



# Theft

# ELEMENTS OF THEFT

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Petty theft, per **PC 484** and **PC 488**, is the unlawful taking of **property worth \$950 or less**.

The elements of this crime are spelled out in California Criminal Jury Instruction “CALCRIM” 1800. For you to be convicted of petty theft, prosecutors must prove beyond a reasonable doubt the following five elements:

1. **you took possession** of property owned by someone else, **you took the property with**

Aspects of these elements are discussed in more detail below.

## Owner vs. Possessor

The theft victim does not have to be the owner of the property.<sup>3</sup> It is enough if the victim is just in possession (“control”) of the property

## Intent to Deprive

For prosecutors to prove you intended to deprive an owner permanently of their property, it is enough to show that:

- you intended to deprive an owner of the main value of their property, and this intent

You may try to defend against a theft accusation by showing that you intended to return the property you took. However, you must return the property within a reasonable time of taking it.

A judge or jury will decide what is a “reasonable time” by examining the facts of the case

## Moving of Property

For a completed [theft crime](#), you must have moved the property or carried it away.<sup>7</sup> This is called “asportation” and must include three things:

2. the goods have been moved from the hands and possession of the owner or

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# Stolen Property

**California Penal Code Section 496(a) PC: Receiving Stolen Property.**

# CA PC § 496 - Rcvng Stolen Property

## California Code, Penal Code - PEN § 496

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(a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to [subdivision \(h\) of Section 1170](#). However, if the value of the property does not exceed nine hundred fifty dollars (\$950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for an offense specified in clause (iv) of [subparagraph \(C\) of paragraph \(2\) of subdivision \(e\) of Section 667](#) or for an offense requiring registration pursuant to [subdivision \(c\) of Section 290](#).

**A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property.**

**(b) Every swap meet vendor, as defined in [Section 21661 of the Business and Professions Code](#), and every person whose principal business is dealing in, or collecting, merchandise or personal property, and every agent, employee, or representative of that person, who buys or receives any property of a value in excess of nine hundred fifty dollars (\$950) that has been stolen or obtained in any manner constituting theft or extortion, under circumstances that should cause the person, agent, employee, or representative to make reasonable inquiry to ascertain that the person from whom the property was bought or received had the legal right to sell or deliver it, without making a reasonable inquiry, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to [subdivision \(h\) of Section 1170](#).**

**Every swap meet vendor, as defined in [Section 21661 of the Business and Professions Code](#), and every person whose principal business is dealing in, or collecting, merchandise or personal property, and every agent, employee, or representative of that person, who buys or receives any property of a value of nine hundred fifty dollars (\$950) or less that has been stolen or obtained in any manner constituting theft or extortion, under circumstances that should cause the person, agent, employee, or representative to make reasonable inquiry to ascertain that the person from whom the property was bought or received had the legal right to sell or deliver it, without making a reasonable inquiry, shall be guilty of a misdemeanor.**

**(c) Any person who has been injured by a violation of subdivision (a) or (b) may bring an action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit, and reasonable attorney's fees.**

**(d) Notwithstanding [Section 664](#), any attempt to commit any act prohibited by this section, except an offense specified in the accusatory pleading as a misdemeanor, is punishable by imprisonment in a county jail for not more than one year, or by imprisonment pursuant to [subdivision \(h\) of Section 1170](#).**

**source: <https://codes.findlaw.com/ca/penal-code/pen-sect-496/>**

# Receiving Stolen Property

## California Penal Code Section 496(a) PC: Receiving Stolen Property

### Definition and Elements of the Crime

While many [theft offenses](#) make it illegal to unlawfully take or steal property from someone else, the person who [receives stolen property](#) can also be charged with a crime under the law. [Receiving stolen property](#) is a serious criminal offense under [California Penal Code Section 496\(a\) PC](#) that can result in a felony conviction.

To prove that the defendant is guilty of receiving stolen property, a prosecutor must be able to establish the following elements:



# Defenses to Receiving Stolen Property

As described above, a person who accidentally or unknowingly receives stolen property would not be criminally liable under statute. In these circumstances, the defendant would have a valid [accident](#) defense if charged with this offense.

