U.S. Department of Justice

Executive Office for Immigration Review

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Name: PEREZ AYALA, EDGAR WILLIAM **A 029-308-742**

Date of this notice: 6/29/2018

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:
Wendtland, Linda S.
Pauley, Roger
O'Connor, Blair

Userteam: Docket

File: A029 308 742 – Alvarado, TX Date: JUN 29 2018

In re: Edgar William PEREZ Ayala

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ann Kelleher Miller, Esquire

APPLICATION: Termination

FACTS AND BACKGROUND

The respondent appeals from the Immigration Judge's September 21, 2017, decision denying his motion to terminate proceedings and ordering him removed to El Salvador. The Department of Homeland Security ("DHS") has not filed a brief on appeal. We will sustain the appeal and terminate removal proceedings.

We review for clear error the findings of fact, including determinations of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in an appeal from an Immigration Judge's decision de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On November 30, 2007, the Department of Homeland Security ("DHS") served the respondent with a Notice to Appear charging him as removable under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i), for a conviction for a crime involving moral turpitude ("CIMT") committed within 5 years after admission and for which a sentence of 1 year or longer may be imposed, based on his October 2, 2000, conviction for burglary of a vehicle in violation of TEX. PENAL CODE ANN. § 30.04(a) (Exh. 1). On June 24, 2010, the respondent moved to terminate on the grounds that his crime was not one for which a sentence of 1 year or longer may be imposed, and that his lawful permanent resident status could not be terminated because he was an asylee. On June 20, 2011, the Immigration Judge issued a decision denying the motion and ordering the respondent removed to El Salvador. The respondent timely appealed, and on January 24, 2013, the Board affirmed the Immigration Judge's denial of the motion to terminate but remanded to give the respondent an opportunity to seek any relief for which he may be eligible.

On January 29, 2015, the Immigration Judge issued a decision denying the respondent's applications for asylum, withholding of removal, and protection under the Convention Against Torture. Sections 208(b)(1)(A), 241(b)(3)(A) of the Act, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A); 8 C.F.R. §§ 1208.13, 1208.16-.18. The respondent did not appeal. On February 10, 2017, the respondent filed a motion to reopen or reconsider, arguing that the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), changed the law in his favor regarding whether his conviction is a CIMT. On March 8, 2017, the Immigration Judge denied the motion as untimely. The respondent appealed, and on June 6, 2017, the

Board sua sponte reopened the proceedings and remanded the record for the Immigration Judge to consider the respondent's arguments regarding his removability.

On August 2, 2017, the respondent filed a new motion to terminate before the Immigration Judge, arguing that under *Mathis v. United States*, 136 S. Ct. 2243, the DHS could not sustain its removability charge. On September 21, 2017, the Immigration Judge issued his decision denying the respondent's motion to terminate, determining his conviction to be categorically a crime involving moral turpitude, and ordering him removed to El Salvador.[1] This appeal followed.

ISSUE

The issue is whether burglary of a vehicle committed with intent to commit theft or any felony is a categorical crime involving moral turpitude.

ANALYSIS

To determine if the respondent's burglary offense is a crime involving moral turpitude, we employ a categorical inquiry. *See Matter of Silva-Trevino* ("*Silva-Trevino III*"), 26 I&N Dec. 826, 831 (BIA 2016).[2] In the United States Court of Appeals for the Fifth Circuit, the jurisdiction in which this case arises, the categorical inquiry requires a focus not on the specific facts underlying the respondent's particular violation of law, but rather on whether "the minimum reading of the statute [of conviction] necessarily reaches *only* offenses involving moral turpitude." *Gomez-Perez v. Lynch*, 829 F.3d 323, 327 (5th Cir. 2016) (internal quotation marks and citation omitted); *Mercado v. Lynch*, 823 F.3d 276, 278-79 (5th Cir. 2016); *see also Silva-Trevino III,* 26 I&N Dec. at 832 (explaining that the Fifth Circuit applies the "minimum reading" approach to the categorical inquiry).

At all relevant times, the respondent's statute of conviction has provided, in pertinent part, "[a] person commits an offense if, without the effective consent of the owner, he breaks into or enters a vehicle or any part of a vehicle with intent to commit any felony or theft." TEXAS PENAL CODE ANN. § 30.04(a). The elements of the offense are 1) a person; 2) without the effective consent of the owner; 3) breaks into or enters a vehicle or any part of a vehicle; 4) with the intent to commit any felony or theft. *Washington v. States*, 603 S.W.2d 859, 859 (Tex. Crim. App. 1980).

