U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: RODRIGUEZ, JUAN GABRIEL

A 092-389-472

Date of this notice: 1/17/2014

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Mullane, Hugh G.
Creppy, Michael J.
Malphrus, Garry D.

TranC
Userteam: Docket

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RODRIGUEZ, JUAN GABRIEL
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P.O. Box 26449
San Francisco, CA 94126-6449

Name: RODRIGUEZ, JUAN GABRIEL **A 092-389-472**

Date of this notice: 1/17/2014

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Mullane, Hugh G.
Creppy, Michael J.
Malphrus, Garry D.

TranC
Userteam: Docket

File: A092 389 472 – San Francisco, CA Date: JAN 17 2014

In re: JUAN GABRIEL RODRIGUEZ

IN REMOVAL PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Walter S. Nomura, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(C), I&N Act [8 U.S.C. § 1227(a)(2)(C)] – Convicted of firearms or destructive device violation

APPLICATION: Adjustment of status

ORDER:

PER CURIAM. On July 30, 2013, the Immigration Judge certified the record of proceedings to the Board pursuant to 8 C.F.R. §§ 1003.1(c) and 1240.1(a)(2) for a determination regarding the respondent's eligibility for adjustment of status. The Immigration Judge's actions are tantamount to an interlocutory appeal, and we find that certification is not appropriate in this instance. *See Matter of Ruiz-Campuzano*, 17 I&N Dec. 108 (BIA 1979) (holding that in order to avoid piecemeal review of the many questions that arise in the course of proceedings before us, we do not ordinarily entertain interlocutory appeals). Therefore, we decline to accept the Immigration Judge's certification of this case. *See* 8 C.F.R. § 1003.1(c) (providing that the Board in its discretion *may* review any case certified by the Immigration Judge) (emphasis added).

Accordingly, the record is returned to the Immigration Court without further Board action.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

In Re	)	**Date: July 30, 2013**
	)	
Juan Gabriel Rodriguez	)	**File Number: A 092 389 472**
	)	
	)	**In Removal Proceedings**
	)	
Respondent	)	**MEMORANDUM**
	)	

The respondent is a native and citizen of Mexico. After entering the United States illegally, he was made a lawful permanent resident in 1990. In 1999 he was convicted for discharge of a firearm in a grossly negligent manner, in violation of Cal. Penal Code Section 246.3. He was placed in removal proceedings and in May 2000 he was granted cancellation of removal for permanent residents under Section 240A(a) of the Immigration and Nationality Act (INA). However, respondent got into trouble again.

In April 2011 he was convicted for being a felon in possession of a firearm in violation of Cal. Penal Code Section 12021(a)(1). Ex. 2. This is a conviction for an aggravated felony. *United States v. Castillo-Rivera*, 244 F. 3d 1020 (9th Cir. 2001). The felony predicate for this conviction was a February 2002 conviction for receipt of stolen property in violation of Cal. Penal Code Section 496(a). *See* Ex. 2. In 2012 he was placed in removal proceedings a second time and charged with having been convicted of an offense related to firearms, see INA Section 237(a)(2)(C)(i). Respondent concedes alienage and concedes that he is removable as charged.

Respondent is ineligible for cancellation of removal because (1) he has been convicted of an aggravated felony, and (2) he previously received cancellation of removal. INA Sections 240A(a)(3) and 240A(c)(6). Instead, he sought to adjust status under INA Section 245. If respondent has been convicted of a crime involving moral turpitude, (CIMT) he cannot adjust status because the CIMT renders him inadmissible, and he cannot obtain a waiver under INA Section 212(h) because he has previously been admitted as a lawful permanent resident and he has been convicted of an aggravated felony.

Respondent contends that he does not need a Section 212(h) waiver because receipt of stolen property is not a CIMT. DHS contends, in a June 4, 2013 filing that receipt of stolen property is a CIMT. For the reasons set forth below, the court finds that receipt of stolen property is a crime involving moral turpitude, and that respondent is ineligible to adjust status under INA Section 245.

