U.S. Department of Justice

Executive Office for Immigration Review

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Name: ARELLANO, HUMBERTO JOSE **A 029-586-456**

Date of this notice: 3/5/2018

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.

Userteam: Docket

File: A029 586 456 – Miami, FL

Date: MAR – 5 2018

In re: Humberto Jose ARELLANO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mark A. Prada, Esquire

ON BEHALF OF DHS: Jacob Teichman Addicott
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security (DHS) appeals from the Immigration Judge's April 21, 2017, decision granting the respondent's motion to terminate removal proceedings. The respondent opposes the appeal. The appeal will be dismissed, and the proceedings will be terminated.

We review findings of fact, including credibility findings, for clear error. *See* 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. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The sole issue on appeal is whether the respondent is removable from the United States due to his 2002 and 2004 convictions for theft as set forth under Florida Statute (Fla. Stat.) § 812.014(1). The DHS contends that theft under this statute constitutes a crime involving moral turpitude, and that the respondent's convictions trigger his removability under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). The Immigration Judge found that the Florida theft statute was not a crime involving moral turpitude, and the DHS now appeals that decision.

In determining whether a crime involves moral turpitude, we apply the categorical and modified categorical approaches as defined by recent Supreme Court precedent and consistent with Federal appellate court precedent. *Matter of Silva-Trevino*, 26 I&N Dec. 826, 831 (BIA 2016). We recently held "that [a theft] offense qualifies as a categorical crime involving moral turpitude if it 'embodies a mainstream, contemporary understanding of theft, which requires an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded.'" *Matter of Obeya*, 26 I&N Dec. 856, 859 (BIA 2016) (quoting *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 854 (BIA 2016)).

The statute in pertinent part is set forth as follows:

> (1) 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) Deprive the other person of a right to the property or a benefit from the property.
>
> (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. Ann. § 812.014(1). We have noted that Florida is one of two states that "permit conviction for theft on a showing of intent to temporarily deprive an owner of property." *Matter of Diaz-Lizarraga*, 26 I&N Dec. at 852.[1]

Unlike many state theft laws which are based at least in part on the Model Penal Code, Florida's theft statute does not have a limitation akin to the substantial erosion of property rights. The Florida statute thus criminalizes conduct broader than the mainstream, contemporary understanding of theft, which requires an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded.

The DHS correctly notes that theft under Florida law requires an intent to steal (DHS's Br. at 18-20). *See Ginn v. State*, 26 So. 3d 706, 712 (Fla. Dist. Ct. App. 2010) ("Intent to steal is a necessary element of the offense of theft, and the burden rests on the State to establish that the property was taken with this intent."). However, this intent can be to either permanently or temporarily deprive or appropriate. *See Daniels v. State*, 570 So. 2d 319, 321 (Fla. Dist. Ct. App. 1990), *approved*, 587 So. 2d 460 (Fla. 1991) ("Clearly, 'theft' in Florida now requires a specific criminal intent with an animus furandi that may be *either* the intent to temporarily deprive another of property or the intent to permanently deprive another of property.").

The DHS argues that the intent to temporarily deprive or appropriate under Florida law is equally turpitudinous as the intent to permanently deprive or appropriate (DHS's Br. at 19). An intent to temporarily deprive another of his or her property might very well involve moral turpitude. *Matter of Diaz-Lizarraga*, 26 I&N Dec. at 853 (distinguishing between taking a ring with the intent to keep it for a night against taking a ring with the intent to keep it for 20 years). However, the issue is not whether an intent to temporarily deprive someone of his or her property might involve moral turpitude. Rather, we must "focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the respondent's particular violation of that statute." *Matter of Silva-Trevino*, 26 I&N Dec. at 831 (citation omitted).

We agree with the Immigration Judge's application of the realistic probability test. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (requiring "a realistic probability, not a

[1] The DHS does not contend on appeal that Fla. Stat. § 812.014(1) is divisible, and we thus need not decide whether the modified categorical approach applies in this case. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (setting forth that arguments not raised on appeal are waived).

theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime"). Ordinarily, "[t]o show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.* However, this showing is not required "when the statutory language itself, rather than the application of legal imagination to that language, creates the realistic probability that a state would apply the statute to conduct beyond the generic definition." *Ramos v. U.S. Atty. Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013) (internal quotation marks removed). In this case, the statute expressly includes the intent to temporarily deprive or appropriate.

