-*, 2 I&N Dec. at 720 ("If the statute is so broad that it covers gross negligence, we think that the offense cannot be regarded as inherently base, vile or depraved.").

Here, the "willfully and maliciously" element of Fla. Stat. § 806.13 requires intentional, knowing, and purposeful damage or destruction of the property of another. *M.H. v. State*, 936 So. 2d 1, 3 (Fla. 3d DCA 2006) (citing Fla. Std. Jury Instr. (Crim.) 12.4 ("Willfully" means intentionally, knowingly, and purposely. "Maliciously" means wrongfully, intentionally, without legal justification or excuse and with the knowledge that injury or damage will or may be caused to another person or the property of another person.); *Sanchez*, 909 So. 2d at 985; *Matter of J.G.*, 655 So. 2d 1284, 1285 (Fla. Dist. Ct. App. 1995) (The offense of criminal mischief requires that the actor possess the specific intent to damage the property of another). Thus, to obtain a conviction, the state must prove beyond a reasonable doubt that the defendant damaged or destroyed property with malice. *M.H.*, 936 So. 2d at 4 (explaining that a conviction under this statute requires an act that was committed wantonly or maliciously and that an accidental act does not fall within the statute). Since Fla. Stat. § 806.13 requires an intentional and wrongful act, the Court finds that the scienter requirement for a CIMT is satisfied. *Leal*, 26 I&N Dec. at 21; *M.H.*, 936 So. 2d at 4.

While the requisite *mens rea* may be met under the "willfully and maliciously" element of Fla. Stat. § 806.13, the statute of conviction must also include reprehensible conduct to constitute a CIMT. *Id.* The BIA has held that malicious damage to or destruction of property constitutes reprehensible conduct when coupled with an aggravating factor, such as the use of explosives or the killing or injury of animals. *Matter of R-*, 5 I&N Dec. 612, 616–17 (BIA 1954) (determining that a conviction involving "wantonly, willfully and maliciously, by . . . explosive substances . . . destroys, attempts to destroy, damages or injures any property" amounted to a CIMT); *Matter of M-*, 3 I&N Dec. at 273–74 (determining that a conviction involving "maliciously or wantonly kill, wound, disfigure, or injure any animal, the property of another" was a CIMT). However, where a statute prohibiting malicious damage to or destruction of property punishes a broad range of conduct, but does not include an aggravating factor, and entails only limited damage or loss of property, the statute does not involve reprehensible conduct. *Matter of N-*, 8 I&N Dec. at 467–68 (finding that a crime involving "unlawfully, maliciously and mischievously destroys or injures any real or personal property . . . to the value of less than $100" was *not* a CIMT).

Here, the Florida statute at issue does not include reprehensible conduct. The statute under which Respondent was convicted penalizes damage or destruction of property by "any means . . . including, but not limited to, the placement of graffiti thereon or other acts of vandalism thereto." Fla. Stat. § 806.13(1)(a). This statute has been applied to punish conduct that the Court considers to be reprehensible.[3] *See, e.g., Jones v. State*, 20 So. 2d 901 (Fla. 1945)

[3] The analysis in this paragraph is influenced by the reasoning of the BIA in an unpublished decision, *Matter of Patrana*, No. A025 441 027, 2014 WL 7691444, at *4 (BIA Dec. 22, 2014). Unpublished BIA decisions are not binding precedent on Immigration Courts. *C.f.* 8 C.F.R. § 1003.1(g) ("By majority vote of the permanent [BIA] members, selected decisions of the [BIA] rendered by a three-member panel or by the [BIA] en banc may be designated to serve as precedents in all proceedings involving the same issue or issues."); *see also Matter of Echeverria*, 25 I&N Dec. 512, 519 (BIA 2011). However, unpublished BIA decisions may be persuasive. Here, the

(punishing the disfiguring and/or killing of an animal); *Martin v. State*, 183 So. 634 (Fla. 1938) (punishing the act of destroying property by burning); *Parker v. State*, 169 So. 411 (Fla. 1936) (punishing the maiming of animals). However, it has also been applied to punish conduct that this Court does not find to be inherently reprehensible. *See, e.g., G.H. v. State*, 599 So. 2d 231 (Fla. Dist. Ct. App. 1992) (punishing damage to a vehicle imposed by key scratches); *D.B. v. State*, 559 So. 2d 305 (Fla. Dist. Ct. App. 1990) (punishing destruction of a chest of drawers); *Koenig v. State*, 214 So. 2d 627 (Fla. Dist. Ct. App. 1968) (punishing damage to a public telephone booth). Thus, the statute is overbroad. *Descamps*, 133 S. Ct. at 2290. Moreover, the statute does not require the existence of an additional aggravating factor that would render it a CIMT under the BIA's precedent. *Matter of R-*, 5 I&N Dec. at 616–17; *Matter of M-*, 3 I&N Dec. at 273–74. Consequently, Fla. Sta. § 806.13 is not categorically a CIMT.

