05-4134-ag

To Be Argued By:
VICTORIA S. SHIN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-4134-ag

MIGUEL RHODES-BRADFORD,
Petitioner,

-vs-

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERTO R. GONZALES ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review an order of the Board of Immigration Appeals removing an alien convicted of an aggravated felony, *see* § 242(a)(2)(C) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1252(a)(2)(C), as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (2005) (codified at 8 U.S.C. § 1252(a)(2)(D)). Nevertheless, the INA, as amended by the REAL ID Act, permits this Court to review "questions of law raised upon a petition for review filed with an appropriate court of appeals." 8 U.S.C. § 1252(a)(2)(D). Since the Petitioner raises questions of law, this Court has jurisdiction to review them. *See Canada v. Gonzales*, 448 F.3d 560, 563 (2d Cir. 2006).

ISSUES PRESENTED FOR REVIEW

(1) Whether the Board of Immigration Appeals was authorized to issue a removal order in the first instance based on its purely legal determination that Mr. Rhodes was convicted of an aggravated felony?

(2) Whether the Board of Immigration Appeals correctly found that Mr. Rhodes's conviction in Connecticut for larceny in the first degree constituted a theft offense and thereby an aggravated felony under the immigration statutes?

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Preliminary Statement

Mr. Miguel Rhodes-Bradford ("Mr. Rhodes" or "the Petitioner"), a native and citizen of Jamaica, petitions this Court for review of a decision of the Board of Immigration Appeals ("BIA") (1) reversing the decision by the Immigration Judge ("IJ") to terminate removal proceedings against Mr. Rhodes based on the IJ's

conclusion that a Connecticut first-degree larceny conviction is not an aggravated felony under the Immigration and Nationality Act ("INA"); and (2) ordering Mr. Rhodes removed from the United States.

Mr. Rhodes contends, *inter alia*, that a conviction under the Connecticut first-degree larceny statute, Conn. Gen. Stat. § 53a-122, does not categorically qualify as a theft offense, and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) (2006). He contends that the Connecticut statute does not uniformly impose on all covered conduct the requisite "intent" element, and that the statute is thus broader than the definition of "theft offense" under federal law. Mr. Rhodes further argues that even assuming *arguendo* that he was convicted of a theft offense, and thereby a removable aggravated felony, the BIA, unlike an IJ, lacked authority to issue an order of removal against him in the first instance.

Contrary to Mr. Rhodes's contentions, the BIA correctly determined that a conviction under the Connecticut first-degree larceny statute categorically qualifies as an aggravated felony. This Court held in *Abimbola v. Ashcroft*, 378 F.3d 173, 180 (2d Cir.), *cert. denied*, 126 S. Ct. 734 (2005), that a conviction for third-degree larceny in Connecticut, Conn. Gen. Stat. § 53a-124, is an aggravated felony. That decision primarily rested on this Court's observation that § 53a-124 explicitly encompasses the preamble to § 53a-119. Hence, this Court explained that "to be convicted of larceny, a person must have the '*intent to deprive* another of property or to appropriate the same to himself or a third person.'"

Abimbola, 379 F.3d at 179 (quoting Conn. Gen. Stat. § 53a-119) (emphasis in *Abimbola*). The first-degree larceny statute relevant to this case makes identical reference to § 53a-119. Accordingly, this Court's reasoning in *Abimbola* applies with equal and dispositive force to this case; under *Abimbola*, Connecticut first-degree larceny is a theft offense, and thereby an aggravated felony.

Furthermore, the BIA properly and permissibly ordered Mr. Rhodes's removal upon determining that he was convicted of an aggravated felony. Indeed, the BIA acted consistently with its broadly delegated authority under the INA and the regulations promulgated thereunder. Moreover, as a pragmatic concern, it was reasonable for the BIA to issue a removal order in the first instance rather than to remand Mr. Rhodes's case to an IJ for the merely ministerial purpose of issuing a removal order.