We disagree with the DHS that the Florida does not prosecute joyriding or other de minimis takings as theft (DHS's Br. at 20-23). The Supreme Court of Florida has held that the Florida theft statute left Florida's now-repealed anti-joyriding statute with no valid field of operation. *State v. Dunmann*, 427 So. 2d 166, 168 (Fla. 1983). Florida courts have set aside theft adjudications where the accused was merely present "as an after-acquired passenger in a vehicle, with knowledge that it has been stolen." *State v. G.C.*, 572 So. 2d 1380, 1382 (Fla. 1991). In that case, the District Court below distinguished a passenger in those circumstances from a driver having the intent to temporarily deprive the owner of his or her property. *G.C. v. State*, 560 So. 2d 1186, 1188 (Fla. Dist. Ct. App. 1990). The DHS's arguments do not persuade us to disturb the Immigration Judge's determination that Fla. Stat. § 812.014(1) is not categorically a crime involving moral turpitude.

We also decline the DHS's invitation to abandon our adherence to the categorical approach in the context of crimes involving moral turpitude (DHS Br. at 23-29). *Cf. Matter of C-T-L-*, 25 I&N Dec. 341, 347 (BIA 2010) (stating that consistency and predictability are important principles in immigration law); *see also Hohn v. United States*, 524 U.S. 236, 251(1998) (noting that principles of stare decisis have special force in the context of statutory interpretation because the legislature remains free to amend the statute). In sum, we agree with the Immigration Judge's decision to terminate removal proceedings.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed, and the removal proceedings are terminated.

Linda J. Wendtland

FOR THE BOARD

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

In the Matter of:	
Humberto Jose Arellano	File No.: 029 586 456
In removal proceedings	

ORDER OF THE IMMIGRATION JUDGE

The present case requires the Court to decide if the respondent's convictions in 2002 and 2004 for theft under Fla. Stat. § 812.014,[1] *see* Exh. 2, qualify as crimes involving moral turpitude that would trigger his removability under INA § 212(a)(2)(A)(i)(I).[2] The Court received written briefs from the parties and heard oral argument on March 13, 2017 from the Department of Homeland Security ("Department"), the respondent's counsel, and counsel for four other respondents who are similarly situated.[3] The Court would like to express its gratitude to the parties for their exceptional advocacy and professionalism. After careful review of

[1] The respondent's was convicted on April 18, 2002 for petit theft under Miami-Dade County (Florida) Municipal Ordinance § 21-81(a). *See* Exh. 2, 3. That ordinance makes it unlawful in Miami-Dade County to commit "any act which is recognized by the laws of the State of Florida as a misdemeanor." *See* Miami-Dade County (Florida) Municipal Ordinance § 21-81(a). It appears to be undisputed here that the municipal ordinance incorporates the substance of Fla. Stat. § 812.014, which punishes petit theft as a misdemeanor.

[2] The Court will not consider whether the offenses described in allegation four of the Notice to Appear are turpitudinous. Because the respondent adjusted his status with a waiver of inadmissibility, which related to those offenses, they cannot be a factual predicate for removability as charged here. *Compare Matter of Mascorro-Perales*, 12 I&N Dec. 228, 230 (BIA 1967) ("when relief has been granted in accordance with the authorization of Congress, it would be clearly repugnant to say that the respondent remains deportable because of the same conviction"); *with Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991) (holding that a conviction which was a predicate for a charge of deportability may be alleged as one of two crimes involving moral turpitude in a subsequent proceeding, but only where the respondent was convicted of a new crime involving moral turpitude).

[3] To allow the Board of Immigration Appeals to more easily follow the oral arguments presented on March 13, 2017, in the event this case is appealed, the Court has attached to this order a list of the cases discussed in alphabetical order. *See* Appendix A.

the law, the Court respectfully concludes that theft under Fla. Stat. § 812.014 is not a crime involving moral turpitude.

I.

A crime involving moral turpitude is one that 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 Ajami,* 22 I&N Dec. 949, 950 (BIA 1999) (citations omitted); *see also Keungne v. U.S. Att'y Gen.*, 561 F.3d 1281, 1284 (11th Cir. 2009). Scienter is the "touchstone" of moral turpitude. *Michel v. INS*, 206 F.3d 253, 263 (2d Cir. 2000) (deferring to the conclusion of the Board of Immigration Appeals ("Board") that possession of stolen property is a crime involving moral turpitude). Therefore, offenses which are intrinsically wrong or *malum in se* are generally turpitudinous, while those that are the result of a statutory prohibition or *malum prohibitum* are not. *See Matter of P-*, 6 I&N Dec. 795, 798 (BIA 1955).