The statutory phrase "crime involving moral turpitude" is broadly descriptive of a class of offenses involving reprehensible conduct committed with a culpable mental state. *Silva-Trevino III*, 26 I&N Dec. at 831, 834. 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." *Id.* at 833 (internal quotation marks and citation omitted). The respondent contends that TEXAS PENAL CODE ANN. § 30.04(a) is not categorically

[1] The respondent did not file any new applications for relief on remand (Tr. at 71).

[2] The statute of conviction is not divisible, and thus not subject to a modified categorical inquiry (IJ at 2, Sept. 21, 2017). *Descamps v. United States*, 133 S.Ct. 2276 (2013).

a CIMT because, unlike burglary statutes proscribing entry into an occupied or intermittently occupied dwelling, burglary of a vehicle does not violate the property owner's expectation of privacy and security to the same degree, nor does the conduct involve the same invitation to the potential use of force (Respondent's Br. at 6-9). In support of his claim, the respondent cites to *Richardson v. State*, 888 S.W.2d 822, 824 (Tex. Crim. App. 1994) (en banc), where the state court found that the defendant violated TEX. PENAL CODE ANN. § 30.04(a) by reaching into the open bed of a pick-up truck and removing property therein (Respondent's Br. at 7-8). The respondent also contends that the fourth element – intent to commit any felony or theft – renders the statute overbroad because the crime intended may be morally non-turpitudinous (Respondent's Br. at 11).

We conclude that the respondent's argument is correct, and supports his motion to terminate. We first addressed in a precedent decision whether burglary is a CIMT in *Matter of M-*, 2 I&N Dec. 721 (BIA A.G. 1946). In that decision (which included a dissent but which the Attorney General affirmed in a one-sentence order), we considered a provision of New York Penal Law that proscribed whoever "[w]ith intent to commit a crime therein, breaks and enters a building, or a room, or any part of a building; or [b]eing in any building, commits a crime therein and breaks out of the same."

We indicated that we had "always maintained that these offenses may or may not involve moral turpitude, the determinative factor being whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude." *Id.* at 723 (citing non-precedential orders issued between 1943 and 1945). As the provision at issue in *Matter of M-* could extend to morally non-turpitudinous crimes, such as opening the unlocked door of an abandoned barn to play cards in violation of a state wagering law, we held that it was not categorically a crime involving moral turpitude. *Id.* at 723-23.

After *Matter of M-*, we applied the holding that burglary is a crime involving moral turpitude only if the crime accompanying the unlawful entry is itself turpitudinous in numerous unpublished decisions. *See Matter of J-G-D-F-*, 27 I&N Dec. 82, 86-87 (BIA 2017). In *Matter of Louissant*, 24 I&N Dec. 754 (BIA 2009), however, we held that burglary is a crime involving moral turpitude regardless of the nature of the accompanying crime if the perpetrator enters an occupied dwelling. We determined that the conscious and overt act of unlawfully entering or remaining in an occupied dwelling with the intent to commit a crime is inherently "reprehensible conduct" because in breaking into a dwelling of another for an illicit purpose, the burglar tears away the resident's justifiable expectation of privacy and personal security and invites a violent defensive response from the resident. *Matter of Louissant*, 24 I&N Dec. at 758-59. We extended the rationale of *Louissaint* in *Matter of J-G-D-F-*, 27 I&N Dec. at 88, to burglaries of dwellings even though they were unoccupied at the time of the offense, provided that the dwelling was at least intermittently occupied.

We decline, however, to extend the rationale of *Louissant* to the Texas statute at issue here because a property owner's expectation of privacy and personal security is far greater in a dwelling, even one intermittently occupied, than in his or her vehicle. As the respondent notes on appeal, the Texas courts have sustained convictions under section 30.04(a) for incidents where the defendant reached into the open flatbed of a pickup truck (Respondent's Br. at 7 (citing *Richardson v. State*, 888 S.W.2d at 824)).

