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Ferreiras Veloz v. Garland

1 IN THE

2 **United States Court of Appeals**
3 **For the Second Circuit**

4 _____
5 AUGUST TERM, 2020

6
7 ARGUED: NOVEMBER 23, 2020

8 DECIDED: JUNE 7, 2021

9
10 No. 19-4111
11

12 ANDY PABEL FERREIRAS VELOZ, AKA ANDY FERREIRAS,

13 *Petitioner,*

14
15 *v.*

16
17 MERRICK B. GARLAND, UNITED STATES ATTORNEY GENERAL,

18 *Respondent.**
19

20 _____
21
22 On Petition for Review of a Final Decision of the Board of Immigration Appeals.
23

24 No. A061-308-478.
25

26 _____
27
28 Before: CALABRESI, KATZMANN, and SULLIVAN *Circuit Judges.*
29 _____

* The Clerk of Court is directed to amend the caption as set forth above.

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1 CALABRESI, *Circuit Judge*:

2 This case requires us to determine whether the intent provision of New
3 York's larceny statute is a categorical match with the Board of Immigration
4 Appeals ("BIA") definition of the intent required for crimes involving moral
5 turpitude ("CIMTs") under 8 U.S.C. § 1227(a)(2)(A)(ii). Petitioner Andy Ferreira
6 seeks review of a BIA order finding him removable based on convictions for three
7 CIMTs. Ferreira argues that none of his crimes of conviction, all three of which
8 were for petit larceny, are CIMTs. He contends that the New York statute
9 encompasses a broader set of larcenous intents than the BIA's definition of CIMTs.

10 Since 2016, the BIA has defined a theft crime as a CIMT when it includes the
11 intent to deprive owners of their property "either permanently or under
12 circumstances where the owner's property rights are substantially eroded." *Matter*
13 *of Diaz-Lizarraga*, 26 I. & N. Dec. 847, 853 (BIA 2016). Using the categorical
14 approach in Petitioner Ferreira's case, the BIA ruled that the intent requirement
15 for larceny in New York Penal Law ("NYPL") is a categorical match with the BIA's
16 CIMT definition.

17 Ferreira argues that this was error. Under New York law, larceny requires
18 the intent either to "deprive" someone of their property or to "appropriate" the

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1 property of another. NYPL § 155.05(1). Ferreiras maintains that the definition of
2 “appropriate” in the statute makes the definition of larceny under New York law
3 broader than the BIA’s definition of a CIMT, and that therefore these definitions
4 are not a categorical match. Ferreiras points out that NYPL § 155.00(4)(b) includes
5 under the term “appropriate” the intent “to dispose of the property for the benefit
6 of oneself or a third person.” He contends that because this provision does not
7 include a temporal limitation, the statute makes criminal even minimal takings
8 that are not covered by the BIA’s definition of a CIMT.

9 We do not doubt that the *Diaz-Lizarraga* rule applies to Ferreiras. We have,
10 however, left open the question of whether New York petit larceny constitutes a
11 CIMT under that standard. *See Obeya v. Sessions*, 884 F.3d 442, 445 n.1 (2d Cir. 2018).
12 The BIA has said that it does. *See Matter of Obeya*, 26 I & N Dec. 856 (BIA 2016). But
13 we owe no deference to the BIA’s reading of New York law. *See Gill v. I.N.S.*, 420
14 F.3d 82, 89 (2d Cir. 2005). The issue before us is therefore: what does the New York
15 statute require, and does reading the statute or the relevant New York cases make
16 us sufficiently sure of that requirement?

17 Since examination of that statute and those cases leaves us uncertain, we
18 believe it is prudent to ask the New York State Court of Appeals (“NYCA”) how

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1 it would interpret § 155.00(4)(b). We therefore certify to the NYCA the question
2 whether an intent to “appropriate” property under New York Penal Law §
3 155.00(4)(b) requires an intent to deprive the owner of his or her property either
4 permanently or under circumstances where the owner’s property rights are
5 substantially eroded, which, as noted earlier, is how the BIA defines a theft
6 involving moral turpitude.

7 BACKGROUND

8 Andy Ferreiras is a native and citizen of the Dominican Republic who
9 became a lawful permanent resident of the United States in 2011. Before he was
10 detained by the Department of Homeland Security (“DHS”), he worked in the
11 restaurant industry and as a barber in the Bronx. In 2017, Ferreiras pleaded guilty
12 to three separate charges of petit larceny under NYPL § 155.25. On July 3, 2019, an
13 Immigration Judge applied the categorical approach, and found him removable as
14 a non-citizen convicted of two or more CIMTs pursuant to 8 U.S.C. §
15 1227(a)(2)(A)(ii). Ferreiras appealed to the BIA, arguing that the intent provision
16 of New York’s larceny statute encompasses takings intended to neither
17 permanently nor substantially erode property rights, making it broader than the

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1 federal definition. *See* NYPL § 155.00(4)(b). The BIA found Ferreira's argument
2 precluded by *Matter of Diaz-Lizarraga* and *Matter of Obeya*.