To determine whether an offense involves moral turpitude, the Court applies the categorical and modified categorical approaches. *See Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016); *Sanchez Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303 (11th Cir. 2011); *Descamps v. United States*, 133 S. Ct. 2276 (2013); *Mathis v. United States*, 136 S. Ct. 2243 (2016). Under the categorical approach, the Court determines if the elements of the crime of conviction fit within the generic definition of a crime involving moral turpitude. *Silva-Trevino*, 26 I&N Dec. at 831; *Mathis*, 136 S. Ct. at 2248. If a criminal statute lists elements in the alternative and thereby defines multiple crimes, the statute is divisible and the Court may proceed to the modified categorical approach to determine what crime, with what elements, a defendant was convicted. *Silva-Trevino*, 26 I&N Dec. at 833; *Mathis*, 136 S. Ct. at 2249.

In *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016), the Board provided specific guidance in reviewing whether theft offenses involve moral turpitude. The Board held that a theft offense is turpitudinous if it "embodies a mainstream, contemporary understanding of theft, which requires 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 854; *see also Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016).

II.

The respondent was convicted of theft under Fla. Stat. § 812.014. *See* Exh. 2. The statute provides that 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) [a]ppropriate 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 (emphasis added). The jury instructions make clear that the jury need not unanimously agree on whether the defendant intended a temporary or a permanent taking. *See* Fla. Standard Jury Instr. (Crim.) 14.1 (instructing a jury to find the defendant guilty if the State of Florida establishes, *inter alia*, an intent to "*either* temporarily *or* permanently, a. deprive . . . [or] b. appropriate . . . .") (emphasis added).

A conviction for theft under Fla. Stat. § 812.014 is not turpitudinous because the statute explicitly states that temporary takings are sufficient to warrant a conviction. Temporary takings do not meet the test articulated by the Board in *Diaz-Lizarraga*: they are not permanent, nor are they *necessarily* "under circumstances where the owner's property rights are substantially eroded." *Diaz-Lizarraga*, 26 I&N Dec. at 854. Florida's theft statute thus stands in stark contrast to those of the twenty-four states that have adopted the Model Penal Code's definition of "deprive" either verbatim or in large part, the fifteen states that have done so through case law, and the five states that have retained the intent to permanently deprive an owner of property as an explicit statutory requirement. *Id.* at 851-52; *compare State v. G.C.*, 572 So. 2d 1380, 1382 n.4 (Fla. 1991) (explaining the meaning of the terms "deprive" or "appropriate" as used in Fla. Stat. § 812.014, but without regard to whether the taking is substantial or *de minimis*).

The Department has correctly argued that the Court must focus on the minimum conduct that has a realistic probability, not just a theoretical possibility, of being prosecuted. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 184 (2007). But the statute's explicit reference to temporary takings creates the realistic probability that *de minimis* takings are prosecuted. *See Ramos v. U.S. Atty. Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) (holding that express statutory language created a realistic probability that a state would apply its statute beyond the generic definition of theft as that term is used in INA § 101(a)(43)(G)); *see generally Sebastiano v. State*, 14 So. 3d 1160, 1165 (Fla. Dist. Ct. App. 2009) (upholding a conviction under Fla. Stat. § 812.014 because there was sufficient evidence that the defendant intended a deprivation "at the very least temporarily").

Even apart from the statutory language, the Court finds that *R.C. v. State*, 481 So. 2d 14 (Fla. Dist. Ct. App. 1985), is clear proof that *de minimis* takings are prosecuted under Fla. Stat. § 812.014. In *R.C.*, a man named J.T. King found a girl's bicycle on his apartment patio and intended to turn it in to the apartment manager the next day. *R.C.*, 481 So. 2d at 14. When a juvenile who was watching television at King's apartment asked King for permission to ride the bicycle home, King refused and told the juvenile not to touch the bicycle. *Id.* at 15. The juvenile did not heed the warning, was caught, and returned to the apartment "an hour later" with a police officer, who had noticed it was a girl's bicycle. *Id.* Although King told the officer the bicycle was not his, the juvenile was nonetheless charged with grand theft under Fla. Stat. § 812.014, and his adjudication of delinquency was affirmed on appeal by Florida's First District Court of Appeal. *Id.*