The Texas Court of Criminals Appeals also affirmed a conviction under section 30.04(a) where the defendant placed his hand through the railing of a ladder rack "and into the plane created between the dome of the ladder rack and the side of the truck." *Hopkins v. State*, 864 S.W.2d 119, 120 (Tex. Crim. App. 1993). In our view, an owner's expectation of personal security and privacy in the open bed of a pick-up truck or the plane of the ladder rack on the side of the truck is qualitatively different, and less, than the owner's expectation of personal security and privacy in his or her dwelling, even if occupied intermittently.

Furthermore, the statute criminalizes burglary of a vehicle with intent to commit any felony, not only morally turpitudinous ones. Joyriding is a felony under the Texas Penal Code, but historically the Board has not found convictions for joyriding to be morally turpitudinous. TEX. PENAL CODE ANN. § 31.07; *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 854 n.10 (BIA 2016); *accord*, *Matter of D-*, 1 I&N Dec. 143, 145 (BIA 1941).

Likewise, the Texas statute criminalizes burglary of a vehicle with intent to commit a theft, but the Board has held that temporary takings, where the nonconsensual deprivation is temporary and does not substantially erode the property's value, are not morally turpitudinous. *See Matter of Diaz-Lizarraga*, 26 I&N Dec. at 853 (a theft offense is a crime involving moral turpitude if it involves a taking or exercise of control over another's property without consent, and with "intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded"). As the Texas statute includes thefts that may be temporary in nature, and thus not morally turpitudinous, the Texas offense is not categorically morally turpitudinous. *See Matter of M-*, 2 I&N Dec. at 723; *Matter of J-G-D-F*, 27 I&N Dec. at 86-87.

Thus, we will sustain the respondent's appeal because the Texas offense of burglary of a vehicle with intent to commit a theft or felony does not implicate the sense of privacy and security that burglary of a dwelling does, and the crime that is intended at the time of entry (a theft or felony) may be morally non-turpitudinous. As the statute of conviction is not categorically a crime involving moral turpitude, and the modified categorical analysis is not available (because the statute is indivisible), the DHS cannot sustain the removal charge under section 237(a)(2)(A)(i) of the Act, and the Immigration Judge erred in denying the respondent's motion to terminate. Section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A). Thus, we will sustain the respondent's appeal, and terminate removal proceedings.

Accordingly, the following orders will be issued.

ORDER: The appeal is sustained.

FURTHER ORDER: The removal proceedings are terminated.

FOR THE BOARD

File: A029 308 742 – Alvarado, TX Date: JUN 29 2018

In re: Edgar William PEREZ Ayala

CONCURRING OPINION: Blair O'Connor

I concur with Board Member Wendtland's decision, but do so with considerable reluctance. I believe our dissenting colleague's view is by no means without force. The average person on the street would ordinarily view the offense of burglary as being contrary to accepted rules of morality and the duties owed between persons and to society in general. Indeed, common sense would say that this view is obvious. But the categorical approach does not permit us to use common sense. Instead, circuit precedent requires us to focus on the minimum conduct that could be prosecuted under the statute. So it matters not that the record before us indicates that the respondent broke out the driver's side window of the vehicle he burglarized, and then reached in and stole property, including the owner's checkbook (Exh. 2). All that matters is that the statute in question conceivably could cover someone who steals a pencil from the open flatbed of an empty pickup truck, even if the State of Texas has never prosecuted such a case. And if you ask the same person on the street if he or she views the latter conduct as inherently base, vile, or depraved, chances are you will be told no. So once again the categorical approach prevents us from finding an individual removable whom Congress clearly intended to be removable. Instead of using our common sense, we must "ignore facts already known and instead proceed with eyes shut." *United States v. Chapman*, 866 F.3d 129, 138 (Jordan, J., concurring). In the process, the respondent "escapes the consequences that Congress intended for [his] conduct." *United States v. Valdivia-Flores*, 876 F.3d 1201, 1211 (O'Scannlain, J., specially concurring).