The elements of receipt of stolen property are that a person bought, received, sold or concealed property which had been stolen or obtained by extortion, and the person actually knew the property was stolen or obtained by theft or extortion at the time he bought, received, sold or concealed the property. CALJIC 14.65.

Under *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*) the court of appeals is required to give *Chevron* deference to determinations by the BIA in precedent decisions as to what crimes constitute crimes of moral turpitude. The *en banc* decision in *Marmolejo-Campos* is, of course, binding on all subsequent panels of the court of appeals, on the BIA, and on this court. The BIA holds that receipt of stolen property which (as is the case here) has as an element knowledge that the property is stolen is sufficiently contrary to accepted moral values to be turpitudinous. *Matter of Salvail*, 17 I. & N. Dec. 19, 20 (BIA 1979); *Matter of Patel*, 15 I&N Dec. 212 (BIA 1975); *Matter of Z*, 7 I&N Dec. 253 (BIA 1956); *Matter of R*, 6 I&N Dec. 746 (BIA 1955).

Respondent asserts that receipt of stolen property is not a crime of moral turpitude, citing *Castillo-Cruz v. Holder*, 581 F. 3d 1154 (9th Cir. 2009). *Castillo-Cruz* reaches this result by discussing BIA cases which hold that a conviction for *theft* which does not involve an intent to permanently deprive the owner of property is not morally turpitudinous. According to *Castillo-Cruz,* receipt of stolen property does not have as an element the intent to permanently deprive the owner of the property, and it is therefore not turpitudinous. This interpretation is contrary to California law.

California courts hold that "the mere receipt of stolen goods with knowledge that they have been stolen *is not itself a crime* if the property was received with intent to restore it to the owner without reward or with any other innocent intent." *People v. Weilograf*, 101 Cal. App. 3d 488, 494 (1980) (emphasis added). If a defendant convinces the jury that when he received the stolen property he intended to return it to the rightful owner, this will "absolve [the defendant] of guilt." *People v. Dishman*, 128 Cal. App. 3d 717, 721-22 (1982).[1]

Under *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), a respondent must show a realistic probability, not a theoretical possibility, that he could be convicted under his interpretation of the statute. What the cases cited above show is that it is realistically *impossible* for a defendant to be convicted under Cal. Penal Code Section 496 if he intends, at the time the crime is complete, to return stolen property to its owner rather than keep it himself.

While stating that the court would "accord substantial deference to established

[1] Two recent unpublished decisions from the California appellate courts are in accord. *People v. Hall*, 2009 WL 3110938 (Sept. 29, 2009) at *13; *People v. Castro*, 2004 WL 2050647 (Sept. 15, 2004) at *6.

constructions by the BIA of the statutes it is charged to administer," 581 F. 3d at 1159, *Castillo-Cruz,* as a practical matter, does not follow the BIA's precedent decisions with respect to receipt of stolen property. In addition *Castillo-Cruz* does not follow, or even mention, *Marmolejo-Campos,* despite the fact that *Marmolejo-Campos* represents the opinion of the Ninth Circuit sitting *en banc.*[2]

Castillo-Cruz sets forth two rationales for this. First, the opinion states at p. 1159 that *Patel v. INS,* 542 F. 2d 796 (9th Cir. 1976), a *Ninth Circuit* decision holding that receipt of stolen property is a CIMT, was made prior to the adoption of the categorical approach of *Taylor v. United States*, 495 U.S. 575 (1990). But the BIA has used the categorical approach to determine whether a crime is a CIMT since at least 1954. In the BIA cases cited above the Board determined that receipt of stolen property was turpitudinous based on an analysis of the elements of the offense, not the individual conduct of the offender, which is of course the essence of the categorical approach, and which *Taylor* simply applied nationally for purposes of federal sentencing hearings. *See e.g. See Matter of Z*, 7 I&N Dec. 253 at 255-56 (setting forth the elements of Connecticut's receipt of stolen property statute and concluding, based on those elements, that it is "apparent" that this crime involved moral turpitude); *Matter of R-,* 6 I&N Dec. 444, 447-48 (BIA 1954).