## Penalties

Receiving stolen property is a "wobbler" offense that can be charged as either a felony or a misdemeanor, depending on the factual circumstances of the case and the defendant's criminal history. If convicted of receiving stolen property as a misdemeanor, the defendant can be sentenced to up to a year in jail and costly court fines. If convicted as a felony, the maximum sentence is three years in prison. In addition, the victim of this offense would be entitled to collect three times the amount of his or her damages, in addition to attorney fees and costs.

# Immigration Consequences

## Matter of Alday- Dominguez, 27 I&N Dec. 48 (BIA 2017)

Receiving stolen property under section 496(a) of the California Penal Code was *categorically* an aggravated felony theft offense under section 101(a)(43)(G) of the INA,

On June 1, 2017, the Board of Immigration Appeals (BIA) issued a precedent decision in the *Matter of Alday-Dominguez*, 27 I&N Dec. 48 (BIA 2017) [[PDF version](#)]. The Board held that the aggravated felony receipt of stolen property codified in section 101(a)(43)(G) of the Immigration and Nationality Act (INA) does not require that the unlawfully received property have been obtained by means of common law theft or larceny.

# **Facts and Procedural History:**

## **27 I&N Dec. at 48-49**

**The respondent, a native and citizen of Mexico, was a lawful permanent resident (LPR) of the United States. On March 11, 2011, the respondent was convicted of receiving stolen property in violation of section 496(a) of the California Penal Code. As a result of the conviction, the respondent was sentenced to serve 16 months in prison.**

**In footnote 1, the BIA quoted the pertinent part of section 496(a) of the California Penal Code at all relevant times in the case:**

**“ Every person who buys or receives any property that has been stolen or that has been obtained in any manner construing theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment...**

**Based on the conviction, the Department of Homeland Security (DHS) issued a notice to appear to the respondent, charging him as removable based on having been convicted of an aggravated felony theft offense under section 101(a)(43)(G) of the INA.**

**In proceedings, the Immigration Judge concluded that the DHS failed to demonstrate that the respondent was removable as charged and thus**

terminated removal proceedings. The Immigration Judge reasoned that a conviction under section 496(a) of the California Penal Code is not categorically a conviction for an aggravated felony theft offense. To this effect, the Immigration Judge cited to controlling precedent from the United States Court of Appeals for the Ninth Circuit in *Lopez-Valencia v. Lynch*, 798 F.3d 863 (9th Cir. 2015) [[PDF version](#)].

## **Board's Analysis and Decision**

### **27 I&N Dec. at 49-51**

The Board would review *de novo* whether receiving stolen property under section 496(a) of the California Penal Code was categorically an aggravated felony theft offense under section 101(a)(43)(G) of the INA, that is, review the case from the beginning. In employing the “categorical approach,” the question involved not the respondent’s specific conduct, but rather whether the minimum conduct that would violate section 496(a) would be an aggravated felony under section 101(a)(43)(G) of the INA.

For reasons that we will examine, the BIA would conclude that a conviction under section 496(a) of the California Penal Code was categorically an aggravated felony theft offense as defined in section 101(a)(43)(G) of the INA.

The Board explained that section 101(a)(43)(G) of the INA defines aggravated felony theft as “a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is [at] least one year.” The Board explained in footnote 2 that the Supreme Court of the United States, the Ninth Circuit, and the Board itself have each defined

**“theft” as “the taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than permanent.”**

**In the *Matter of Cardiel*, 25 I&N Dec. 12, 17 (BIA 2009) [[PDF version](#)], the Board held that a conviction for receipt of stolen property under the statute of conviction in the instant case — section 496(a) of the California Penal Code — was categorically a conviction for aggravated felony theft under section 101(a)(43)(G) of the INA, provided that such conviction was accompanied by a prison sentence of at least one year. The Board noted that the Ninth Circuit had reached the same conclusion that same year in *Verdugo-Gonzalez v. Holder*, 581 F.3d 1059, 1061-62 (9th Cir. 2009) [[PDF version](#)].**

**The Board explained that in *Matter of Cardiel*, 25 I&N Dec. at 14, it held that the term “receipt of stolen property” is not a subset of “theft,” as the term is used in section 101(a)(43)(G) of the INA, “because each can be considered a distinct and separate offense.”**