Since Fla. Stat. § 806.13 potentially punishes both conduct is and is not a CIMT, the Court must determine whether the statute is divisible. The plain language of the statute states that criminal mischief is committed when a person intentionally injures or damages property that belongs to another. *Sanchez*, 909 So. 2d at 984–85; Fla. Std. Jury Instr. (Crim.) 12.4. Upon review of the statutory text, it is clear that the statute does not contain alternative elements. *Spaho*, 837 F.3d at 1177. As such, the statute is not divisible. *Lockett*, 810 F.3d at 1267; *Fajardo*, 659 F.3d at 1305-06.

Accordingly, Fla. Stat. § 806.13 does not categorically proscribe only reprehensible conduct, is overly broad, and it is not divisible. Thus it does not constitute a CIMT. *Descamps*, 133 S. Ct. at 2290; *Lockett*, 810 F.3d at 1267; *Leal*, 26 I&N Dec. at 21.

vi. Fleeing/Eluding – Fla. Stat. § 316.1935(2)[4]

On January 17, 2012, Respondent was convicted of fleeing/eluding a law enforcement officer who employed his/her lights and sirens in violation of Fla. Stat. § 316.1935(2). The statute states:

> Any person who willfully flees or attempts to elude a law enforcement officer in an authorized law enforcement patrol vehicle, with agency insignia and other jurisdictional markings prominently displayed on the vehicle, with siren and lights activated commits a felony of the third degree…

Fla. Stat. § 316.1935(2) (2004). To obtain a conviction under Fla. Stat. § 316.1935(2), the state must prove the following: (1) the defendant was operating a vehicle upon a street or highway in Florida; (2) the defendant, knowing he had been directed to stop by a duly authorized law enforcement officer, willfully fled in a vehicle in an attempt to elude a law enforcement officer;

BIA's reasoning is detailed, well-supported by case law, and ultimately persuasive in concluding that criminal mischief in violation of section 806.13 of the Florida Statutes is not a CIMT.

[4] Respondent argues that DHS waived the right to argue that fleeing or eluding under Fla. Stat. § 316.9135(2) constitutes a CIMT, as it did pose the argument before the Immigration Court when the issue was litigated in November and December of 2016. However, the BIA decision on remand instructs the Court "apply the proper framework as set forth in *Mathis* and *Matter of Silva-Trevino* in determining whether the DHS has met its burden in establishing the respondent's removability for a crime involving moral turpitude as based on one (or more) of his convictions." In the interest of leaving no issue unaddressed, the Court will analyze whether Respondent's conviction under Fla. Stat. § 316.9135(2) constitutes a CIMT.

and (3) the law enforcement officers was in an authorized law enforcement patrol vehicle with agency insignia and other jurisdictional markings prominently displayed on the vehicle and with siren and lights activated. *U.S. v. Coronado-Cura*, 713 F.3d 597 (11th Cir. 2013); Fla. Std. Jury Instr. (Crim.) 28.7. While the requisite *mens rea* (willfulness) is sufficient to constitute a CIMT, the issue of whether the *actus reus* constitutes reprehensible conduct remains.

