

Asporation of Stolen Property is Aggravated Felony Theft

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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).¹

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*.”

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