[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-11896

ITALO ANTONI FERRER ROJAS,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals
Agency No. A099-318-250

Before GRANT, ABUDU, and ED CARNES, Circuit Judges.

PER CURIAM:

Italo Ferrer Rojas (Ferrer), a native and citizen of Peru, petitions for review of the Board of Immigration Appeals' decision refusing to reconsider his removal order. Ferrer has a conviction for receipt of stolen property, which the BIA determined qualifies as a crime involving moral turpitude, making him ineligible for cancellation of removal. He challenges that determination.

I. Background

Ferrer entered the United States without inspection in 2000. In 2007 he was convicted of misdemeanor receipt of stolen property in violation of Va. Code Ann. § 18.2-108. That statute makes it a crime to "buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen." Va. Code Ann. § 18.2-108 (2007).

In October 2020 the Department of Homeland Security served Ferrer with a notice to appear, charging him as removable under the Immigration and Nationality Act (INA) for being a noncitizen present in the United States without being admitted or paroled. *See* 8 U.S.C. § 1182(a)(6)(A)(i). At his preliminary hearing Ferrer admitted the factual allegations against him and conceded the charge of removability. He then applied for cancellation of removal.

An immigration judge denied Ferrer's application. She ruled that Ferrer was statutorily ineligible for cancellation of removal

because his 2007 conviction qualified as a "crime involving moral turpitude." The IJ noted that the Virginia statute criminalized three distinct crimes (buying, receiving, and aiding in concealing stolen goods), and after reviewing the record of conviction she determined that Ferrer had been convicted of "receipt" of stolen goods. She then concluded that under BIA precedent receipt of stolen goods is a crime involving moral turpitude when the statute of conviction requires knowledge that the goods were stolen, and the Virginia statute does.

Ferrer appealed to the BIA, raising arguments unrelated to this petition for review. The BIA dismissed Ferrer's appeal and adopted and affirmed the IJ's decision that Ferrer was ineligible for cancellation of removal because he had been convicted of a crime involving moral turpitude.

Ferrer filed a motion to reconsider, this time contending that a conviction under Va. Code. Ann. § 18.2-108 for receipt of stolen goods is not a crime involving moral turpitude because intent to permanently deprive the owner of the property is not an element of the offense.

The BIA denied Ferrer's motion to reconsider. It agreed with the IJ that Ferrer had been convicted of receipt of stolen goods. And it concluded that receipt of stolen goods under Virginia law is a crime involving moral turpitude because the statute requires knowledge that the property was stolen. The BIA explained that to constitute a crime involving moral turpitude, receipt of

stolen goods need not have a separate "intent to deprive" element in addition to knowledge that the goods were stolen.

Ferrer timely petitioned this Court for review. He contends that the statute he was convicted of violating does not require an intent to permanently deprive, and for that reason the BIA wrongly concluded that his receipt of stolen goods conviction was a crime involving moral turpitude. He also contends that the statute encompasses conduct that is not inherently base, vile, or depraved, which is another reason why his conviction was not for a crime involving moral turpitude.

II. Standards of Review

We review the BIA's denial of a motion to reconsider for abuse of discretion. *Chacku v. U.S. Att'y Gen.*, 555 F.3d 1281, 1286 (11th Cir. 2008). "The BIA abuses its discretion when it misapplies the law in reaching its decision" or does "not follow[] its own precedents without providing a reasoned explanation for doing so." *Ferreira v. U.S. Att'y Gen.*, 714 F.3d 1240, 1243 (11th Cir. 2013). "We review only the BIA's decision, except to the extent that it expressly adopts the IJ's opinion." *Flores-Panameno v. U.S. Att'y Gen.*, 913 F.3d 1036, 1040 (11th Cir. 2019) (quotation marks omitted).

Though the INA strips us of jurisdiction to review "any judgment regarding the granting of relief under section . . . 1229b" of Title 8 (which covers cancellation of removal), we retain jurisdiction over "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(B)(i), (a)(2)(D). Whether a previous conviction qualifies as a crime involving moral turpitude is a legal question

that we review *de novo*. *See Lauture v. U.S. Att'y Gen.*, 28 F.4th 1169, 1172 (11th Cir. 2022); *Pierre v. U.S. Att'y Gen.*, 879 F.3d 1241, 1248–49 (11th Cir. 2018).