**In the instant case, the respondent argued that “receipt of stolen property” in section 101(a)(43)(G) only encompasses offenses where the stolen property is obtained through theft. However, the Board found this argument unpersuasive. The Board noted that “[t]he parenthetical does not say that it only includes ‘receipt of stolen property obtained by theft’ or some comparable formulation.”**

**Furthermore, the Board cited to the Supreme Court decision in *United States v. Turley*, 352 U.S. 407, 415-17 (1957) [[PDF version](#)]. The Board described the Supreme Court decision in *Turley* as having held that the term “stolen does not have a fixed meaning that only refers to common law offenses such as theft and larceny. Rather, the Board noted that the Supreme Court held that the term “stolen should, instead, be interpreted broadly as including**

**offenses of embezzlement, false pretenses, and any other felonious takings.” The Board noted that the issue arose in a “different, albeit relevant, context...”**

**Relying on *Turley*, the Board held that it was not necessary for it to decide whether the respondent’s violation of section 496(a) of the California Penal Code is a generic “theft” offense as the Board has defined the term. This is because, as the Board reiterated, “the receipt of stolen property parenthetical [in section 101(a)(43)(G)] is not limited to receipt offenses in which the property was obtained by means of theft.**

**In footnote 4, the Board explained why the Immigration Judge was incorrect when it found that the Ninth Circuit had implicitly overruled *Verdugo-Gonzalez* in *Lopez-Valencia*. The Board noted that *Lopez-Valencia* addressed an entirely different statute — section 484 of the California Penal Code — than the statute at issue in *Matter of Alday-Dominguez*. In *Lopez-Valencia*, the Ninth Circuit held that section 484 was categorically overbroad relative to the generic definition of aggravated felony theft because it covered theft of labor, false credit reporting, and false pretenses. The Board in the instant case explained that this ruling has no bearing on the issue in the instant case. Furthermore, the Ninth Circuit did not once mention *Verdugo-Gonzalez* in the *Lopez-Valencia* decision. In any event,, in 2016, the Ninth Circuit explicitly reaffirmed *Verdugo-Gonzalez* in a non-precedent decision titled *Prieto-Hernandez v. Lynch*, 653 F.App’x 547, 549 (9th Cir. 2016) [[PDF version](#)].**

## **Ninth Circuit Decision**

**For the foregoing reasons, the Ninth Circuit concluded that the respondent’s conviction in violation of section 496(a) of the California Penal Code for**

**receipt of stolen property was categorically an aggravated felony theft offense under section 101(a)(43)(G) of the INA. The Board held that “the Immigration Judge’s reliance on *Lopez-Valencia* was misplaced.” The Board sustained the DHS’s appeal, reinstated removal proceedings, and remanded the record for consideration of any relief from removal for which the respondent may be eligible.**

# **Conclusion**

**In the *Matter of Alday-Dominguez*, the Board made clear that a conviction for “receipt of stolen property” need not require proof that the property have been originally obtained through “theft” in order for the conviction to fall under section 101(a)(43)(G) of the INA for aggravated felony theft.**

**Considering the fact that the Board had previously found that the very same California statute categorically fell under section 101(a)(43)(G) in the *Matter of Cardiel*, this decision is unlikely to cause any significant changes in how immigration courts read the provision.**

# Asporation of Stolen Property is Aggravated Felony Theft

## Asporation of Stolen Property is AF

This is *not* specific to the California statute.

## Definition of “Asportation”

The Board uses the term “asportation” in its decision. Because this term is uncommon outside of the legal context, we will provide a definition for those who are not familiar with it. The word is defined in the 10th edition of *Black’s Law Dictionary* as follows:

*The act of carrying away or removing (property or a person).*<sup>1</sup>

The entry notes that asportation is a necessary element of larceny, meaning that an act or offense of larceny must necessarily involve carrying away or removing property.