Blair O'Connor
BOARD MEMBER

File: A029 308 742 – Alvarado, TX Date: JUN 29 2018

In re: Edgar William PEREZ Ayala

DISSENTING OPINION: Roger A. Pauley, Board Member

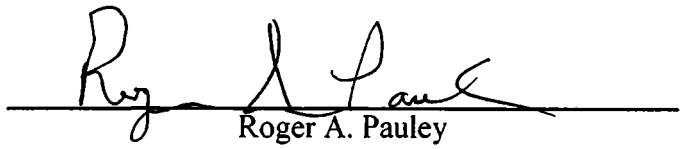
I respectfully dissent. I would hold that a burglary committed with intent to commit theft or a felony, as prescribed by the Texas statute at issue in this case, is a categorical crime involving moral turpitude. TEX. PENAL CODE ANN. § 30.04(a). Burglary, whatever the crime intended, to some degree always involves an invasion of privacy as well as of property rights. Unlike a mere trespass, a burglary requires an unauthorized entry or remaining in some type of enclosed property where personal articles may be lodged that the owner wishes to keep from prying eyes. Emphasizing this privacy interest, we held in *Matter of Louissant*, 24 I&N Dec. 754 (BIA 2009), that the conscious and overt act of unlawfully entering or remaining in an occupied dwelling with the intent to commit a crime is inherently "reprehensible conduct" because in breaking into a dwelling of another for an illicit purpose, the burglar tears away the resident's justifiable expectation of privacy and personal security and invites a violent defensive response from the resident. *Matter of Louissant*, 24 I&N Dec. at 758. We extended the rationale of *Louissaint* in *Matter of J-G-D-F-*, 27 I&N Dec. 82 (BIA 2017), to burglaries of dwellings even though they were unoccupied at the time of the offense, provided that the dwelling was at least intermittently occupied.

While the statute of conviction here involves a vehicle, not a dwelling, regardless of the type of structure unlawfully entered, *some* interference with privacy is inherent in the concept of an unlawful entry into enclosed premises where the burglar has no right to be (IJ at 2-4, Sept. 21, 2017). In one case cited by the majority, *Richardson v. State*, 888 S.W.2d 822, 824 (Tex. Crim. App. 1994) (en banc), the court stated that section 30.04 of the Texas Penal Code, like the state's other burglary statutes, is "intended to protect the sanctity of private areas, be they habitations, buildings not open to the public, or vehicles," and the open bed of a pickup truck is "clearly an interior portion of the truck" entitled to some reasonable expectation of privacy.

Furthermore, although I acknowledge that unlawful entry into a vehicle is less violative of an owner's privacy rights than entry into his or her house, that fact is insufficient to remove a burglary offense from the category of a crime involving moral turpitude where the crime intended is a felony. *See* IJ at 3-4, Sept. 21, 2017; *see also Richardson v. State*, 888 S.W.2d at 824 ("When a burglary [including a violation of TEX. PENAL CODE ANN. § 30.04] is committed, the harm results from the entry itself, because the intrusion violates the occupant's reasonable expectation of privacy. Indeed, once unlawful entry is made, the crime is complete, regardless of whether the intended theft or felony is actually completed."). Unlike a misdemeanor, a felony typically carries with it a panoply of ancillary consequences, such as ineligibility to vote or hold certain political offices or to engage in certain types of occupations, that represent a government's considered judgment as to the seriousness of the offense.

Moreover, as the Supreme Court has observed, burglary is a "classic example" of a crime that by its nature involves a substantial risk of the use of violent force. *Leocal v. United States*, 543 U.S. 1, 10 (2004). While engaging in criminal conduct that carries a potential risk of the use of violent force does not itself make an offense a crime involving moral turpitude, creating an unjustifiable risk of violence through criminal conduct is a significant factor in the calculus. In this regard, the respondent provides no support for the proposition that burglary of a vehicle poses less invitation to the use of violent force than does burglary of a dwelling since the same substantial risk exists that the vehicle's owner or a passerby may witness the offense and seek to prevent it (IJ at 4; Respondent's Br. at 10).

In sum I would hold that, while not all felonies are morally turpitudinous, the combination of unlawful entry conduct[1] creating a substantial risk of the use of violent force, to which is added the intent to commit a felony, renders such a burglary a categorical crime involving moral turpitude. Thus, I would affirm the Immigration Judge's conclusion that the respondent's conviction for burglary of a vehicle in violation of TEX. PENAL CODE ANN. § 30.04(a) is categorically a crime involving moral turpitude, and that the DHS sustained its removability charge (IJ at 2-4). The Immigration Judge properly denied the respondent's motion to terminate and ordered him removed to El Salvador.



Roger A. Pauley
Board Member

[1] Contrary to the respondent's argument on appeal, this analysis above does not overlook the minimum conduct required to violate the statute of conviction (Respondent's Br. at 9-10).