III. Discussion

The Attorney General has discretion to cancel the removal of a noncitizen who establishes that: (1) he has been continuously physically present in the United States for at least ten years; (2) he has been a "person of good moral character" while present in the United States; (3) he has not been convicted of certain specified criminal offenses; and (4) his "removal would result in exceptional and extremely unusual hardship" to a spouse, parent, or child who is a U.S. citizen or lawful permanent resident. 8 U.S.C. § 1229b(b)(1); *see id.* § 1229a(c)(4)(A). Under the third requirement, one type of crime that bars cancellation of removal is a "crime involving moral turpitude" for which the maximum possible sentence is at least one year. *Id.* § 1227(a)(2)(A)(i); *see id.* § 1229b(b)(1)(C). As the noncitizen petitioning for relief from a removal order, Ferrer bears the burden of proving that he was not convicted of a crime involving moral turpitude. *See Pereida v. Wilkinson*, 592 U.S. 224, 231–33 (2021).

The term "moral turpitude" has never been defined by federal statute or rule, but the BIA has held that the term generally refers to "conduct 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." *Zarate v. U.S. Att'y Gen.*, 26 F.4th 1196, 1199–1200 (11th Cir. 2022) (quoting *Matter of Silva-*

Trevino, 26 I. & N. Dec. 826, 833 (BIA 2016)).[1] We have recognized that BIA precedent requires "two essential elements" to classify a crime as one involving moral turpitude: "reprehensible conduct and a culpable mental state." *Id.* at 1200–01 (quoting *Matter of Silva-Trevino*, 26 I. & N. Dec. at 834).

We defer to the BIA's precedential opinions defining moral turpitude and applying that definition. *Id.* at 1201; *see also Choizilme v. U.S. Att'y Gen.*, 886 F.3d 1016, 1022 (11th Cir. 2018) ("Where the BIA has interpreted an ambiguous provision of the INA in a published, precedential decision, we defer to the BIA's interpretation under *Chevron*[*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)], as long as it reflects a permissible construction of the statute.").

To determine whether a crime involves moral turpitude we follow one of two approaches, depending on the structure of the statute in question. If the statute of conviction is not divisible, meaning that it lists alternative means of committing a single offense, we use the categorical approach. *See Lauture*, 28 F.4th at 1172. If the statute of conviction is divisible and criminalizes

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[1] Much to the same effect, we have described a crime involving moral turpitude as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Smith v. U.S. Att'y Gen.*, 983 F.3d 1206, 1210 (11th Cir. 2020) (quotation marks omitted). In other words, the crime "must involve conduct that not only violates a statute but also independently violates a moral norm." *Zarate*, 26 F.4th at 1201 (quotation marks omitted).

separate offenses, we use the modified categorial approach. *See id.* at 1172–73.

The BIA applied the modified categorical approach to determine that Ferrer was convicted of receiving stolen goods and not of buying or aiding in concealing them. Ferrer does not challenge that determination. So we assume for purposes of Ferrer's petition that we apply the modified categorical approach and do not address the divisibility of Va. Code Ann. § 18.2-108. *See Daye v. U.S. Att'y Gen.*, 38 F.4th 1355, 1361 (11th Cir. 2022).

Under the modified categorical approach, we look to the elements of Ferrer's actual crime of conviction (receiving stolen goods) and consider whether those elements categorically match the generic definition of the offense. *See George v. U.S. Att'y Gen.*, 953 F.3d 1300, 1304 (11th Cir. 2020); *Zarate*, 26 F.4th at 1199; *see, e.g.*, *Lauture*, 28 F.4th at 1173–76; *cf. Mathis v. United States*, 579 U.S. 500, 504 (2016); *Descamps v. United States*, 570 U.S. 254, 257 (2013). To obtain a receipt of stolen goods conviction under Va. Code Ann. § 18.2-108, the Commonwealth must prove the following elements: (1) that the property was previously stolen by another; (2) that the property was received by the defendant; (3) that at the time the defendant received the property he knew it had been stolen; and (4) that the defendant acted with dishonest intent. *Whitehead v. Commonwealth*, 684 S.E.2d 577, 580 (Va. 2009).

