No. 16-3922-ag

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CLEMENT OBEYA,

Petitioner,

v.

JEFFERSON B. SESSIONS III, United States Attorney General,

Respondent.

ON PETITION FOR REVIEW FROM A FINAL ORDER OF THE BOARD OF IMMIGRATION APPEALS
Agency No. A055-579-757

BRIEF FOR RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

Respondent believes that the issues presented can be determined upon the record and that oral argument would not benefit the panel. Should the Court consider oral argument appropriate, counsel for Respondent will attend and present Respondent's position.

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BRIEF FOR RESPONDENT

STATEMENT OF JURISDICTION

This is an immigration case in which Petitioner Clement Obeya ("Mr. Obeya") seeks review of a final order of removal issued by the Board of Immigration Appeals ("Board") on November 16, 2016. Certified Administrative Record ("A.R.") 3-8. In its published decision, the Board concluded that Mr. Obeya's conviction for petit larceny, in violation of section 155.25 of the New

York Penal Law ("NYPL"), was categorically a crime involving moral turpitude, rendering Mr. Obeya removable under 8 U.S.C. § 1227(a)(2)(A)(i). A.R. 3-8. The Board's jurisdiction arose under 8 C.F.R. § 1003.1(b)(3), which grants it appellate jurisdiction over decisions of immigration judges in removal proceedings.

This Court's jurisdiction arises under 8 U.S.C. § 1252(a)(1), which confers exclusive jurisdiction upon the Courts of Appeals to review final orders of removal issued by the Board. Mr. Obeya timely filed his petition for review on November 18, 2016, within thirty days of the Board's decision. 8 U.S.C. § 1252(b)(1). Venue is proper because the proceedings before the Immigration Judge concluded in Batavia, New York, which is within the Second Circuit's jurisdiction. See 8 U.S.C. § 1252(b)(2).

COUNTERSTATEMENT OF THE ISSUES

Whether the Court should defer, under Chevron, to the Board's revised standard for analyzing whether a larceny conviction constitutes a crime involving moral turpitude, as set forth in Matter of Diaz-Lizarraga, and not disturb the Board's determination that Mr. Obeya's conviction, in violation of NYPL § 155.25, is categorically a crime involving moral turpitude under its new standard; and whether the Board's revised standard should be applied retroactively to Mr. Obeya's offense.

STATEMENT OF THE CASE

I. Background and Removal Proceedings

Mr. Obeya is a native and citizen of Nigeria who was admitted to the United States as a lawful permanent resident at New York, New York, on August 12, 2004. A.R. 1026. On July 16, 2008, Mr. Obeya was convicted in Albany County Court in Albany County, New York, for the offense of petit larceny, in violation of NYPL § 155.25, a crime for which a sentence of one year or longer may be imposed. Id.; see A.R. 359. Although Mr. Obeya initially was sentenced to three years of probation, he was resentenced on December 6, 2011, to ten months of imprisonment after he violated the terms of probation. See A.R. 357, 359, 364.

On March 3, 2009, the Department of Homeland Security ("DHS") commenced removal proceedings against Mr. Obeya by filing a Notice to Appear ("NTA") in immigration court, charging him with removability pursuant to 8 U.S.C. § 1227(a)(2)(A)(i), as an alien who, within five years of admission, had been convicted of a crime involving moral turpitude ("CIMT") for which a sentence of one year or longer may have been imposed. A.R. 1026-27. Mr. Obeya appeared in removal proceedings in Buffalo, New York, on May 7, 2010, and, representing himself, he initially admitted and conceded the allegations and charge

of removability contained in the NTA.[1] A.R. 815-16. On December 5, 2011, Mr. Obeya returned to court with former counsel for a hearing on his eligibility for voluntary departure, and counsel requested an additional continuance to allow him time to review Mr. Obeya's case. A.R. 865-66. Counsel also asked to withdraw Mr. Obeya's plea conceding the charge of removability and to schedule a hearing on the issue of whether Mr. Obeya's conviction fell under the petty offense exception for CIMTs. A.R. 866-67, 869. The Immigration Judge granted counsel's request. A.R. 870.

At the continued hearing held on March 13, 2012, former counsel for Mr. Obeya requested another continuance to await a final decision on Mr. Obeya's motion to vacate his criminal conviction. A.R. 885-87. The Immigration Judge denied his request, explaining that Mr. Obeya had not established good cause for a continuance. A.R. 887-88. The Immigration Judge then asked Mr. Obeya to verify the information alleged in the NTA regarding his admission to the United States, and Mr. Obeya confirmed that he had been admitted on August 12, 2004, as a lawful permanent resident at New York, New York. A.R. 889. Based on Mr.

[1] Prior to the May 7, 2010 hearing, the Immigration Judge continued Mr. Obeya's proceedings twice to provide him additional time to hire an attorney. See A.R. 797, 806-07.

Obeya's admissions, the Immigration Judge rejected his counsel's assertion that Mr. Obeya had been admitted to the United States in 2003 and that his 2008 conviction for petit larceny thus fell outside the five-year statutory period. A.R. 890-91; see also A.R. 899-905.

Counsel for Mr. Obeya also argued that Mr. Obeya's conviction fell within the petty offense exception because it was his first offense, he initially was sentenced to three years of probation, and he ultimately was incarcerated for ten months due to a violation of his probation. A.R. 892. In response, counsel for DHS argued that Mr. Obeya's conviction was a Class A misdemeanor which carried a maximum sentence of one year of incarceration and that he had been resentenced to ten months of incarceration. A.R. 893-94. DHS counsel argued that the petty offense exception did not apply to Mr. Obeya because he was not under the age of eighteen when he committed the crime, and because he was sentenced to a term of incarceration in excess of six months. A.R. 894. The Immigration Judge concluded that the 8 U.S.C. § 1182(a)(2) petty offense exception did not apply to Mr. Obeya's case because he had been charged with removability under 8 U.S.C. § 1227(a)(2)(A)(i), and the government thus only needed to establish that the crime was committed within five years of Mr. Obeya's admission to the United States and that it carried a potential sentence of one year of

imprisonment regardless of what sentence had actually been imposed. A.R. 898. Lastly, Mr. Obeya declined to apply for any relief, including voluntary departure. A.R. 906-07.