## **Matter of Delgado, 27 I&N Dec. 100 (BIA 2017)**

On September 7, 2017, the Board of Immigration Appeals (BIA) issued a published for-precedent decision in the *Matter of Delgado*, 27 I&N Dec. 100 (BIA 2017) [[PDF version](#)]. In *Matter of Delgado*, the Board held that the crime of robbery as codified under section 211 of the California Penal Code, which includes the element of asportation of property, is a categorical aggravated felony under section 101(a)(43)(G) of the Immigration and Nationality Act (INA). Significantly, the Board made this finding regardless of whether the violator of the statute merely aided or abetted in the asportation of property stolen by a principal.

**Language of Statute of Conviction and Aggravated Felony Provision: 27 I&N Dec. at 100 & n.1**

**The Board excerpted the pertinent part of section 211 of the California Penal Code, the statute of conviction in the instant case. Section 211 of the California Penal Code defines the crime of robbery as:**

“ *the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.*

**The question in the case was whether section 211 categorically defined an aggravated felony offense under section 101(a)(43)(G), a Federal immigration statute. Section 101(a)(43)(G) defines an aggravated felony as:**

“ *a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year.*

**The instant case was only concerned with whether the statute was “a theft offense” under section 101(a)(43)(G).**

## **Analysis and Decision: 27 I&N Dec. at 100-104**

**In the foregoing subsections, we will examine the Board’s analysis of the relevant statutes and its conclusion that section 211 of the California Penal Code is a categorical aggravated felony as defined by section 101(a)(43)(G) of the INA.**

## **The Categorical Approach: 27 I&N Dec. at 100-101**

**Citing to its decision in the *Matter of Ibarra*, 26 I&N Dec. 809, 810 (BIA 2016), the Board explained that it was required to apply the categorical approach in determining whether the respondent’s offense was an aggravated felony theft offense as defined by section 101(a)(43)(G). In applying the categorical approach, the Board focused only on whether the elements of the statute of conviction, meaning what must be proven in order for someone to be convicted, proscribe conduct that falls within the scope of aggravated felony theft under 101(a)(43)(G). The categorical approach is not concerned with the particular facts of the respondent’s crime. The Board referenced the Supreme Court of the United States decision in *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016), which we discuss in detail on site [see article]. In the recent decision of the United States Court of Appeals for the Ninth Circuit in *Diego v. Sessions*, 857 F.3d 1005, 1009 (9th Cir. 2017) [[PDF version](#)], the Ninth Circuit explained that when the elements of a state offense “are the same as or narrower than the elements of the federal offense ... the state crime is a categorical match and every conviction under that statute qualifies as an aggravated felony.”**

## **“Asportation” Element Narrows, Not Broadens, Statute of Conviction**

**In *Matter of Ibarra*, 26 I&N Dec. at 811, which quoted from the Supreme Court decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2017) [see article], the Board explained that the “taking of property or an exercise of control over property *without consent* with the criminal intent to deprive the owner of rights and benefits of ownership” is aggravated felony theft even if the deprivation “is less than total or permanent.”**

**Interestingly, *Matter of Ibarra* also addressed section 211 of the California Penal Code. The issue in that case was whether the element “without consent,” noted by the Supreme Court in *Duenas-Alvarez*, encompassed extortionate takings accomplished through force or fear. In *Matter of Ibarra*, the Board concluded that an extortionate taking through force or fear indeed falls under generic theft and thus under section 101(a)(43)(G) of the INA, finding that section 211 of the California Penal Code categorically defined aggravated felony theft.**

**In the instant case, the respondent made a different argument in support of his claim that section 211 of the California Penal Code is categorically over-broad than was presented in *Matter of Ibarra*. Here, the respondent focused on the “taking of property” element of the statute. In *People v. Hill*, 952 P.2d 673, 703 (Cal. 1998) [[PDF version](#)], a state court decision, the “taking” element of section 211 of the California Penal Code was found to have the following two components:**

- 1. Gaining control over the property; and*
- 2. Asportation.*

**The respondent argued that the requirement that the stolen property be carried away in accord with the asportation element made section 211 of the California Penal Code categorically over-broad with respect to section 101(a)(43)(G) of the INA.**

**The Board noted that asportation was an element of common law larceny offenses. Furthermore, it noted that it remains an express element in the robbery statutes of several states. However, contrary to the respondent’s argument that the inclusion of asportation in the meaning of the “felonious taking” element expanded the scope of section 211 of the California Penal Code, the Board determined that it in fact narrowed the scope of the statute.**