Statement of the Case

Mr. Rhodes, a native and citizen of Jamaica, entered the United States on November 22, 1983. Joint Appendix ("JA") 109, 146. The government commenced deportation proceedings against Mr. Rhodes by serving a Notice to Appear ("NTA") on November 28, 2003. JA 144-46. The NTA alleged, *inter alia*, that Mr. Rhodes was convicted in Superior Court, Stamford, Connecticut, for the crimes of larceny in the first degree and failure to appear in the first degree, which are aggravated felonies for removal purposes pursuant to 8 U.S.C. §§ 1101(a)(43)(G) and (T), respectively.

Mr. Rhodes, represented by counsel, appeared before IJ Michael W. Straus in Hartford, Connecticut, on December 14, 2003, for a removal hearing. JA 78-84. Mr. Rhodes admitted allegations 1-3 of the NTA, but denied allegations 4-6. JA 81-82, 109. In connection with his opposition to the bases for removal cited in the NTA, he requested time to submit to the court a brief explaining his view that his criminal convictions did not qualify as aggravated felonies under immigration law. JA 83. The IJ granted Mr. Rhodes' request, and continued the hearing until January 14, 2004. *Id.*

On or about January 8, 2004, Mr. Rhodes filed with the court two motions, one to amend his pleadings, JA 135-36, and another to terminate removal proceedings against him, JA 116-34. In his motion to amend, Mr. Rhodes requested relief under the former INA § 212(c), based on his impression that he had pled guilty to the larceny charge in 1996. Mr. Rhodes argued in his motion to terminate proceedings, *inter alia*, that a conviction for first-degree larceny in Connecticut is not an aggravated felony as a categorical matter. JA 120-29.

When the hearing resumed on January 14, 2004, the parties and the IJ focused mainly on the issue of whether Connecticut first-degree larceny requires a taking and an intent to steal. JA 88-94. Following a one-week continuance, on January 21, 2004, the IJ delivered an oral decision. JA 69-75. He granted Mr. Rhodes' motion to terminate the proceedings based on his view that the Government had not proved by clear and convincing

evidence that Mr. Rhodes had been convicted of removable aggravated felonies. JA 73-75.

On January 30, 2004, the Government filed with the BIA a timely Notice of Appeal of the IJ's January 21, 2004, decision. JA 58-65. On June 30, 2005, the BIA concluded that first-degree larceny is categorically a theft offense, and accordingly sustained the Government's appeal, reversed the IJ's decision, and ordered Mr. Rhodes removed to Jamaica. JA 2-5. Mr. Rhodes filed a timely petition for review with this Court on July 29, 2005.

STATEMENT OF FACTS

A. Petitioner's Entry into the United States and Aggravated Felony Conviction

Mr. Rhodes is a native and citizen of Jamaica who on November 22, 1983, was admitted to the United States through New York as an immigrant. JA 109, 146.

On July 7, 1998, Mr. Rhodes pleaded guilty to first-degree larceny, pursuant to Conn. Gen. Stat. § 53a-122, in the Superior Court of the State of Connecticut. He was sentenced to three years in prison, execution suspended, and three years of probation. JA 70, 106. In addition, on or about June 4, 2002, Mr. Rhodes pleaded guilty to failure to appear in the first-degree, under Conn. Gen. Stat. § 53a-172, and was sentenced to 18 months in prison. JA 70, 106-07.

B. Petitioner's Removal Proceedings

The government instituted removal proceedings against Mr. Rhodes on or about November 28, 2003, by serving an NTA. JA 144-46. Mr. Rhodes, represented by counsel, appeared at a hearing on December 10, 2003. JA 78-84. The following documentary exhibits were submitted:

Exhibit 1: Notice to Appear. JA 144-46.

Exhibit 2: Respondent's Pleadings. JA 109-10.

Exhibit 3: Record of Conviction. JA 106-08.

The hearing was continued to allow the submission of briefing on whether Mr. Rhodes's convictions were aggravated felonies. The IJ heard argument on this question at a hearing on January 14, 2004, JA 85-96, and issued his oral decision on January 21, 2004, JA 69-75.