II. The Immigration Judge's March 13, 2012 Decision

On March 13, 2012, the Immigration Judge issued an oral decision sustaining the charge of removability under 8 U.S.C. § 1227(a)(2)(A)(i) and ordering Mr. Obeya's removal to Nigeria. A.R. 783-90. Based on Mr. Obeya's admissions to the factual allegations in the NTA and the documentary evidence of his conviction for petit larceny submitted by DHS, the Immigration Judge concluded that Mr. Obeya's removability had been established by clear and convincing evidence. A.R. 784-86. The Immigration Judge acknowledged Mr. Obeya's testimony that he had been previously admitted in 2003 but noted that Mr. Obeya had not submitted any evidence establishing this prior admission. A.R. 786. The Immigration Judge further explained that, pursuant to the Board's decision in Matter of Alyazji, 25 I&N Dec. 397 (BIA 2011), the five-year period referred to in 8 U.S.C. § 1227(a)(2)(A)(i) is measured starting from the individual's last admission by which he is present in the United States. Id. Accordingly, the Immigration Judge determined that the relevant five-year period commenced on August 12, 2004, the date Mr. Obeya was admitted as a lawful permanent resident

and date by which he is present in the United States. A.R. 786-87. The Immigration Judge therefore concluded that Mr. Obeya's commission of his petit larceny offense on May 6, 2008, occurred within five years of his admission to the United States. Id.

The Immigration Judge further acknowledged Mr. Obeya's assertion that he qualifies for the petty offense exception under 8 U.S.C. § 1182(a)(2)(A), but reiterated that, because Mr. Obeya was subject to a charge of removability under 8 U.S.C. § 1227(a)(2)(A)(i), the government was required merely to show that Mr. Obeya had been convicted of a CIMT committed within five years of admission for which a sentence of one year or longer may have been imposed. A.R. 787. The Immigration Judge concluded that DHS had met its burden of establishing Mr. Obeya's removability, noting that larceny and theft offenses constitute crimes involving moral turpitude. A.R. 787-88. Because Mr. Obeya had not applied for any relief from removal, the Immigration Judge ordered his removal from the United States to Nigeria. A.R. 789-90.

III. The Board's August 7, 2012 Decision and the Second Circuit's July 10, 2014 Decision Remanding Mr. Obeya's Case to the Agency

Mr. Obeya filed an appeal of the Immigration Judge's decision on April 6, 2012, A.R. 772-74, and an administrative appellate brief on June 13, 2012. A.R. 720-25. In his appeal, Mr. Obeya reasserted his argument that his 2008 conviction

for petit larceny did not occur within five years after his admission to the United States because he first entered the United States on an unspecified date in 2003 and not on August 12, 2004. A.R. 723-24. In addition, he argued that the Immigration Judge erred in concluding that the petty offense exception did not apply to his case because he received a sentence of probation for his crime, was sentenced to ten months' imprisonment only for violating parole, and ultimately spent only 162 days in prison. A.R. 724-25.

The Board dismissed Mr. Obeya's appeal in a written decision issued August 7, 2012. A.R. 716-17. The Board determined there was no clear error in the Immigration Judge's conclusion that Mr. Obeya's removal had been established by clear and convincing evidence. A.R. 716. Addressing Mr. Obeya's arguments regarding his date of admission, the Board noted that he had presented no evidence supporting his claim that he had been admitted in 2003 and that, even if he had been admitted in 2003, his testimony and other evidence indicated that he left the United States and was readmitted on August 12, 2004. Id. The Board explained that, pursuant to its decision in Matter of Alyazji, 25 I&N Dec. at 406, "the relevant date of admission for purposes of deportability under . . . 8 U.S.C. § 1227(a)(2)(A)(i), was the one by virtue of which [Mr. Obeya] was present in the United States when he committed his crime." Id. Thus, the Board concluded that

Mr. Obeya's conviction for a crime involving moral turpitude committed on or before May 6, 2008, rendered him removable under 8 U.S.C. § 1227(a)(2)(A)(i). A.R. 717. The Board further agreed with the Immigration Judge that the petty offense exception for CIMTs only applied to the ground of *inadmissibility* at 8 U.S.C. § 1182(a)(2)(A)(i)(I) and not to the ground of removability for which Mr. Obeya had been charged. Id. The Board thus dismissed Mr. Obeya's appeal. Id.

Mr. Obeya filed a petition for review of the Board's decision in this Court on August 20, 2012.[2] See Docket No. 12-3276. On July 10, 2014, the Court granted the petition for review and remanded the case back to the Board "to determine in the first instance whether [Mr.] Obeya's conviction under NYPL § 155.25 constitutes a CIMT." Obeya v. Holder, 572 F. App'x 34, 35 (2d Cir. 2014).

IV. The Board's Published Decision Issued November 16, 2016

On November 16, 2016, the Board issued a published decision affirming that Mr. Obeya's conviction for petit larceny, in violation of NYPL § 155.25, was categorically a crime involving moral turpitude. See Matter of Obeya, 26 I&N

[2] In addition, on September 13, 2013, while his first petition for review was pending, Mr. Obeya filed a motion to reopen with the Board, alleging, inter alia, ineffective assistance of prior counsel. See A.R. 633-48. The Board denied his motion to reopen in a written decision issued on December 9, 2013. A.R. 620-21. Mr. Obeya did not seek review of that decision.