Here, the BIA concluded that a conviction for receipt of stolen goods in violation of Va. Code Ann. § 18.2-108 involves moral turpitude because it includes knowledge the property was stolen,

and BIA precedent requires only that knowledge, not intent to permanently deprive. We agree with the BIA that its precedent does not, as a rule, require for moral turpitude purposes that a receipt of stolen goods conviction include the intent to permanently deprive. But the BIA's analysis was incomplete because it failed to address whether Ferrer's conviction involved both a culpable mental state (knowledge that the goods were stolen) and reprehensible conduct (inherent baseness, vileness, or depravity). *See Zarate*, 26 F.4th at 1200–01, 1203.

A.

Before the BIA came to recognize "reprehensible conduct and a culpable mental state" as the two "essential elements" of a crime involving moral turpitude, *see Matter of Silva-Trevino*, 26 I. & N. Dec. at 834, it had held that a receipt of stolen goods conviction involves moral turpitude so long as the statute of conviction requires knowledge that the goods were stolen. *See, e.g.*, *Matter of Serna*, 20 I. & N. Dec. 579, 585 n.10 (BIA 1992) (noting that "possession of stolen goods or mail, with the knowledge that they are stolen, has been held to be a crime involving moral turpitude"); *Matter of Patel*, 15 I. & N. Dec. 212, 213 (BIA 1975) ("The crime of receiving stolen property involves moral turpitude, if knowledge that the goods were stolen is an element of the offense."), *overruled on other grounds by Matter of Castro*, 19 I. & N. Dec. 692 (BIA 1988); *Matter of Z-*, 7 I. & N. Dec. 253, 255–56 (BIA 1956) (explaining that a conviction for receiving stolen goods in violation of Connecticut law "involves moral turpitude" where an essential element of the offense was that the property was received "with the knowledge

that it was stolen"); *see also Matter of Salvail*, 17 I. & N. Dec. 19, 20 (BIA 1979) ("Conviction under [a Canadian statute for possession of stolen goods] is a conviction for a crime involving moral turpitude, as it specifically requires knowledge of the stolen nature of the goods.").

Under that BIA precedent, a conviction for receipt of stolen goods under Va. Code Ann. § 18.2-108 would seem to qualify as a crime involving moral turpitude because the statute does require knowledge that the goods were stolen. *See* Va. Code Ann. § 18.2-108; *Whitehead*, 684 S.E.2d at 580.[2]

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[2] Ferrer contends that before those other cases were decided, the BIA ruled that receipt of stolen property is a crime involving moral turpitude only if it requires both knowledge that the property was stolen *and* the intent to permanently deprive. *See Matter of K-*, 2 I. & N. Dec. 90 (BIA 1944). We don't read *Matter of K-* to require the intent to permanently deprive.

In *Matter of K-* the BIA held that a German conviction for possession of stolen property did not involve moral turpitude because the statute criminalized a kind of negligent receipt of stolen property without knowledge that the property was stolen, which differed from the BIA's conception of the crime. *See id.* at 91. The BIA commented that "[w]here property is acquired without knowledge that it is stolen or without intent to deprive the rightful owner of his possession, the offense does not involve moral turpitude." *Id.* But that comment that the intent to deprive is a required element was just that — a comment. It was not necessary to the result in that case, so it was not part of the BIA's holding. *See Castillo v. Fla., Sec'y of DOC*, 722 F.3d 1281, 1290 (11th Cir. 2013) ("[B]ecause those statements in [an earlier] opinion are not necessary to the result in that case . . . they are not the holding of the decision."); *United States v. Shamsid-Deen*, 61 F.4th 935, 949 n.1 (11th Cir. 2023); ("Because the statement . . . was not necessary to the result in that case, it was dicta."); *Rambaran v. Sec'y, Dep't of Corr.*, 821 F.3d 1325, 1333 (11th Cir. 2016) ("[T]he