# **Asportation by Aider or Abettor Still Categorical Felony Theft**

**The respondent relied on several unpublished decisions of the United States District Court for the Southern District of California to argue that section 211 of the California Penal Code could be used to successfully prosecute crimes that would fall outside of the scope of section 101(a)(43)(G). Specifically, the respondent argued that the statute could be used to successfully prosecute an accomplice – and aider and abettor – whose only conduct involved the asportation of property after it had been taken by the principal. The respondent argued that this did not fall under section 101(a)(43)(G).**

**The Board discussed one of the decisions cited to by the respondent, *United States v. Bernal Sanchez*, No. 15CR1689 WQH, 2016 WL 727070 \*4-7 (S.D. Cal. Feb. 24, 2016). The Board explained that in *Bernal Sanchez*, the District Court concluded that a conviction involving *only* the asportation of stolen property would not be an aggravated felony. At \*7, the District Court decision stated that generic theft does not cover conduct “limited solely to participation in the asportation of the stolen property.” The Court in *Bernal Sanchez* stated that the asportation requirement “is not confined to a fixed point in time. The asportation continues thereafter as long as the loot is being carried away to a place of temporary safety.”**

**The Board recognized the reasoning in the unpublished district court decisions cited to by the respondent. However, unlike Supreme Court decisions or published Federal circuit court decisions from the circuit from which a case arises, the Board is not bound by unpublished district court decisions. The Board quoted the following passage from the Supreme Court**

**decision in *Rosemond v. United States*, 134 S.Ct. 1240, 1248 (2014) [[PDF version](#)]: “[A] person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense’s commission. An intent to advance some different or lesser offense is not ... sufficient: Instead, the intent must go to a specific and entire crime charged...”**

**In short, Supreme Court precedent requires that in order for an individual to aid or abet a crime, he or she must take part in the requisite act and endeavor to facilitate the commission of the offense. If the individual endeavors to advance a different or lesser offense, he or she is not an aider or abettor of the offense committed by the perpetrator. The Board found that California case-law on the subject is in line with Supreme Court precedent in *Rosemond*. In *People v. Beeman*, 674 P.2d 1318, 1326 (Ca. 1984), the California Supreme Court held that “an aider and abettor must share the specific intent of the perpetrator.” Furthermore, this required that the aider or abettor know “the full extent of the perpetrator’s criminal purpose” and offer aid or encouragement “with the intent or purpose of facilitating the perpetrator’s commission of the crime.” Section 31 of the California Penal Code states that “[a]ll persons concerned in the commission of a crime,... whether they directly commit the act constituting the offense, or aid and abet its commission,... are principals in any crime so committed.” (Emphasis added by the Board.) The California Supreme Court held in *People v. Delgado*, 297 P.3d 859, 863 (Cal. 2013) that aiders and abettors are responsible for their accomplices’ actions as well as their own under California law.**

**The issue has been addressed in the immigration context by both the Supreme Court of the United States and the Ninth Circuit. In *Duenas-Alvarez*, 549 U.S. at 189, the Supreme Court held that one who aids or abets a theft falls within the scope of the generic definition of theft. Following that holding in *Duenas-Alvarez*, the Ninth Circuit held in *Ortiz-Magana v. Mukasey*, 542**

**F.3d 653, 658 (9th Cir. 2008) [[PDF version](#)] that aiding and abetting a crime of violence is an aggravated felony crime of violence under section 101(a)(43)(F) of the INA. In *Ortiz-Magana*, the Ninth Circuit determined that “there is no material distinction between an aider and abettor and principals in any jurisdiction of the United States...”**

**The Board also rejected the respondent’s concerns that the asportation requirement of section 211 of the California Penal Code is not fixed in time. The Board concluded that the time for assessing whether a violation of section 211 is a categorical aggravated felony theft offense is “at the completion of the crime.” The Board noted, however, that in order for an aider or abettor to be convicted in California for assisting in the asportation of stolen property, he or she must “have had knowledge of the perpetrator’s unlawful purpose and have acted with the specific intent in and purpose of facilitating the commission of the *entire crime*.”**