Second, *Castillo-Cruz* states at pp. 1159-60 that the BIA "has not, however, expressly held that the recipient of stolen property has committed a theft offense amounting to a crime of moral turpitude." But the Board does not analyze receipt of stolen property using the elements of generic theft. On the contrary, the Board has previously held that receipt of stolen property "is not merely a subset" of the term "theft." *Matter of Cardiel-Guerrero*, 25 I&N Dec. 12, 14 (BIA 2009). As noted above, what the BIA *has* held is that the particular offense of knowing receipt of stolen property is turpitudinous.

In addition, the Second, Third and Fifth Circuits all agree that receipt of stolen property is a crime of moral turpitude. *Michel v. INS*, 206 F. 3d 253 (2d Cir. 2000); *DeLeon Reynoso v. Ashcroft*, 293 F. 3d 633 (3d Cir. 2002); *United States v. Castro*, 26 F. 3d 557 (5th Cir. 1994).[3]

Lastly, if the court of appeals thought that the BIA's cases on receipt of stolen property were in tension with the Board's cases on theft, the court of appeals should have remanded the case to the BIA for an exposition of the Board's views. *See Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (summary reversal where the Ninth Circuit decided in the first instance whether a

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[2] A similar, but not identical, problem is presented by *Robles-Urrea v. Holder,* 678 F. 3d 702 (9th Cir. 2012) and *Castrijon-Garcia v. Holder,* 704 F. 3d 1205 (9th Cir. 2013).

[3] It should be noted that the issues raised above regarding receipt of stolen property apply equally to *Alvarez-Reynaga v.* Holder, 596 F. 3d 534 (9th Cir. 2009) which holds that receipt of a stolen automobile (Cal. Penal Code Sectio 496d(a)) is not a CIMT exclusively by a citation *Castillo-Cruz.*

family was a social group instead of remanding to the BIA); *INS v. Orlando Ventura*, 537 U.S. 12 (2002) (summary reversal where the Ninth Circuit decided in the first instance whether country conditions had materially changed instead of remanding to the BIA).

In a supplemental brief filed on June 27, 2013, respondent makes several arguments for why *Castillo-Cruz* should be controlling in this case. None are availing. First, respondent argues that a conviction for receipt of stolen property "could" incorporate the elements of theft. But the jury instructions to which respondent cites merely provide supplemental guidance to a jury on the definition of the word "stolen" in the phrase "receipt of *stolen* property." The cited instructions do not convert receipt of stolen property into theft.

Second, respondent contends that receipt of stolen property and theft are "interrelated in regard to the intent necessary for a conviction." Supplemental Brief at p. 4. But the discussion which follows is no more than a reiteration of a point made above, namely that it is a defense to a charge of receipt of stolen property that the defendant intended to return the stolen property to the owner.

Respondent also argues that *Marmolejo-Campos* and *Castillo-Cruz* are not inconsistent, but as set forth above, they are quite clearly irreconcilable. Respondent also asserts that there are no binding BIA precedents on receipt of stolen property, but the binding precedents have been cited above. Lastly, respondent asserts that *Castillo-Cruz,* and nothing else, is binding on this court. For the reasons set forth above, this court cannot agree.

This court is obligated to follow *Marmolejo-Campos* and the controlling BIA precedents of *Matter of Salvail*, *Matter of Patel*, *Matter of Z*, and *Matter of R*. Based on those cases the court finds that respondent's conviction for receipt of stolen property is categorically a crime of moral turpitude.

The Board has the authority to address the issues raised herein pursuant to *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967 (2005). *See Matter of Cortes-Medina*, 26 I&N Dec. 79 (BIA 2013) (holding, that indecent exposure under California law is a CIMT, in contradistinction to *Nunez v. Holder* 594 F. 3d 1124 (9th Cir. 1124)). However, the Board has held that only the Board can invoke *Brand X. Cortes-Medina, supra,* at 86. The respondent, through counsel, has stated on the record that he is seeking no relief from removal other than adjustment of status, and he is not eligible for voluntary departure because of his aggravated felony conviction. Accordingly, this case is certified to the BIA to determine, in the first instance, whether the respondent is eligible for the only relief he seeks.

Anthony S. Murry
Immigration Judge