Most of our sister circuits have not held that BIA precedent requires that in order to involve moral turpitude a conviction for receipt or possession of stolen goods must include an intent to permanently deprive the owner of possession. *See Solis-Flores v. Garland*, 82 F.4th 264, 270 (4th Cir. 2023) (holding that under BIA precedent, receipt of stolen property in violation of Va. Code Ann. § 18.2-108 is a crime involving moral turpitude because knowledge that the goods were stolen is an element of the offense, and adding that the intent to permanently deprive is not required); *De Leon v. Lynch*, 808 F.3d 1224, 1230 (10th Cir. 2015) ("[T]he weight of apposite caselaw from the BIA and our sister circuits supports the view that knowing the goods to be stolen, alone, is sufficient to render a[] [receipt or possession of stolen goods] offense a crime of moral turpitude."); *Michel v. INS*, 206 F.3d 253, 263 (2d Cir. 2000) (concluding that possession of stolen property in violation of New York law is "morally turpitudinous because knowledge is a requisite element" of the statute); *De Leon-Reynoso v. Ashcroft*, 293 F.3d 633, 637 (3d Cir. 2002) (holding that a Pennsylvania conviction for possession of stolen property with knowledge that it was "probably" stolen is a crime involving moral turpitude); *United States v. Castro*, 26 F.3d 557, 558 n.1 (5th Cir. 1994) (noting that a conviction for receiving stolen property "with knowledge that such property is stolen" is a crime of moral turpitude); *Hashish v. Gonzales*, 442 F.3d 572, 576 n.4 (7th Cir. 2006) ("[R]eceiving stolen property requires the same

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statement is dicta because it was not necessary to the result in [the earlier case].").

state of mind, 'knowingly,' as other crimes of theft, and has been recognized as a crime of moral turpitude."); *Okoroha v. INS*, 715 F.2d 380, 382 (8th Cir. 1983) (deferring to the BIA's determination that "possession of stolen mail was a crime of moral turpitude because knowledge that the article of mail had been stolen was an essential element of the offense").

Only the Ninth Circuit has held that a conviction for receipt of stolen goods is not a crime involving moral turpitude if the statute of conviction does not require an intent to permanently deprive. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). It concluded that without the intent to permanently deprive, the receipt of stolen property is not "inherently base, vile, or depraved," so it cannot involve moral turpitude. *Id.* at 1160 (quotation marks omitted).

By focusing on whether the crime could be considered "inherently base, vile, or depraved," the Ninth Circuit based its holding on what the BIA has called the reprehensible conduct element for moral turpitude. *See Matter of Silva-Trevino*, 26 I. & N. Dec. at 833–34; *Zarate*, 26 F.4th at 1207. As we will discuss next, the BIA did not decide whether Ferrer's receipt of stolen goods conviction under Virginia law involved reprehensible conduct, so we need not reach that question. We simply recognize that BIA precedent generally does not require a receipt of stolen goods conviction to include the intent to permanently deprive in order for it to be deemed a crime involving moral turpitude.

B.

As we've said before, "the BIA's two-pronged moral turpitude standard requires not just a culpable mental state, but also conduct that is reprehensible, i.e., inherently base, vile, or depraved." *Zarate*, 26 F.4th at 1207; *see Matter of Silva-Trevino*, 26 I. & N. Dec. at 833–34. We recently explained that while the culpable mental state element can inform whether conduct is reprehensible, unless the crime of conviction involves fraud it is "inappropriate to conflate the BIA's two requirements . . . so that one (a culpable mental state) automatically satisfies the other (moral reprehensibility)." *Zarate*, 26 F.4th at 1207.

Here, the BIA ruled that receiving stolen property in violation of Va. Code. Ann. § 18.2-108 involves moral turpitude because the statute requires knowledge that the goods were stolen. But the BIA did not distinguish in this case between the culpable mental state element and reprehensible conduct element for moral turpitude and did not say whether a conviction under that statute involves inherent baseness, vileness, or depravity.