Dec. 856 (BIA 2016); see also A.R. 3-8. The Board explained that the term "moral turpitude" 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.'" Matter of Obeya, 26 I&N Dec. at 857 (quoting Matter of Leal, 26 I&N Dec. 20, 25 (BIA 2012) (quoting Matter of Ruiz-Lopez, 25 I&N Dec. 551, 553 (BIA 2011))). The Board emphasized that "a finding of moral turpitude requires that a perpetrator have committed the reprehensible act with some form of scienter." Matter of Obeya, 26 I&N Dec. at 857 (citing Matter of Silva-Trevino, 26 I&N Dec. 826, 828 n.2, 833-34 (BIA 2016)). The Board also noted that, in past decisions, it had ruled that theft crimes involved moral turpitude when committed "with the intent to permanently deprive the owner of property." Matter of Obeya, 26 I&N Dec. at 857 (citing Matter of Grazley, 14 I&N Dec. 330, 333 (BIA 1973)).

The Board examined the statute of conviction, including its definitions for the terms "petit larceny," "larceny," and "deprive." Matter of Obeya, 26 I&N Dec. at 858 (quoting NYPL § 155.25, 155.05(1), and 155.00(3)). The Board determined that it was not precluded from applying its companion decision in Matter of Diaz-Lizarraga, supra, to Mr. Obeya's case, notwithstanding the Court's reference in its remand order to Wala v. Mukasey, 511 F.3d 102, 106 (2d Cir. 2007), in which it noted that, under prior Board precedent, larceny constituted a crime involving

moral turpitude "only when a permanent taking is intended." Matter of Obeya, 26 I&N Dec. at 858 (internal quotation marks and citations omitted). The Board pointed out that, in Wala, the Court noted that whether a distinction exists between permanent and temporary takings "'is an open question'" and that the Board was "'free to reconsider its view of what types of larcenies amount to [crimes involving moral turpitude].'" Id. at 858-59 (quoting Wala, 511 F.3d at 106).

The Board explained that, in Matter of Diaz-Lizarraga, 26 I&N Dec. at 852-53, it determined that a theft offense could involve moral turpitude even if it did not involve a literally permanent taking, so long as it "'embodie[d] a mainstream, contemporary understanding of theft, which require[d] an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded.'"[3] Matter of Obeya, 26 I&N Dec. at 859 (quoting Matter of Diaz-Lizarraga, 26 I&N Dec. at 854). The Board further

[3] The Board noted that this definition tracks the Model Penal Code, section 223.0(1), which defines the term "deprive" as:

> (a) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it.

Matter of Obeya, 26 I&N Dec. at 859 n.3.

noted that New York's larceny statute, "which requires an intent to 'deprive,' largely tracks the Model Penal Code formulation" and that the statute also may be violated with an "intent to 'appropriate.'" Matter of Obeya, 26 I&N Dec. at 859 (quoting NYPL § 155.00(4)). Although the Board acknowledged that the "plain language" of the definition for "appropriate" at NYPL § 155.00(4)(b) "does not require a showing that a permanent deprivation or substantial erosion of property rights was intended," the Board noted that New York's highest court had determined that any larceny conviction requires "proof of an intent 'to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof.'" Matter of Obeya, 26 I&N Dec. at 860 (quoting People v. Medina, 960 N.E.2d 377, 382 (N.Y. 2011)) (other citations omitted).

The Board was unpersuaded by the cases Mr. Obeya cited in support of the proposition that one could be convicted of larceny under New York law "without a showing that he or she intended a permanent or virtually permanent deprivation," noting that one citation quoted language from the court's *dissenting* opinion – rather than majority opinion – and that the other cases analyzed Connecticut's larceny statute and not New York's. See Matter of Obeya, 26 I&N Dec. at 860-61 (internal citations omitted). The Board explained that, unlike Connecticut's courts,

"New York courts have long held that larceny requires proof of intent to permanently or virtually permanently appropriate property or deprive the owner of the use of the property." 26 I&N Dec. at 861. Thus, the Board concluded that Mr. Obeya's offense, in violation of NYPL § 155.25, satisfied the standard enunciated in Matter of Diaz-Lizarraga, in that it required "an intent to deprive the owner of his property either permanently or under such circumstances that the owner's property rights are substantially eroded." Id. The Board therefore dismissed Mr. Obeya's appeal, and this petition for review followed.

SUMMARY OF THE ARGUMENT

The Court should deny the petition for review. *First*, the Court should afford Chevron deference to the Board's revised standard for determining whether a theft or larceny conviction constitutes a crime involving moral turpitude. In Matter of Diaz-Lizarraga, the Board clarified that a theft offense qualifies as a categorical CIMT if the conviction requires an intent to deprive the owner of his or her property either permanently or under circumstances where the owner's property rights are substantially eroded. The Court should defer to the Board's published standard because it is a reasonable construction of the statute, it does not represent an abrupt departure from prior law or policy, and the Board provided a thorough, well-reasoned explanation for its decision. *Second*, applying its revised

standard, the Board properly concluded in a companion published opinion that Mr. Obeya's petit larceny conviction, in violation of NYPL § 155.25, is categorically a CIMT because the offense requires proof of the intent to permanently or virtually permanently deprive an owner of property. *Finally*, the Court should reject Mr. Obeya's argument that the Board's revised standard should not apply retroactively to his case. For these reasons, the Court should not disturb the Board's decision and should deny the petition for review.