The Court finds that the taking of a bicycle for one hour as described in *R.C.* is a *de minimis* taking, as that term is used in *Diaz-Lizarraga*. The taking was short in duration and there is certainly no mention in the case of a substantial erosion of the victim's property rights. In fact, the "victim" was King, who had only a temporary, custodial interest in the bicycle himself. There is no indication in *R.C.* that King was even *aware* of the bicycle's one-hour absence. *See Diaz-Lizarraga*, 26 I&N Dec. at 850 (holding that *de minimis* takings are ones where the owner's

property rights are compromised little, if at all, such as joyriding and other short-term takings).

In sum, Florida is one of only two states in the country that explicitly permits a defendant to be convicted of theft for a *temporary* taking, without more. *Diaz-Lizarraga*, 26 I&N Dec. at 852 n.8. The statute thus extends to "short-term" or "*de minimis*" takings, *Diaz-Lizarraga*, 26 I&N Dec. 850-51, which do not meet the test articulated by the Board in *Diaz-Lizarraga*: they are not permanent, nor are they necessarily "under circumstances where the owner's property rights are substantially eroded," *id.* at 854. And because a Florida jury need not unanimously agree on the nature of the intended taking – temporary or permanent – it is not an "element" of the offense, the statute is indivisible, and the Court cannot proceed to the modified categorical approach. *Mathis*, 136 S. Ct. at 2248. The respondent's convictions are therefore not crimes involving moral turpitude.

III.

The Department claims that in the context of impeachment, the Florida courts consider theft to be a crime of dishonesty or moral turpitude. *See State v. Page*, 449 So. 2d 813 (Fla. 1984); *State ex rel. Tullidge v. Hollingsworth*, 146 So. 660 (Fla. 1933); *Pearl v. Florida Bd. of Real Estate*, 394 So. 2d 189 (Fla. Dist. Ct. App. 1981). The Department argues that the Court should defer to Florida's interpretation of its own theft statute in the absence of conflicting authority from the Board or the Eleventh Circuit Court of Appeals.

But the Court does not know of any case where an Immigration Judge or the Board has deferred to a state's interpretation of the term "crime involving moral turpitude." The Court will not break new ground today, although it will look to the reasoning employed by the Florida courts for guidance, to the extent that reasoning is persuasive in addressing the specific legal issue before the Court. *See generally Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (holding that an administrative agency's rules deserve deference according to their persuasiveness).

Upon review of the cases cited by the Department, the Florida courts addressed issues different than the one before the Court. For example, *Page* held

that theft is a crime "involving dishonesty" for purposes of Fla. Stat. § 90.610(1), while *Pearl* held that possession of a controlled substance was not a crime involving moral turpitude for purposes of Fla. Stat. § 475.25(1)(e). *See Page*, 449 So. 2d at 815; *Pearl*, 394 So. 2d at 192. Because these Florida cases predate *Diaz-Lizarraga* and *Obeya*, they certainly do not cite, much less apply, the test announced by the Board: a theft offense is only turpitudinous where there is an intent to deprive the owner of the property either permanently or under circumstances where his or her property rights are substantially eroded. Therefore, the Court cannot defer to their reasoning.

IV.

The Department also points to Florida case law which holds that a conviction under Fla. Stat. § 812.014 requires that the defendant have a specific intent to steal. *See Daniels v. State*, 587 So. 2d 460 (Fla. 1991); *Spivey v. State*, 680 So. 2d 565 (Fla. Dist. Ct. App. 1996); *Stramaglia v. State*, 603 So. 2d 536 (Fla. Dist. Ct. App. 1992). The Department posits that where there is a specific intent to steal, there is *necessarily* a substantial erosion of the victim's property rights.

The Court cannot agree. Examining one of the "specific intent to steal" cases cited by the Department, the Court finds the following passage:

> Two years later we held "that the specific intent necessary for theft is the intent to steal, not the intent to permanently deprive an owner of his property." *State v. Dunmann*, 427 So.2d 166, 167 (Fla. 1983). By adding the phrase "either temporarily or permanently" to subsection 812.014(1) the legislature has expressed its intent in this area, and we hold that the specific intent to commit robbery is **the intent to steal, i.e., to deprive an owner of property either permanently or temporarily.**

Daniels v. State, 587 So. 2d 460, 462 (Fla. 1991) (emphasis added).