3 Ferreira timely petitioned for review before our Court.¹ He argues again
4 that New York petit larceny is not a CIMT under the categorical approach because
5 its plain language encompasses thefts with less culpable intent than the *Diaz-*
6 *Lizarraga* rule requires.

7 STANDARD OF REVIEW

8 Our jurisdiction over Ferreira's petition for review is limited to
9 "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D). Whether New
10 York's petit larceny statute qualifies as a CIMT is a question of law. Accordingly,
11 we review *de novo*. *See Gill*, 420 F.3d at 89.

12 DISCUSSION

13 Finding a categorical match is a tricky business. We must determine
14 whether state law permits convictions for crimes that would not be CIMTs under
15 the appropriate federal definition. *See Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013)

¹ Submissions from the parties indicate that DHS removed Ferreira to the Dominican Republic in May of 2020.

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1 (explaining the categorical approach); *Matthews v. Barr*, 927 F.3d 606, 616-617 (2d
2 Cir. 2019) (applying categorical approach to New York’s child endangerment law).
3 We therefore begin with the federal definition. In that respect, we pay due
4 deference to the BIA’s delegated authority to define a CIMT, and its expertise in
5 doing so. *See Gill* 420 F.3d at 89 (“Because the BIA has expertise applying and
6 construing immigration law, we afford *Chevron* deference to its construction of
7 undefined statutory terms such as ‘moral turpitude.’”). As recited above, the BIA
8 defines a theft as a CIMT where it involves “an intent to deprive the owner of his
9 property either permanently or under circumstances where the owner’s property
10 rights are substantially eroded.” *Diaz-Lizarraga*, 26 I. & N. Dec. at 853.

11 But we do not owe the BIA deference when it interprets state law, because
12 it is not an expert in state law.² *See Mendez v. Mukasey*, 547 F.3d 345, 346 (2d Cir.
13 2008) (“[W]e owe no deference to the BIA’s construction of state criminal
14 statutes.”); *Rodriguez v. Gonzales*, 451 F.3d 60, 63 (2d Cir. 2006). Instead, we give
15 full deference to the state. *See e.g., Gill*, 420 F.3d at 90 (relying on New York state

² For this reason, we do not defer to the BIA’s interpretation of NYPL § 155.00 in *Matter of Obeya*, 26 I & N Dec. 856 (BIA 2016).

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1 court interpretation of its own criminal laws when applying the categorical
2 approach to CIMTs).

3 This core principle of federalism is especially important in situations like
4 this one, where the need to ascertain state law is required by federal law, and
5 where litigants who are incarcerated or have been deported may be able to seek a
6 reopening of their case even many years later should our decision as to state law
7 prove to be wrong. Consider what might happen if we found that the statute is a
8 match, and a few years later the NYCA defined it as clearly not a match. What
9 would happen if a petitioner then sought habeas or similar relief? Certification
10 allows us to avoid precisely such potential problems.

11 In order to apply the categorical approach, we must “identify the minimum
12 criminal conduct necessary for conviction under a particular statute by looking
13 only to the statutory definitions—i.e., the elements—of the offense, and not to the
14 particular underlying facts.” *Hylton v. Sessions*, 897 F.3d 57, 60 (2d Cir. 2018)
15 (quoting *United States v. Hill*, 890 F.3d 51, 55 (2d Cir. 2018)). Our inquiry therefore
16 begins with the statute and its plain language.

17 Under New York penal law, “[a] person is guilty of petit larceny when he
18 steals property.” NYPL § 155.25. Stealing property requires either the intent to

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1 “deprive another of property,” or the intent “to appropriate the same to himself or
2 to a third person.” NYPL § 155.05(1). To “deprive” another of property is defined
3 as “(a) to withhold it . . . permanently or for so extended a period . . . that the major
4 portion of its economic value or benefit is lost to him, or (b) to dispose of the
5 property in such manner . . . as to render it unlikely that an owner will recover
6 such property.” NYPL § 155.00(3). To “appropriate” property means “(a) to
7 exercise control over it . . . permanently or for so extended a period . . . as to acquire
8 the major portion of its economic value or benefit, or (b) to dispose of the property
9 for the benefit of oneself or a third person.” NYPL § 155.00(4).

