U.S. Department of Justice

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Name: DE LEON GONZALEZ, ALEJAND... **A 044-564-165**

Date of this notice: 4/15/2020

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:
Morris, Daniel

Userteam: Docket

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File: A044-564-165 – Conroe, TX

Date: APR 15 2020

In re: Alejandro DE LEON GONZALEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Amanda Waterhouse, Esquire

ON BEHALF OF DHS: Nora E. Norman
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") has appealed an Immigration Judge's decision, dated October 22, 2019, that the respondent was not removable as an alien convicted of two or more crimes involving moral turpitude ("CIMT") not arising out of a single scheme of criminal misconduct under section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii), and terminating proceedings. The respondent has filed a brief on appeal. The appeal will be dismissed, and the record remanded for the required background checks.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

We adopt and affirm the decision of the Immigration Judge terminating proceedings (IJ at 6-8). *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994).

The Immigration Judge determined that the respondent's July 11, 2012, conviction for evading arrest under Texas Pen. Code § 38.04 was a crime involving moral turpitude (IJ at 3-6). The respondent does not contest this determination. The Immigration Judge also determined that the respondent's conviction on October 13, 2015, under Texas Pen. Code § 30.02 (burglary of a building with intent to commit theft) was not a crime involving moral turpitude (IJ at 6-7). The DHS contests this finding (DHS Brief at 6-17).

To determine if the respondent has been convicted of an offense which qualifies as a crime involving moral turpitude, we employ the categorical approach developed in *Taylor v. United States*, 495 U.S. 575 (1990) and subsequent cases. *See Matter of Silva-Trevino* ("*Silva-Trevino III*"), 26 I&N Dec. 826, 830-31 (BIA 2016). Under this approach, we determine whether the statute of conviction fits within the generic definition of a crime of moral turpitude, focusing on the "minimum conduct that has a realistic probability of being prosecuted" under the statute. *Silva-Trevino III*, 26 I&N Dec. at 831. If the minimum conduct prosecuted includes non-morally turpitudinous conduct, the statute of conviction is overbroad and is not a

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categorical crime involving moral turpitude. *Silva-Trevino III*, 26 I&N Dec. at 833; *see also Gomez-Perez v. Lynch*, 829 F.3d 323, 327 (5th Cir. 2016) (citation omitted); *Mercado v. Lynch*, 823 F.3d 276, 279-80 (5th Cir. 2016).

If the statute is divisible, i.e., it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of elements, and at least one, but not all, of the listed offenses or combinations is a categorical match to the generic offense, we may apply a modified categorical approach. *Silva-Trevino III*, 26 I&N Dec. at 833.

The statute of conviction for the respondent's burglary conviction provides, in pertinent part:

> (a) A person commits an offense if, without the effective consent of the owner, the person:
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
> (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
> (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

Tex. Pen. Code § 30.02(a) (West 2014).

In *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc) (*Herrold I*), the Fifth Circuit addressed Tex. Pen. Code § 30.02 in the context of whether it qualified for sentencing purposes as a predicate offense (under the "generic burglary" provision) of the Armed Career Criminal Act ("ACCA"). The court concluded that it was both indivisible and overbroad, with respect to the definition of generic burglary adopted by the United States Supreme Court in *Taylor v. United States*, 495 U.S. at 599 (1990) (defining "burglary" as "any crime, regardless of its exact definition or label, having the basic elements of an unlawful or unprivileged entry into, or remaining in, a building or its structure, with intent to commit a crime").

The court focused on subsections (a)(1) and (a)(3) of Tex. Pen. Code § 30.02, and found that they were indivisible because they did not define "distinct offenses, but were rather separate means of committing one burglary offense." *Herrold I*, 883 F.3d at 529. In finding that subsections 30.02(a)(1) and (a)(3) were indivisible, the court noted that it "must use the categorical approach to examine the viability of Herrold's two burglary convictions under the ACCA." *Herrold I* at 530-31. Applying the categorical approach, the court held that § 30.02(a)(3) is broader than generic burglary, "because it criminalizes entry and subsequent intent formation rather than entry with intent to commit a crime." *Herrold I* at 541. Because subsections 30.02(a)(1) and (a)(3) were indivisible, the court held that a conviction under section 30.02(a) was broader than the definition of generic burglary adopted in *Taylor*. *Herrold I* at 541.

The DHS appealed the Fifth Circuit's decision to the United States Supreme Court, which in turn vacated and remanded *Herrold I*. *See United States v. Herrold*, 139 S. Ct. 2712 (2019). The Fifth Circuit issued a new decision in which it determined that the defendant's conviction for burglary under Tex. Pen. Code § 30.02 was a qualifying prior conviction under the Armed Career

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Criminal Act, but it also reinstated Part II of *Herrold I*. *See United States v. Herrold*, 941 F.3d 173, 177 (5th Cir. 2019) (*Herrold* II). As noted, Part II specifically found that subsections (a)(1) and (a)(3) of Tex. Pen. Code § 30.02 were indivisible because they did not define "distinct offenses, but were rather separate means of committing one burglary offense." *United States v. Herrold*, 883 F.3d at 529. We disagree with the DHS that *Herrold II* is not controlling with regard to the issue of whether Tex. Pen. Code § 30.02 is morally turpitudinous because it involves a distinct divisibility issue related to the ACCA enhancement and does not involve factors critical to moral turpitude divisibility (DHS Br. at 9).

A burglary offense constitutes a crime involving moral turpitude if the crime the perpetrator intended to commit after breaking and entering is turpitudinous; in other words, if the target offense is a crime involving moral turpitude, then so too is the burglary. *See Matter of M-*, 2 I&N Dec. 721, 723 (BIA; A.G. 1946). Here, because the target offense for burglary under the statute is not an element, and includes assault, the respondent has not been convicted of a crime involving moral turpitude. *See Gomez-Perez v. Lynch*, 829 F.3d 323, 327-28 (5th Cir. 2016) (finding that jury unanimity is not required for the mens rea for assault, and thus, the three culpable mental states are merely means of satisfying the intent element).

In light of the aforementioned, we affirm the Immigration Judge's determination that the DHS has not established by clear and convincing evidence that the respondent's burglary conviction is for a crime involving moral turpitude. As the DHS has not established that the respondent has been convicted of two crimes involving moral turpitude, it has not established the respondent's removability under section 237(a)(2)(A)(ii) of the Act

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

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