In light of the above, the Court finds that a defendant's "specific intent to steal" does not *necessarily* cause a substantial erosion of the victim's property rights. Instead, the "specific intent to steal" is simply the intent to deprive or appropriate from the victim "either permanently or temporarily." In other words, the "specific intent to steal" is a tautological reference to the disjunctive language of

the statute. Fla. Stat. § 812.014(1). They are one in the same, which is why the jury instructions omit any separate reference to a "specific intent to steal." *See* Fla. Standard Jury Instr. (Crim.) 14.1.

V.

Along the same lines, the Department argues that where a defendant takes the property of another without a substantial effect upon the property owner's rights – a *de minimis* taking – any conviction would be reversed by Florida's appellate courts for insufficient proof of a felonious intent to steal. The Department points to two cases from the Florida courts which are consistent with its argument: *T.L.M. v. State*, 755 So. 2d 749 (Fla. Dist. Ct. App. 2000), and *Peoples v. State*, 760 So. 2d 1141 (Fla. Dist. Ct. App. 2000).

T.L.M. concerned a juvenile charged with grand theft of a fire extinguisher. *T.L.M*, 755 So. 2d at 750. In response to a conflict with a school disciplinary official, the juvenile removed the fire extinguisher from the wall of the "time out room," and "[i]n a fit of anger" threw it towards a desk in the vicinity of the school disciplinary official. *Id.* On appeal, Florida's Fourth District Court of Appeal reversed the conviction because the evidence did not establish that the juvenile had the specific intent to appropriate or deprive the school of its property. *Id.* at 751. The Court concluded that the juvenile's use of the fire extinguisher was "incidental to another act" in that the juvenile had only taken it from the wall in a fit of anger over impending discipline. *Id.* "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's] property as defined under section 812.014(1)." *Id.* at 751-52.

Peoples also concerned the theft of a fire extinguisher, but instead by an inmate of the Orange County correctional institution. *Peoples*, 760 So. 2d at 1142. The inmate took a fire extinguisher from a storage area, struck a correctional officer with it, and then discharged its contents in the face of the officer. *Id.* On appeal, Florida's Fifth District Court of Appeal affirmed the inmate's conviction for grand theft. *Id.* The Court distinguished *T.L.M.*, finding that the inmate's use of the fire

extinguisher was not "incidental" to another act, nor was his use of the fire extinguisher "for only a second or two." *Peoples*, 760 So. 2d at 1143. The Court concluded that the inmate's use of the fire extinguisher to batter the correctional officer was sufficient evidence of an intent to appropriate. *Id.* at 1143.

The Department points to *T.L.M.* as an example of a *de minimis* taking that was reversed on appeal, while *Peoples* is a taking under circumstances where the owner's property rights were substantially eroded, which was affirmed on appeal. The Department argues that the differing treatment of these cases *proves* that Fla. Stat. § 812.014 does not extend to *de minimis* takings. While the Court agrees with the Department's characterization of the outcomes in *T.L.M.* and *Peoples*, it cannot agree with its ultimate conclusion, for a few reasons.

First, the Department reads too much into *T.L.M.* Florida's Fourth District Court of Appeal does refer to the fact that the juvenile possessed the fire extinguisher for "only a second or two." *T.L.M*, 755 So. 2d at 751. This is certainly a significant fact in the Court's decision, but the length of the taking alone was not the only fact the Court relied upon in reversing the conviction. The Court also cited the fact that the juvenile's use of the fire extinguisher was "incidental to another act" – his fit of anger – in finding insufficient proof of an intent to steal. *Id.* at 751. Given the reliance of the Fourth District Court of Appeal on *both* facts, one cannot conclude that the brevity of the taking alone caused reversal.

Second, even if the momentary nature of the taking was enough *in itself* to warrant reversal, *T.L.M.* still proves too little. That is because *T.L.M.* involved an exceedingly *de minimis* taking, one of "only a second or two." In contrast, the concept of a *de minimis* taking as discussed in *Diaz-Lizarraga* is broader, including longer and more substantial takings, such as the borrowing of a Victrola or ring for short-term use at a party. *See Diaz-Lizarraga*, 26 I&N Dec. at 850, 854. The fact that Florida's Fourth District Court of Appeal set aside a juvenile's theft conviction for the taking of a fire extinguisher for "only a second or two" simply does not mean there would be a similar result in a more substantial, but still *de minimis*, taking.