10 Thus, NYPL § 155.00(4)(a) clearly coheres with the federal requirement for
11 a CIMT. The crux of Ferreiras’s argument is, however, that § 155.00(4)(b)’s intent
12 “to dispose of the property for the benefit of oneself or a third person,” is a less
13 culpable mental state than the *Diaz-Lizarraga* definition. He argues that this intent
14 could be as minimal as joyriding, or stealing something with the intent of putting
15 it back the next day.

16 Ferreiras contends, moreover, that the intent requirement in the larceny
17 statute is so manifestly broader than the *Diaz-Lizarraga* rule that we need not, and
18 indeed cannot, look any further. In making this argument, he relies principally on

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1 *Hylton*, where we held that the BIA erred in looking beyond the clear language of
2 a statute “when the statutory language itself, rather than the application of legal
3 imagination to that language, creates the realistic probability that a state would
4 apply the statute to conduct beyond the generic definition.” 897 F.3d at 63
5 (citations omitted). We are however, not persuaded that the meaning of this
6 statute is so plain that we can simply rely on its language.

7 What the statute makes criminal depends on the meaning of “dispose” in
8 NYPL § 155.00(4)(b), for that is the sub-section of the statute that does not have
9 any explicit temporal limitations. Does it mean, as Ferreiras thinks obvious,
10 something like “use,” so that a temporary theft clearly falls within the statute’s
11 ambit? Or, does “dispose” suggest something more like “throw away,” in which
12 case some degree of permanence is implied? The statute leaves us in doubt. And
13 that means we must look to state cases interpreting the statute to see if they make
14 clear the meaning of “dispose” in the statute.

15 Some thirty-five years ago, in *People v. Jennings*, the NYCA said, “[t]he mens
16 rea element of larceny. . . is simply not satisfied by an intent temporarily to use
17 property without the owner’s permission, or even an intent to appropriate
18 outright the benefits of the property’s short-term use.” 69 N.Y.2d 103, 119 (1986);

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1 accord *People v. Jensen*, 86 N.Y.2d 248, 252 (1995) (“The intent to ‘deprive’ or
2 ‘appropriate’ prescribed in section 155.05 is satisfied by the exertion of permanent
3 or virtually permanent control over the property taken.”) (internal quotations
4 omitted). The NYCA seemed to reinforce that principle more recently in *People v.*
5 *Medina*, which found the exclusion of the definitions of “deprive” and
6 “appropriate” from a jury charge to be reversible error in part because the jury
7 might have been misled into “thinking that any withholding, permanent or
8 temporary, constituted larceny.” 18 N.Y.3d 98, 105 (2011).

9 On the other hand, as Ferreiras argues, those cases concerned NYPL §
10 155.00(4)(a), not (4)(b), and so these statements might well be only dicta as to (4)(b).
11 As a result, we believe that *Jennings* and *Medina* are not necessarily determinative
12 of what the NYCA would say about NYPL § 155.00(4)(b) if it addressed that
13 provision directly. In this respect we are influenced by an analogous situation in
14 Connecticut, which has an identical provision in its larceny statute. Compare Conn.
15 Gen. Stat. § 53a-118(a)(4)(B) with NYPL § 155.00(4)(b). In *State v. Wieler*, the
16 Connecticut Supreme Court addressed its § (4)(B), and held that it merely
17 “requires disposal of the property without the intent permanently to deprive the
18 victims of their property.” 660 A.2d 740, 742 (Conn. 1995). We cannot be sure that

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1 the NYCA would interpret NYPL § 155.00(4)(b) otherwise, or find that the
 2 subsection encompasses an intent to substantially erode property rights..

3 Turning to New York's lower courts does not clarify the issue. Several cases
 4 seem to support the government's position. For example, in *People v. Brigante* the
 5 Appellate Division explained that larcenous intent is constituted by "a
 6 substantially permanent appropriation of the property." 186 A.D.2d 360, 360 (1st
 7 Dep't 1992). *See also People v. Hoyt*, 92 A.D.2d 1079, 1079 (3d Dep't 1983) ("[A]
 8 temporary withholding of the [stolen property], by itself, would not constitute
 9 larcenous intent."); *People v. Montgomery*, 39 A.D.2d 889 (1st Dep't 1972) (requiring
 10 evidence of intent permanently to deprive taxi owner of the vehicle to sustain
 11 grand larceny conviction where robber abandoned the car after a short drive).
 12 Similarly, in *People v. Drouin*, the Appellate Division relied on *Jennings* to hold that
 13 a landlord's intent to possess his tenant's ATV temporarily was insufficient to
 14 sustain a larceny conviction. 143 A.D.3d 1056, 1058, (3d Dep't 2016).³