The BIA has held that fleeing/eluding law enforcement with aggravating factors constitutes a CIMT. *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011) (holding that a conviction under Washington Rev. Code § 46.61.024 for driving a vehicle in a manner indicating a wanton or willful disregard for lives or property of others while attempting to elude a police vehicle after being given a signal by police to stop constitutes a CIMT); *see also Cano-Oyarzabal v. Holder*, 774 F.3d 914 (7th Cir. 2014) (holding that a conviction under Wis. Stat. § 346.04(3) for operating a vehicle to flee or elude an officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians constitutes a CIMT); *see also Mei v. Ashcroft*, 393 F.3d 737 (7th Cir. 2004) (holding that a conviction under Ill. Stat. 625 ILCS 5/11-204.1(a)(1) for operating a vehicle to flee or attempting to elude a peace officer, after being given a visual or audible signal by a peace officer and such flight or attempt to elude is at a rate of speed at least 21 miles per hour over the legal speed limit constitutes a CIMT). All of these cases contain an aggravating factor as an element, such as wanton or willful disregard for the safety of others, causing bodily harm or excessive speed. Fla. Stat. § 316.1935**(3)** contains several aggravating factors, but the statute under which Respondent was convicted, Fla. Stat. § 316.1935**(2),** does not contain any aggravating factors.

The Court is not aware of any precedent for holding that a fleeing/eluding offense without an aggravating factor such as wanton or willful disregard for the safety of others, bodily injury or excessive speed constitutes a CIMT. The Court identified one unpublished decision that analyzes Fla. Stat. § 316.1935**(1)**, which punishes the operator of a vehicle, who has knowledge that he has been ordered to stop such vehicle by a duly authorized law enforcement officer, who willfully refuses or fails to stop the vehicle in compliance with such order or, having stopped in knowing compliance with such order, willfully flees in an attempt to elude the officer. *Matter of Qazi*, 2009 WL 3818032 (BIA 2009).[5] Like Fla. Stat. § 316.1935**(2),** Fla. Stat. § 316.9135**(1)** does not contain an aggravating factor. The BIA held that a conviction under Fla. Stat. § 316.9135**(1)** does not constitute a CIMT pursuant to the first two analytical steps set forth in *Silva-Trevino*. In this case, the BIA remanded the case for the IJ to analyze the offense under step three of the *Silva-Trevino* framework. However, since that time, the third step of the *Silva-Trevino* framework has been vacated. *Silva-Trevino*, 26 I&N Dec. 550 (BIA 2015). Therefore, under the limited two-step process, the Court must find that Respondent's conviction does not constitute a CIMT.

[5] Unpublished BIA decisions are not binding precedent on Immigration Courts. *C.f.* 8 C.F.R. § 1003.1(g) ("By majority vote of the permanent [BIA] members, selected decisions of the [BIA] rendered by a three-member panel or by the [BIA] en banc may be designated to serve as precedents in all proceedings involving the same issue or issues."); *see also Matter of Echeverria*, 25 I&N Dec. 512, 519 (BIA 2011). However, unpublished BIA decisions may be persuasive. Here, the BIA evaluated a different subsection of the statute under which Respondent was convicted, namely Fla. Stat. § 316.9135(1) (Respondent was convicted under Fla. Stat. § 316.9135(2)). The Court finds the decision persuasive with regard to explaining Florida's statutory scheme and hierarchy of fleeing/eluding offenses.

Pursuant to the two-step process approach that is available to this Court (the categorical and modified categorical approaches), the Court must find that Respondent's conviction under Fla. Stat. § 316.9135(2) is not a CIMT.

IV. CONCLUSION

Under the framework set forth in *Mathis*, the Court finds that Respondent's convictions for grand theft in violation of Fla. Stat. § 812.014(2)(C)(6), burglary of an unoccupied conveyance in violation of Fla. Stat. § 810.02(4)(b), criminal mischief in violation of Fla. Stat. § 806.13 and Fleeing/Eluding in violation of Fla. Stat. § 316.9135(2) do not constitute CIMTs. Therefore, Respondent is not removable under INA § 212(a)(2)(A)(i).

In light of the foregoing, the following order is entered:

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that Respondent is **NOT INADMISSIBLE** pursuant to INA § 212(a)(2)(A)(i).

IT IS HEREBY ORDERED that Respondent's Removal Proceedings be **TERMINATED.**

DATED this 15th day of June, 2017.

Sarah Mazzie

Sarah Mazzie
Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal this decision. A notice of appeal must be filed with the Board of Immigration Appeals within thirty calendar days of the issuance date of this decision. 8 C.F.R. § 1003.38(b). If the final date for filing the notice of appeal occurs on a Saturday, Sunday or legal holiday, the time period for filing will be extended to the next business day. *Id.* If the time period expires and no appeal has been filed, this decision becomes final. 8 C.F.R. § 1003.38(d).

APPEAL DATE: July 17, 2017