C. The IJ's Decision

On January 21, 2004, the IJ issued an oral decision in which he granted Mr. Rhodes's motion to terminate proceedings. While the IJ was persuaded that the Government had established all allegations in the NTA, JA 70, he nevertheless concluded that the Government had not proven by clear and convincing evidence that Mr. Rhodes' criminal convictions constituted aggravated felonies, JA 73, 75.

With respect to Mr. Rhodes' conviction for first-degree larceny under Conn. Gen. Stat. § 53a-122, the IJ noted that a conviction thereunder results when a defendant commits larceny as defined in Conn. Gen. Stat. § 53a-119, and the value of the property, as provided in § 53a-122, is in excess of $10,000, or is in excess of $2,000 where the charge is for defrauding a public community. JA 71. The IJ further recognized that Section 53a-119 "provides that a person commits larceny when, with the intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from the owner." *Id.*

The IJ additionally observed the following: (1) under § 53a-119(6)(A), a person is guilty of defrauding a public community if he authorizes, certifies, or attests, or files a claim for benefits or reimbursement from a local, State, or Federal agency, which he knows is false, JA 71; (2) according to *In re V-Z-S-*, 22 I. & N. Dec. 1338 (BIA 2000), "a theft offense exists where there is a criminal intent to deprive the owner of the rights and benefits of ownership even if such deprivation is less than total or permanent," JA 72; (3) "Connecticut courts have generally held that the [] definition of larceny sets forth a requirement of intent to deprive or a wrongful taking or withholding requiring a[n] intent to deprive the owner of the property[,]" JA 72 (citing *Connecticut v. Kimber*, 709 A.2d 570 (Conn. App. Ct. 1998)); and (4) "since larceny includes all of the subsections in Section 53[a]-119, either intent to deprive or wrongful taking o[r] withholding would generally be an element of the crime[,]" JA 72.

Despite the foregoing, the IJ ultimately was not convinced that defrauding a public community, a larceny offense explicitly listed in § 53a-119, qualified as a theft offense. JA 73. Even though the IJ understood that defrauding a public community consisted in "filing a claim in which the perpetrator knows he or she is not entitled to[,]" JA 72, he hesitated in the face of the holding in *Connecticut v. Robins*, 643 A.2d 881 (Conn. App. Ct. 1994), *aff'd* 660 A.2d 738 (Conn. 1995), that a conviction for defrauding a public community does not require proving, as the IJ described, "that the perpetrator obtained benefits to which [he] was not entitled," JA 73. As a result, the court perceived some ambiguity in "whether there is a[n] intent to deprive the owner of the rights and benefits of ownership" requisite to a conviction for larceny in the form of defrauding a public community, and that this offense could thereby fall outside the definition of theft offense. JA 73. And since, reasoned the IJ, it is the Government's burden to demonstrate that the larceny statute categorically constitutes a theft offense, the court could not confidently conclude that coverage of § 53a-122 is no broader than the requirements of § 1101(a)(43)(G). *Id.* The IJ reasoned that the statute was thereby divisible, but that there was no additional evidence regarding Mr. Rhodes's first-degree larceny conviction upon which to make further determinations. JA 73. Thus, the IJ concluded that the Government had failed to show that Mr. Rhodes's larceny conviction was a theft offense.[1] JA 73.

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[1] The IJ also concluded that the Government had failed to show that Mr. Rhodes's conviction for failure to appear was (continued...)

D. The BIA Appeal

On January 30, 2004, the Government filed with the BIA a notice of appeal and a supporting brief. JA 58-65. The Government's challenge to the IJ's decision was limited to his determination that a conviction for first-degree larceny did not amount to an aggravated felony theft offense within the scope of 8 U.S.C. § 1101(a)(43)(G).