³ An additional line of Appellate Division cases has found reversible error where a trial judge excluded the definitions of "deprive" and "appropriate" from the jury charge in a larceny case because the jury could be misled "into thinking that any withholding, permanent or temporary, constituted larceny." *People v. Matthews*, 61 A.D.2d 1017, 1017 (2d Dep't 1978). *See e.g., People v. Archie*, 71 A.D.3d 686, 688 (2d Dep't 2010); *People v. Albanese*, 88 A.D.2d 603, 603 (2d Dep't 1982); *People v. Johnson*, 75 A.D.2d 585, 585 (2d Dep't 1980). Again, it is not clear in these cases whether

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1 But we also find some possible support for Ferreiras's position in the lower
2 courts of New York. In *In re Reinaldo O.*, the Appellate Division interpreted NYPL
3 § 155.00(4)(a) to uphold a petit larceny conviction against a student who
4 temporarily stole his teacher's credit card. 250 A.D.2d 502 (1st Dep't 1998). And,
5 more recently, the Appellate Division has explained that a larceny conviction
6 could be sustained where "the trial evidence established a completed asportation
7 of the [stolen property] with larcenous intent, even if the takings were to be viewed
8 as temporary." *People v. DiCarlo*, 293 A.D.2d 279, 280 (1st Dep't 2002). The
9 government argues that even these cases can be read, in line with *Jennings*, to
10 require more than a temporary taking in order to support a larceny conviction.
11 Perhaps, but like *Jennings*, none of these cases specifically interprets NYPL §
12 155.00(4)(b). We are therefore left without clear guidance about the applicability
13 of *Jennings* to that section.

14 Given these New York cases, if certification were not available, we would
15 likely hold that NYPL § 155.00 conforms to the BIA's definition of a CIMT, and
16 does require an intent to deprive owners of their property permanently, or in such

the NYCA or the Appellate Division intends this rule to apply to NYPL § 155.00(4)(b).

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1 a way that their property rights are “substantially eroded.” In other words, we
2 would read *Jennings* as applying to both sub-sections (a) and (b) of NYPL §
3 155.00(4). As a result, if the NYCA declines certification we would most probably
4 agree with the government that petit larceny in New York constitutes a CIMT.

5 We believe, however, that the NYCA should have the last word on this
6 issue, and for that reason, certify the question.⁴ We are not suggesting that the
7 NYCA should answer us, but only asking it to speak if it wishes.⁵ In this respect,
8 we are almost like the Appellate Division. The NYCA may take the case up if it
9 thinks we are wrong or if it simply wishes to speak to the issue. But it may also
10 decline to hear the case for any number of reasons, including a reluctance to
11 address the question at this time.

⁴ As we mentioned earlier, if we do not give the NYCA the opportunity now, and later they say we were wrong, we would have invited difficulties if any number of deported people sought to reopen their cases to correct the mistake.

⁵ We did something similar in *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 772 F.3d 740 (2014). There too, we indicated our likely outcome in the face of considerable Delaware case law. In that case we actually urged the Delaware Supreme Court to do something specific about those state cases, which it did. *See NAF Holdings, LLC v. Li Fung (Trading) Ltd.*, 118 A.3d 175 (Del. 2015). Here we urge no outcome, but merely invite the NYCA, should it accept our certification, to speak on this issue.

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1 **CONCLUSION**

2 Because we believe it appropriate to give the NYCA a chance to speak to the
3 meaning of NYPL § 155.00(4)(b), one way or the other, in a case that concerns this
4 New York statute and its consequences, we certify the following question to the
5 New York State Court of Appeals:

6 Does an intent to “appropriate” property under New York Penal
7 Law § 155.00(4)(b) require an intent to deprive the owner of his or
8 her property either permanently or under circumstances where the
9 owner’s property rights are substantially eroded?
10

11 As always, if the NYCA accepts certification, we invite it to address any
12 other issues involving New York law as it relates to the instant case. This panel
13 will retain jurisdiction following the response of the New York State Court of
14 Appeals.

15 It is therefore **ORDERED** that the Clerk of this Court transmit to the Clerk
16 of the Court of Appeals of the State of New York a Certificate, as set forth below,
17 together with complete sets of briefs and appendices, and the records filed in this
18 Court by the parties.

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CERTIFICATE

The foregoing is hereby certified to the Court of Appeals of New York pursuant to Second Circuit Local Rule 27.2 and New York Codes, Rules, and Regulations Title 22, § 500.27(a), as ordered by the United States Court of Appeals for the Second Circuit.