ARGUMENT

I. Scope and Standard of Review

Where, as here, the Board issues its own decision and does not adopt the Immigration Judge's, the Court reviews only the Board's decision. Ming Xia Chen v. BIA, 435 F.3d 141, 144 (2d Cir. 2006).

Questions of law are reviewed *de novo*, with deference to an agency's interpretation of the statutes and regulations it is charged with implementing. Yanqin Weng v. Holder, 562 F.3d 510, 513 (2d Cir. 2009). The Attorney General's determinations and rulings "with respect to all questions of law shall be controlling," 8 U.S.C. § 1103(a)(1), and deference to the Board's interpretation of the Immigration and Nationality Act ("INA") and its corresponding regulations is required. See Negusie v. Holder, 555 U.S. 511, 517 (2009) (citing INS v. Aguirre-

Aguirre, 526 U.S. 415, 424 (1999); Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984)).

II. Mr. Obeya is Removable Due to His Conviction for Petit Larceny, Which Constitutes a Crime Involving Moral Turpitude

A. The Court Should Defer Under Chevron to the Board's Published Standard for Assessing Whether a Theft Offense is a Crime Involving Moral Turpitude

The United States Code does not define "moral turpitude." The Board and this Court have defined "crime involving moral turpitude" as an offense involving 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." Matter of Leal, 26 I&N Dec. at 25 (quoting Matter of Ruiz-Lopez, 25 I&N Dec. 551, 553 (BIA 2011)); Mendez v. Mukasey, 547 F.3d 345, 347 (2d Cir. 2008). A finding of moral turpitude requires that a perpetrator have committed the reprehensible act with some form of scienter. Matter of Silva-Trevino, 26 I&N Dec. at 828 n.2, 833-34. Because Congress left the term "moral turpitude" undefined in the INA, the Court will defer to the Board's construction of the ambiguous term so long as it is reasonable. See Mendez, 547 F.3d at 347 ("[The Court] afford[s] Chevron deference to the [Board's] interpretation of the undefined statutory term moral turpitude . . . .") (internal quotation marks and citation omitted); Wala, 511 F.3d at 105 ("[The Court] accord[s] Chevron deference to the

[Board's] construction of ambiguous statutory terms in immigration law, such as 'moral turpitude.'") (internal citation omitted).

Generally, theft has long been considered a crime involving moral turpitude. See, e.g., Chiaramonte v. INS, 626 F.2d 1093, 1097 (2d Cir. 1980) ("It has been long acknowledged by this Court and every other circuit that has addressed the issue that crimes of theft . . . are presumed to involve moral turpitude.") (internal citations omitted); Matter of Westman, 17 I&N Dec. 50, 51 (BIA 1979) (noting that the Board has previously held that larceny is a crime involving moral turpitude); Matter of Scarpulla, 15 I&N Dec. 139, 140-41 (BIA 1974) ("It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude.") (internal citations omitted).

As this Court noted in Wala, under prior Board precedent, larceny was considered a crime involving moral turpitude only when the offense required an intentional permanent taking. 511 F.3d at 106 (citing Matter of Grazley, 14 I&N Dec. 330, 333 (BIA 1973); Matter of R-, 2 I&N Dec. 819, 828 (BIA 1947)). However, the Court also acknowledged other Board decisions, such as Matter of Westman, 17 I&N Dec. at 51, in which the Board found a larceny conviction to be a crime involving moral turpitude without distinguishing between a permanent and a temporary taking. Wala, 511 F.3d at 106. In addition, the Court pointed out that,

"when it is clear from the record of conviction that certain types of takings are involved, the [Board] has assumed or presumed that the taking was intended to be permanent for purposes of determining removability. Wala, 511 F.3d at 106 (citing Matter of Jurado-Delgado, 24 I&N. Dec. 29, 33 (BIA 2006); Matter of Grazley, 14 I&N Dec. at 333; Matter of G-, 2 I&N Dec. 235, 237-38 (BIA 1945)).

In Matter of Diaz-Lizarraga, the Board determined that a theft offense may categorically involve moral turpitude even if it does not require that a perpetrator intend a *literal* permanent taking. 26 I&N Dec. at 852. Instead, the Board held that "a taking or exercise of control over another's property without consent"[4] qualifies as a categorical CIMT if it "requires an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded." Id. at 852-53. Under this revised standard, reiterated in Mr. Obeya's case, the Board ruled that New York's petit larceny statute is a categorical CIMT. Matter of Obeya, 26 I&N Dec. at 861; see Matter of Diaz-Lizarraga, 26 I&N Dec. at 848, 854-55.

[4] The Board made clear that this specific conduct is what it meant when it referred to a "theft offense" that would qualify as a CIMT when coupled with the requisite intent. Matter of Diaz-Lazarraga, 26 I&N Dec. at 852-53; see Mendez, 547 F.3d at 347 ("Whether a crime is one involving moral turpitude depends on 'the offender's evil intent or corruption of the mind.'") (quoting Matter of Serna, 20 I&N Dec. 579, 581 (BIA 1992)).

The Board's interpretation in Matter of Obeya and Matter of Diaz-Lizarraga that a theft offense qualifies as a CIMT where the owner's property rights are substantially eroded, even if the statute does not require a literally permanent taking, is entitled to deference. Importantly, when the Board refined its standard for assessing whether a theft offense categorically constitutes a CIMT in Matter of Diaz-Lizarraga, it provided a reasoned explanation for its new standard and explained why the revision was warranted. See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000 (2005) (holding that "the Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change"); Rust v. Sullivan, 500 U.S. 173, 186-87 (1991) (deferring to the Secretary of Health and Human Services' interpretation, because "the Secretary amply justified his change of interpretation with a 'reasoned analysis'"); Chevron, 467 U.S. at 863-64 (recognizing that "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis").