Third, the Department's theory cannot account for *R.C. v. State*, 481 So. 2d 14 (Fla. Dist. Ct. App. 1985). As discussed above, *R.C.* involved the taking of a bicycle for one hour from a person who had only a custodial interest in the bicycle. Despite the fact that the taking was *de minimis*, it nonetheless resulted in an adjudication of delinquency under Fla. Stat. § 812.014, and that adjudication was *upheld* on appeal by Florida's First District Court of Appeal.

During oral argument, the Court asked the Department to explain if *R.C.* was proof that *de minimis* takings are prosecuted under Fla. Stat. § 812.014. The Department stated that the juvenile in *R.C.* did not challenge on appeal whether there was sufficient proof of his specific intent to steal, but instead sought review of an entirely different issue. Accordingly, the Department argued that *R.C.* should not be taken as proof of Florida's prosecution of a *de minimis* taking under Fla. Stat. § 812.014 because there *may have been* more facts that would establish that the taking resulted in a substantial erosion of the owner's property rights.

Upon review, the Court finds the Department's explanation of *R.C.* is insufficient. Under *Duenas-Alvarez*'s "realistic probability" test, a respondent can prove that a criminal statute is overbroad by pointing "to his own case or other cases" in which a state court applies a criminal statute in a nongeneric manner. *Duenas-Alvarez*, 549 U.S. at 184. Here, the respondent has done exactly that by pointing to *R.C.* The *Duenas-Alvarez* inquiry does not further require the respondent to show *actual litigation* of the contested issue in the case cited, nor is he required to disprove the possibility that there might have been adverse facts which were not recited in the case itself.

VI.

Finally, the Department asks the Court to find Fla. Stat. § 812.014 turpitudinous because its elements establish a reprehensible act committed with some degree of scienter. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 828 n.2 (BIA 2016) (recognizing that "a crime involving moral turpitude is generally defined as a crime that encompasses a reprehensible act with some form of scienter."). In support thereof, the Department cites a recent unpublished opinion from the

Eleventh Circuit Court of Appeals. *See Jaimes-Lopez v. U.S. Atty. Gen.*, No. 15-15532, 2017 WL 83751 (11th Cir. Jan. 10, 2017) (unpublished). While the issue in that case was whether robbery under Florida law qualified as a crime involving moral turpitude, the Eleventh Circuit nevertheless provided this highly relevant analysis:

> Thus, robbery under § 812.13(2)(a) **requires proof of a taking with the specific intent to steal, which alone suggests a disregard for the "private and social duties which a man owes to his fellow men, or to society in general."** *See Cano*, 709 F.3d at 1054; *see McKenzie*, 200 F.2d at 548 ("[C]rimes of ... larceny [and] ... stealing ... are regarded as involving moral turpitude.").

Jaimes-Lopez, 2017 WL 83751, at *5 (emphasis added).

The Court understands the Department's basic, common sense argument that theft is *malum in se* and therefore it should be found to be turpitudinous. And the Court reads *Jaimes-Lopez* in the same way the Department apparently does, in that the Eleventh Circuit would likely defer under *Chevron* step two to an authoritative decision of the Board concluding that all theft offenses involve moral turpitude.[4] But the Board has provided binding guidance on how the Court must evaluate theft convictions. Therefore, the Court's analysis begins and ends with *Diaz-Lizarraga*'s holding that a theft offense is only turpitudinous where there is an