The government contends that both requirements are satisfied by the statute's knowledge element, arguing that it is morally reprehensible to receive goods knowing that they were stolen. That may be true, but we are bound by our precedent to hold that the BIA abused its discretion when it "collaps[ed] the two requirements of moral turpitude into one" and did not separately analyze whether receipt of stolen goods in violation of Va. Code Ann. § 18.2-108 involves both a culpable mental state and reprehensible

conduct. *See Zarate*, 26 F.4th at 1208. If the BIA is going to rule that a receipt of stolen goods conviction under Va. Code Ann. § 18.2-108 is a crime involving moral turpitude it must "do what it has so far failed to do in [Ferrer's] case" and "apply its two-pronged moral turpitude standard in toto." *Id.*

Because of what is referred to as the ordinary remand rule, we cannot apply in the first instance the BIA's two-pronged moral turpitude standard. "The Supreme Court has explained that, in cases on appeal where the BIA has not addressed a particular issue that a petitioner put before it, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Calle v. U.S. Att'y Gen.*, 504 F.3d 1324, 1329 (11th Cir. 2007) (quoting *INS v. Ventura*, 537 U.S. 12, 16 (2002)); *see Gonzales v. Thomas*, 547 U.S. 183, 187 (2006); *Calcutt v. Fed. Deposit Ins. Corp.*, 598 U.S. 623, 628–30 (2023); *see also Talamantes-Enriquez v. U.S. Att'y Gen.*, 12 F.4th 1340, 1348–49 (11th Cir. 2021).

Finding no special circumstance that might justify our determination of whether Ferrer's conviction meets both "essential elements" for a crime involving moral turpitude, we remand to the BIA to decide the question in the first instance. *See Gonzales*, 547 U.S. at 187; *Calcutt*, 598 U.S. at 630; *see also Ruiz v. U.S. Att'y Gen.*, 73 F.4th 852, 860 (11th Cir. 2023) (remanding to the BIA for an initial application of the proper statutory standard for evaluating a request for cancellation of removal).

IV. Conclusion

We grant Ferrer's petition, vacate the BIA's decision, and remand to the BIA for it to decide whether receipt of stolen goods in violation of Va. Code Ann. § 18.2-108 involves both a culpable mental state and conduct that is reprehensible. Our remand is without any implication as to what the result should be.[3]

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[3] Ferrer also contends that the phrase "crime involving moral turpitude" is unconstitutionally vague as applied to non-fraud offenses, relying on the Supreme Court's decisions in *Johnson v. United States*, 576 U.S. 591 (2015), and *Sessions v. Dimaya*, 584 U.S. ----, 138 S. Ct. 1204 (2018). His thoughts about the abstract, nebulous nature of the term "moral turpitude" are not his alone. *See generally Zarate*, 26 F.4th at 1200 & n.2 (explaining why the dissenting justices in *Jordan v. De George*, 341 U.S. 223, 232 (1951) (Jackson, J., dissenting), "got it right" when they wrote that the phrase "crime involving moral turpitude" "has no sufficiently definite meaning to be a constitutional standard for deportation"); *Arias v. Lynch*, 834 F.3d 823, 830 (7th Cir. 2016) (Posner, J., concurring in the judgment) (lamenting that the "stale, antiquated, and worse, meaningless" concept of moral turpitude "should continue to be a part of American law"). But the *De George* dissenters lost the vote count, and Ferrer's vagueness challenge is foreclosed by precedent.

In *De George* the Supreme Court held that the term "moral turpitude" is not unconstitutionally vague. 341 U.S. at 232 (majority opinion). Although *De George* involved a "crime[] in which fraud was an ingredient," *id.*, we recently applied *De George* in a non-fraud context and rejected the same vagueness challenge that Ferrer now makes. *See Daye v. U.S. Att'y Gen.*, 38 F.4th 1355, 1364 (11th Cir. 2022) (explaining that "*Johnson* and *Dimaya* addressed different federal statutes with different statutory phrases and therefore do not permit this Court to deviate from *De George*"). Whatever our concerns about the ambiguity of the phrase "moral turpitude," we are bound by *De George* and *Daye*. *Priva v. U.S. Att'y Gen.*, 34 F.4th 946, 954–55 (11th Cir. 2022) ("[U]nder this Court's prior-panel-precedent rule, a prior panel's holding is binding on all

PETITION GRANTED.

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subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*.") (quotation marks omitted). If *Daye* got *De George* wrong, that doesn't alter *Daye*'s force as binding precedent. *See United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016) ("Under this Court's prior panel precedent rule, there is never an exception carved out for overlooked or misinterpreted Supreme Court precedent."); *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) ("[W]e categorically reject any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at the time.").