In explaining its decision to adopt a revised standard, the Board acknowledged that it had long held that a theft offense is categorically a CIMT only if it requires an intent to permanently deprive an owner of property. Matter of Diaz-Lizarraga, 26 I&N Dec. 849. The Board explained, however, that its early

cases reflected that its purpose in adopting the "intent to permanently deprive" requirement was to distinguish substantial and reprehensible deprivations from mere de minimis takings in which the owner's property rights are compromised little, if at all. 26 I&N Dec. at 850. The Board indicated that it still believes "it is appropriate to distinguish between substantial and de minimis takings when evaluating whether theft offenses involve moral turpitude." Id. at 851.

The Board pointed out, however, that in the seven decades since it first addressed the issue, most jurisdictions have refined the distinction between substantial and de minimis takings to such an extent that the traditional dichotomy between permanent and temporary takings has become "anachronistic." Matter of Diaz-Lizarraga, 26 I&N Dec. at 851. In that regard, the Board noted that "responding to new economic and social realities, lawmakers and judges across the country have come to recognize that many temporary takings are as culpable as permanent ones." Id. The Board observed that the Model Penal Code presently defines "deprive" to include withholding property permanently or for so extended a period of time that a "major portion of its economic value" is appropriated. Id. The Board further explained that the Model Penal Code definition or some variant of it has been adopted by thirty-nine states, either through statute or case law, and that only five states have retained "intent to permanently deprive an owner of

property" as an explicit statutory requirement." 26 I&N Dec. at 851-52. The Board noted, however, that its own "case law has not kept pace with these developments." Id. at 852.

In revisiting its standard, the Board explained that viewing the matter from a modern perspective, its early jurisprudence "does not provide [it] with good reasons to persist in the rule that moral turpitude requires a taking involving a literal permanent intended deprivation" because those cases concerned instances of de minimis takings.[5] Matter of Diaz-Lizarraga, 26 I&N Dec. at 853-54. Significantly, the Board noted that its earlier cases were deficient because they made no distinction between de minimis takings and more serious cases where "property is taken 'temporarily,' but returned damaged or after its value or usefulness to the owner has been vitiated." Id. at 854. This key distinction, the Board explained, is embodied in the Model Penal Code and the laws of the majority of states and is "now an important aspect of modern American theft jurisprudence." Id. Concluding that "the mere antiquity" of its case law is "not a sound reason for continuing to adhere to it," the Board determined that expanding

[5] The Board noted that "a taking or exercise of control over another's property without consent is itself a potentially reprehensible act that is inherently base and contrary to the moral duties owed between persons and to society in general." Matter of Diaz-Lizarraga, 26 I&N Dec. at 852-53.

the standard for assessing whether theft offenses are CIMTs to include offenses requiring an intent to deprive the owner of his or her property under circumstances where the owner's property rights are substantially eroded more precisely captured theft offenses that involve moral turpitude. 26 I&N Dec. at 854.

In his brief to this Court, Mr. Obeya does not address the Board's reasoning in its decision or argue that Matter of Obeya and Matter of Diaz-Lizarraga are themselves not worthy of deference. See generally Petitioner's Brief ("Pet. Br."). Instead, he asserts that the Board exceeded the scope of the Court's remand order by not analyzing his statute of conviction under prior Board case law. See Pet. Br. at 12-14. This argument lacks merit. In its decision remanding Mr. Obeya's case, the Court stated only that it was remanding "for the [Board] to determine in the first instance whether [Mr.] Obeya's conviction under NYPL § 155.25 constitutes a CIMT." Obeya, 572 F. App'x at 35. The Court then vacated the Board's prior order and remanded "for further proceedings." Id. Contrary to Mr. Obeya's unsupported assertion, the Court's order did not confine the Board to deciding his case based only on prior case law. Pet. Br. at 12. The Board was free to determine whether Mr. Obeya's conviction under NYPL § 155.25 was a crime involving moral turpitude applying the analysis and case law it deemed most relevant. See Sompo Japan Ins. Co. of America v. Norfolk Southern Ry. Co., 762 F.3d 165, 176

(2d Cir. 2014) (rejecting petitioner's argument that the district court violated the "mandate rule," noting that the Court "simply vacated the judgment and remanded 'for further proceedings,' leaving it to the district court to determine how the case ought to proceed"); United States v. Salameh, 84 F.3d 47, 49 (2d Cir. 1996) (explaining that the remand order specifying "only that the case was remanded 'for further proceedings' . . . permitted the District Court itself to determine the appropriate course of 'further proceedings'").

Given the Board's reasoned explanation for revising its moral turpitude standard to reflect the evolution in theft jurisprudence, this Court should defer to the Board's revised standard. See Chevron, 467 U.S. at 863-64 (acknowledging that "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis"). Accordingly, the Court should afford Chevron deference to the Board's interpretation in Matter of Diaz-Lizarraga and Matter of Obeya that a theft offense categorically constitutes a CIMT if it requires an intent to deprive the owner of his or her property either permanently or under circumstances where the owner's property rights are substantially eroded. Matter of Diaz-Lizarraga, 26 I&N Dec. at 853-54; Matter of Obeya, 26 I&N Dec. at 861.