[4] If the Court were making its own determination of whether theft was turpitudinous pre-*Diaz-Lizarraga*, its conclusion today would likely have been very different, and consistent with the rationale of *Jaimes-Lopez*. *See generally Wala v. Mukasey*, 511 F.3d 102, 106 (2d Cir. 2007) (holding that the significance of the temporary/permanent distinction in theft cases was an "open question"); *Matter of Jurado*, 24 I&N Dec. 29, 33 (BIA 2006) ("*We need not decide* whether the premise of the respondent's argument is correct, i.e., that if the offense required only an intent to temporarily deprive the owner of the use or benefit of the property taken, the crime would not be one of moral turpitude.") (emphasis added); *Matter of V-Z-S-*, 22 I&N Dec. 1338, 1348 (BIA 2000) (holding in the aggravated felony context that "[t]he fact that a prosecutor does not have to prove specific intent to *permanently* deprive the owner of property in order to secure a conviction [for vehicle theft under California law] *does not alter the character of the public harm*—vehicle taking—that is to be punished.") (emphasis added); *Matter of Serna*, 20 I&N Dec. 579, 585 n.10 (BIA 1992) (holding that mere possession of stolen goods is a crime involving moral turpitude, without explicitly requiring an intent to permanently deprive or appropriate the property from the victim); *Machado-Zuniga v. U.S. Att'y Gen.*, 564 F. App'x 982, 986 (11th Cir. 2014) (unpublished) (holding that transporting stolen property is a crime involving moral turpitude because "[r]egardless of when a person learns that property is stolen in the process of transporting it, the act of continuing to transport it once he knows it is stolen is an affirmative act of dishonest behavior that 'runs contrary to accepted societal duties.'").

intent to deprive the owner of the property either permanently or under circumstances where his or her property rights are substantially eroded.

* * *

In light of the above, the Court concludes that the respondent's convictions are not crimes involving moral turpitude. The charge cannot be sustained, and these removal proceedings are therefore terminated.

4-21-17
Date

Timothy M. Cole
Immigration Judge

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APPENDIX A

Supreme Court Cases

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)
Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007)
Judulang v. Holder, 565 U.S. 42 (2011)
Landgraf v. USI Film Prod., 511 U.S. 244 (1994)
Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005)
Vartelas v. Holder, 566 U.S. 257 (2012)

Federal Circuit Court Cases

De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2015)
Jaimes-Lopez v. U.S. Atty. Gen., No. 15-15532, 2017 WL 83751 (11th Cir. Jan. 10, 2017) (unpublished)
Ramos v. U.S. Atty. Gen., 709 F.3d 1066 (11th Cir. 2013)

Administrative Cases

Matter of Abdelghany, 26 I&N Dec. 254 (BIA 2014)
Matter of Diaz-Lizarraga, 26 I&N Dec. 847 (BIA 2016)
Matter of Obeya, 26 I&N Dec. 856 (BIA 2016)
Matter of Silva-Trevino, 26 I&N Dec. 826 (BIA 2016)

State Cases

Allen v. State, 690 So. 2d 1332 (Fla. Dist. Ct. App. 1997)
Canady v. State, 813 So. 2d 161 (Fla. Dist. Ct. App. 2002)
C.S. v. State, 617 So. 2d 863 (Fla. Dist. Ct. App. 1993)
Daniels v. State, 587 So. 2d 460 (Fla. 1991)
Florida Bar v. Winters, 104 So. 3d 299 (Fla. 2012)
G.C. v. State, 560 So. 2d 1186 (Fla. Dist. Ct. App. 1990)
Hughes v. State, 36 So. 3d 816 (Fla. Dist. Ct. App. 2010)
Hebert v. State, 25 So. 3d 612 (Fla. Dist. Ct. App. 2009)
J.B. v. State, 6 So. 3d 659 (Fla. Dist. Ct. App. 2009)
Lewellen v. State, 682 So. 2d 186 (Fla. Dist. Ct. App. 1996)
Peoples v. State, 760 So. 2d 1141 (Fla. Dist. Ct. App. 2000)
R.C. v. State, 481 So. 2d 14 (Fla. Dist. Ct. App. 1985)
R. M. v. State, 412 So. 2d 44 (Fla. Dist. Ct. App. 1982)
R.M. v. State, 450 So. 2d 897 (Fla. Dist. Ct. App. 1984)
Sebastiano v. State, 14 So. 3d 1160 (Fla. Dist. Ct. App. 2009)
S.M. v. State, 150 So. 3d 1179 (Fla. Dist. Ct. App. 2014)
S.W. v. State, 999 So. 2d 701 (Fla. Dist. Ct. App. 2008)
State v. G.C., 572 So. 2d 1380 (Fla. 1991)
State v. Dunmann, 427 So. 2d 166 (Fla. 1983)
Stephens v. State, 444 So. 2d 498 (Fla. Dist. Ct. App. 1984)
T.L.M. v. State, 755 So. 2d 749 (Fla. Dist. Ct. App. 2000)
Urbanik v. State, 802 So. 2d 511 (Fla. Dist. Ct. App. 2001)