B. Under the Board's Standard, Mr. Obeya's Conviction for Petit Larceny is a Crime Involving Moral Turpitude

The Court should not disturb the Board's decision in Matter of Obeya that a conviction for petit larceny, in violation of NYPL § 155.25, is categorically a crime involving moral turpitude. In assessing whether an offense is a CIMT, the agency and Court apply the categorical approach, which requires "comparing the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime." Descamps v. United States, 133 S. Ct. 2276, 2281 (2013); see Mendez, 547 F.3d at 348 (explaining that, in determining whether an offense is a CIMT, the Court first applies the categorical approach); Matter of Silva-Trevino, 26 I&N Dec. at 830 (concluding that the categorical approach applies to whether an offense is a CIMT). Under the categorical approach, the Court looks not to the facts of a particular case but to whether "'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition" that appears in the INA. Moncrieffe v. Holder, 133 S.Ct. 1678, 1684 (2013) (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186 (2007)); see Flores v. Holder, 779 F.3d 207, 209-10 (2d Cir. 2015); Matter of Silva-Trevino, 26 I&N Dec. at 830. In evaluating whether the statute of conviction is a CIMT, the agency and the Court focus solely on the minimum conduct for which there is a "realistic probability" that a conviction will result. Matter of Silva-Trevino, 26

I&N Dec. at 831; accord United States v. Hill, 832 F.3d 135, 139-40 (2d Cir. 2016) (explaining that there must be "'a realistic probability, not a theoretical possibility,'" that the statute at issue could be applied to conduct that does not constitute a crime of violence") (quoting Duenas-Alvarez, 549 U.S. at 193)).

In this case, the Board properly concluded that NYPL § 155.25 is categorically a crime involving moral turpitude. This section provides that: "a person is guilty of petit larceny when he steals property." NYPL § 155.25. Section 155.05(1), in turn, provides that "[a] person steals property and commits larceny when, with the intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof."

As the Board noted, the New York larceny statute closely tracks the Model Penal Code, except for the fact that it includes an intent to "appropriate" property. Matter of Obeya, 26 I&N Dec. at 859. NYPL § 155.00(4) provides that, to "appropriate" property means: "(a) to exercise control over it . . . permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit, or (b) to dispose of the property for the benefit of oneself or a third person." Although the Board acknowledged that the definition of "appropriate" at NYPL § 155.00(4)(b) "does not require a showing

that a permanent deprivation or substantial erosion of property rights was intended," it noted that New York's highest court had determined that a conviction nevertheless requires "proof of an intent to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof." Matter of Obeya, 26 I&N Dec. at 860 (internal quotation marks and citations omitted).

Contrary to Mr. Obeya's assertions, New York state courts have long held that the statutory definitions of both "deprive" and "appropriate" require an intended taking that is either permanent or virtually permanent and not merely temporary. See, e.g., People v. Medina, 960 N.E.2d 377, 382 (N.Y. 2011) (concluding that the trial court committed reversible error by omitting from the jury instructions the definitions of "appropriate" and "deprive," noting that a jury could be misled "into thinking that any withholding, permanent or temporary, constituted larceny") (citing People v. Blacknall, 472 N.E.2d 1034, 1035 (1984)) (emphasis added); People v. Brigante, 186 A.D.2d 360, 360 (1st Dep't 1992) (prosecution was required to prove there was a "specific intent to steal and that act must contemplate a substantially permanent appropriation of the property") (emphasis added); People v. Pauli, 130 A.D.2d 389 (1st Dep't 1987) (reversing conviction for larceny where it was possible that the prosecutor misled the jury into

believing that intent could be to deprive or appropriate temporarily); People v. Guzman, 68 A.D.2d 58, 62 (N.Y. App. Div. 1979) ("A temporary taking will not establish the larcenous intent.").

The New York Court of Appeals, in People v. Jennings, explained that:

> [T]he concepts of "deprive" and "appropriate," which "are essential to a definition of larcenous intent," "connote a purpose . . . to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof."

504 N.E.2d 1079, 1086 (1986) (quoting Hechtman, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 155.00, p. 103)). And this Court, citing Jennings and construing New York's larceny statute, recognized that "larcenous intent is shown where the defendant intends to exercise control over another's property 'for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit.'" Ponnapula v. Spitzer, 297 F.3d 172, 184 (2d Cir. 2002) (quoting Jennings, 504 N.E.2d at 1079)). The Court further recognized long-standing New York case law establishing that "evidence of mere borrowing without permission, if coupled with the intent to return the property, is insufficient to support a conviction for larceny." Ponnapula, 297 F.3d at 184 (citing Jennings, 504 N.E. 2d at 1079; People v. Matthews, 61 A.D.2d 1017 (App. Div. 1978)).

Indeed, in Jennings, the New York Court of Appeals emphasized the temporal distinction between the elements of "taking" and "larcenous intent," explaining that "[t]he intent element of larceny is . . . very different in concept from the 'taking' element, which is separately defined . . . and is satisfied by a showing that the thief exercised dominion and control over the property for a period of time, however temporary . . . ." 504 N.E.2d at 1086. By contrast, the Court of Appeals held that "[t]he mens rea element of larceny . . . is simply not satisfied by an intent temporarily to use property without the owner's permission, or even an intent to appropriate outright the benefits of the property's short-term use." Id. (emphasis added).

Mr. Obeya's reliance on decisions from Connecticut Supreme Court and the United States Court of Appeals for the First Circuit regarding their interpretations of Connecticut's larceny statute is unavailing. Pet. Br. at 37. To establish that his petit larceny conviction was *not* a CIMT, Mr. Obeya needed to demonstrate a realistic probability that an individual could be convicted in New York of violating NYPL § 155.25 without proof of an intended permanent or virtually permanent deprivation or appropriation of property. See Duenas-Alvarez, 549 U.S. 183, 193 (explaining that a petitioner must demonstrate "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls

outside the generic definition of a crime") (emphasis added); Hill, 832 F.3d at 139-40 (same). And, as the Board explained, unlike Connecticut's courts, "New York courts have long held that larceny requires proof of intent to permanently or virtually permanently appropriate property or deprive the owner of the use of the property." 26 I&N Dec. at 861. Accordingly, the Court should not disturb the Board's conclusion that a conviction for petit larceny constitutes a crime involving moral turpitude under the standard enunciated in Matter of Diaz-Lizarraga, in that it requires "an intent to deprive the owner of his property either permanently or under such circumstances that the owner's property rights are substantially eroded." Matter of Obeya, 26 I&N Dec. at 861.

C. Mr. Obeya's Argument That Matter of Diaz-Lizarraga Should Not Apply Retroactively is Unavailing

The Court should reject Mr. Obeya's argument that Matter of Diaz-Lizarraga should not apply retroactively to his case. See Pet. Br. at 14-27. An agency is the "authoritative interpreter" "of an ambiguous statute [it] is charged with administering" so long as its interpretation is "within the limits of reason." Brand X Internet Servs., 545 U.S. at 983; see Ucelo-Gomez v. Gonzales, 464 F.3d 163, 170 (2d Cir. 2006) (per curiam) (explaining that the Court "must grant the [Board's] responsive opinion Chevron deference, assuming the basic requirements of Chevron are met") (citing Brand X Internet Servs., 545 U.S. at 967; Yuanliang

Liu v. U.S. Dep't of Justice, 455 F.3d 106, 117 (2d Cir. 2006); Sash v. Zenk, 439 F.3d 61, 67 n.6 (2d Cir. 2006)).

In Lugo v. Holder, this Court explained that, in determining whether a Board decision may be applied retroactively, the Court considers: (1) whether the case presents an issue of first impression; (2) whether the new rule presents an abrupt departure from prior policy or merely attempts to fill a void in an unsettled area of law; (3) the extent to which the petitioner relied on the former rule; (4) the burden the retroactive order places on the petitioner; and (5) the statutory interest in applying a new rule despite the reliance of the petitioner on the old standard. 783 F.3d 119, 121 (2d Cir. 2015) (internal citations omitted). Respondent acknowledges that, in Lugo, the Court determined that, under the circumstances of that case, remand was necessary to allow the Board to address the retroactivity factors in the first instance – specifically, whether the Board's determination that misprision of a felony is a crime involving moral turpitude represented a "departure" from prior law, the extent to which petitioner relied on the prior law, and the statutory interest in applying the new decision to petitioner's case. 783 F.3d at 121-22. Nevertheless, in his brief to this Court, Mr. Obeya does not argue that remand is necessary for the Board to apply these factors in the first instance, and Respondent submits that remand is unwarranted under the standards

enunciated in Lugo. 783 F.3d at 121-22; accord Garfias-Rodriguez v. Holder, 702 F.3d 504, 515 (9th Cir. 2012) (en banc) (concluding that remand for the agency to apply the retroactivity factors in the first instance was not required where "no further development in the record is necessary and the parties have briefed the issue thoroughly before th[e] court").

Contrary to Mr. Obeya's assertion, the first factor – whether this case presents an issue of first impression – does not favor either party. Pet. Br. at 17-18; accord Garfias-Rodriguez, 702 F.3d at 521 (stating that whether a case is one of first impression is "not . . . well suited to the context of immigration law"). The issue is not one of first impression because this Court and many other courts have concluded that crimes of theft and larceny, however defined, are presumed to involve moral turpitude. See Chiaramonte v. INS, 626 F.2d 1093, 1097 (2d Cir. 1980) (citing Soetarto v. INS, 516 F.2d 778 (7th Cir. 1975); Brett v. INS, 386 F.2d 439 (2d Cir. 1967); Giammario v. Hurney, 311 F.2d 285 (3d Cir. 1962)).

The second and third factors, however, strongly favor the government. Mr. Obeya cannot reasonably argue that Matter of Diaz-Lizarraga and the Board's decision in his case represent an "abrupt departure" from prior law or policy, given that the agency reached the same result in its previous decision in his case based on

prior law.[6] See A.R. 716-17, 783-90. Indeed, although the Board's prior jurisprudence required a permanent (as opposed to a temporary, de minimis) taking in order for an offense to constitute a CIMT, the Board has long observed that "state courts have repeatedly concluded that this specific intent can be presumed whenever one unlawfully takes, or attempts to take, the property of another." Matter of V-Z-S-, 22 I&N Dec. 1338, 1350 (BIA 2000); see Matter of Diaz-Lizarraga, 26 I&N Dec. at 850 (recognizing that an intent to permanently deprive could be assumed when the offense was retail theft or theft of cash); Matter of Jurado-Delgado, 24 I&N Dec. at 33-34 (presuming retail theft under Pennsylvania law involved an "intention of retaining the merchandise permanently"); Matter of Grazley, 14 I&N Dec. 330, 333 (BIA 1973) (presuming theft of cash involved an intent to retain permanently).

Moreover, to the extent that prior Board cases maintained the requirement of an "intent to permanently deprive," those decisions were addressing the distinction between "substantial and reprehensible deprivations of an owner's property on the

[6] Notably, before the agency, Mr. Obeya never challenged the Immigration Judge's determination that his conviction for petit larceny constituted a crime involving moral turpitude to contest his removability. See, e.g., A.R. 720-25 (Mr. Obeya's brief to the Board). Instead, he argued that the conviction did not occur within five years after his admission to the United States and that the petty offense exception should apply. Id.

one hand and, on the other, mere de minimis takings in which the owner's property rights [were] compromised little, if at all." Matter of Diaz-Lizarraga, 26 I&N Dec. at 850. As the Board explained, those decisions "concerned instances where the taking involved a de minimis deprivation of the owner's property rights, such as 'joyriding' or 'borrowing' a Victrola or ring for short-term use at a party.'" Id. at 853-54. Consequently, Mr. Obeya has not demonstrated that his conviction for petit larceny, in violation of NYPL § 155.25, which requires demonstrating at least a virtually permanent deprivation or appropriation, would not have been considered a CIMT under the Board's prior decisions. See Jennings, 504 N.E.2d at 1087 (holding that "[t]he mens rea element of larceny . . . is simply not satisfied by an intent temporarily to use property without the owner's permission, or even an intent to appropriate outright the benefits of the property's short-term use") (emphasis added).

Long before Mr. Obeya pled guilty to petit larceny in 2008, the Board and this Court had considered similar offenses crimes involving moral turpitude. See, e.g., Chiaramonte, 626 F.2d at 1099 ("[W]hatever the vicissitudes of the state laws of larceny, it is clear that for immigration purposes, a crime of moral turpitude is involved when . . . one carries away property knowing it to belongs to another."); Savchuck v. Mukasey, 518 F.3d 119, 123 (2d Cir. 2008) (concluding that the

certificate of disposition confirmed petitioner's convictions for petit and grand larceny and that he therefore was removable by reason of having committed two or more crimes involving moral turpitude); Matter of Jurado-Delgado, 24 I&N Dec. at 33 ("It is well settled that theft or larceny offenses involve moral turpitude."); Matter of Westman, 17 I&N Dec. 50, 51 (BIA 1979) (noting that the Board had previously held that larceny is a crime involving moral turpitude). The Board observed in Matter of Diaz-Lizarraga, however, that, due to refinements to the categorical approach since its prior decisions were rendered, "the validity of the . . . assumption [of a permanent taking] may be called into serious doubt unless the moral turpitude standard for theft offenses is updated to more accurately distill the state of criminal law in this area." 26 I&N Dec. at 854 n.11. The Board thus made clear that, while it was revising its standard to reflect the modern definition of theft, it was not distancing itself from the results reached under its prior standard. See id.

Consequently, given that the Board had already adjusted the "permanent taking" standard, the fact that Mr. Obeya has identified one unpublished Board decision from 2010 analyzing the same Arizona statute at issue in Matter of Diaz-Lizarraga and reaching a contrary result does not render the Board's analysis and

reasoning an "abrupt departure" from prior decisions.[7] Pet. Br. at 21. If anything, the Board's decisions in Matter of Diaz-Lizarraga and in this case represent attempts to fill a void in an evolving area of the law. Lugo, 783 F.3d at 121; accord Wala, 511 F.3d at 106 (recognizing that, in some cases, the Board found larceny to be a CIMT without distinguishing between a permanent and a temporary taking and that the Board had suggested the distinction may be an "open question"); see also NLRB v. Niagara Mach. & Tool Works, 746 F.2d 143, 151 (2d Cir. 1984) (explaining that "[r]ather than abruptly changing well-settled law, the Board . . . fashioned a clear-cut rule that resolved the uncertainty created by its earlier decisions"). Likewise, Mr. Obeya cannot demonstrate that he relied on any prior rule, to the extent any such rule existed, given that the aforementioned Board decisions all indicated that a literal permanent taking was not required for a theft offense to be considered a crime involving moral turpitude. See, e.g., Matter of V-Z-S-, 22 I&N Dec. at 1350; Matter of Jurado-Delgado, 24 I&N Dec. at 33-34; Matter of Westman, 17 I&N Dec. at 51.

[7] In fact, in multiple unpublished decisions going back to at least 2004, the Board concluded that a conviction under NYPL § 155.25 was categorically a crime involving moral turpitude. See, e.g., Matter of Roman Arturo Gomez, 2011 WL 6965228, at *1 (BIA Dec. 21, 2011); Matter of Luis Manuel Germosen Nunez, 2009 WL 2981799, at *1 (BIA Aug. 28, 2009); Matter of Joseph Pierre, 2004 WL 5537104, at *1 (BIA Jan. 31, 2004).

The fourth factor considers the burden the retroactive order would place on the petitioner. Lugo, 783 F.3d at 121. In this case, the agency already had concluded that Mr. Obeya was removable because his conviction under NYPL § 155.25 was a CIMT; the Board's application of Matter of Diaz-Lizarraga merely solidifies that decision. Nevertheless, Respondent acknowledges that the heavy burden of removal is a factor that weighs in Mr. Obeya's favor. Lugo, 783 F.3d at 121 (noting that the degree of the burden of removal is "massive"). However, the fifth factor favors the government because the Board, as the "authoritative interpreter" of ambiguous statutory terms, has a strong interest in maintaining the uniformity of immigration law. Brand X Internet Servs., 545 U.S. at 983; see Garfias-Rodriguez, 702 F.3d at 522 (noting that "non-retroactivity impairs the uniformity of a statutory scheme, and the importance of uniformity in immigration law is well established"); see also WPIX, Inc. v. NLRB, 870 F.2d 858, 867 (2d Cir. 1989) (concluding that the agency had a statutory interest in retroactive application because it would help avoid "tremendous instability in labor relations"). Accordingly, because the majority of the five factors favor the government, the Board's revised standard should be applied retroactively to Mr. Obeya's conviction for petit larceny.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

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Dated: August 1, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached answering brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) in that the brief is proportionately spaced using Times New Roman 14-point typeface and contains 7655 words and 640 lines of text. Respondent used Microsoft Word to prepare this brief. The undersigned certifies that the text of the electronic brief is identical to the text in the paper copies filed with the Court.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 1, 2017, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the designated electronic mailbox at agencycases@ca2.uscourts.gov, in accordance with the instructions issued by this Court on Friday, July 28, 2017. I further certify that I sent a copy of the foregoing to Petitioner's counsel, Richard Mark, at rmark@gibsondunn.com.

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