The BIA sustained the Government's appeal in a decision issued on June 30, 2005. JA 2-5. The BIA noted that Mr. Rhodes was convicted of first-degree larceny under Conn. Gen. Stat. § 53a-122, JA 3, and that a conviction under that statute results when

> larceny is committed as defined in § 53a-119, and one of the following is satisfied: (1) the property/service is obtained by extortion, (2) the value of the property/service exceeds ten thousand dollars, (3) the property is a motor vehicle worth over ten thousand dollars, or (4) the property is obtained by defrauding a public community, and the value of the property exceeds two thousand dollars.

JA 3 (citing Conn. Gen. Stat. § 53a-122). The BIA then quoted § 53a-119, which states, in pertinent part:

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[1] (...continued)
an aggravated felony under 8 U.S.C. § 1101(a)(43)(T). JA 74-75. That conclusion is not at issue in this case.

> A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. Larceny includes, but is not limited to: . . .

JA 3 (quoting Conn. Gen. Stat. § 53a-119). The foregoing definition, observed the BIA, is then followed by a non-exhaustive list of covered conduct. JA 3.

The BIA explained that, according to its precedential decision in *In re V-S-Z-*, a theft offense under 8 U.S.C. § 1101(a)(43)(G) "include[s] the taking of property 'whenever there is a criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent.'" JA 3 (quoting *In re V-S-Z-*, 22 I. &. N. at 1346). Moreover, the BIA observed that the contours of "theft offense" are not confined by common law definitions of the subject crime, JA 3 (citing *In re V-S-Z-*, 22 I. & N. at 1345), and that its broad construction of "theft offense" had been upheld in *Abimbola v. Ashcroft*, 378 F.3d 173 (2d Cir. 2004).

The BIA focused on the methodology this Court employed in *Abimbola* to reach its holding that a third-degree larceny conviction in Connecticut is categorically a theft offense within the meaning of the INA. JA 3-4. The BIA emphasized that the Court in *Abimbola* looked to the preamble to the Connecticut definition of larceny, which explicitly requires that a person have the "'intent to deprive another of property or to appropriate the same to himself or a third person.'" JA 4 (quoting § 53a-119)).

The preamble thus sufficiently supplied the intent element requisite to a theft offense, regardless of which of the listed examples of larceny was at issue. JA 4 (citing *Abimbola*, 378 F.3d at 180). Thus, according to the BIA, the reasoning with respect to third-degree larceny in *Abimbola* applied to first-degree larceny, and Mr. Rhodes had therefore been convicted of an aggravated felony. JA 4. In so concluding, the BIA rejected Mr. Rhodes's argument that *Abimbola* does not impact his case because that decision addressed third-degree larceny only, which does not punish defrauding a public community. *Id.* The BIA was persuaded that *Abimbola* was more than merely instructive in this case based on language in the opinion stating that, as with third-degree larceny, the preamble to § 53a-119 applies to first- and second-degree larceny convictions. JA 4 (citing *Abimbola*, 378 F.3d at 179-80). In addition, the BIA disagreed with Mr. Rhodes's contention that *Connecticut v. Robins*, *supra*, established that larceny in the form of defrauding a public community did not have as an element a taking because a conviction did not require showing that a defendant was not entitled to the benefits he sought. JA 4. The BIA pointed out that, to the contrary, the *Robins* decision acknowledged that a larceny conviction for defrauding a public community requires showing that the defendant "engaged in 'a wrongful taking, obtaining, or withholding.'" JA 4 (quoting *Robins*, 643 A.2d at 884).

Based on the foregoing, as well as Mr. Rhodes' failure to request relief from removal in his pleadings or at the hearings, JA 4, the BIA: (1) sustained the Government's appeal; (2) reversed the IJ's decision; and (3) ordered Mr.

Rhodes removed pursuant to INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), consequent to his conviction for an aggravated felony theft offense under 8 U.S.C. § 1101(a)(43)(G), JA 4-5.

SUMMARY OF ARGUMENT

1. The BIA was authorized to issue a removal order against Mr. Rhodes in the first instance upon determining as a purely legal matter that he had been convicted of an aggravated felony, and was thereby removable. *See* 8 U.S.C. § 1101(a)(47)(A) ("The term 'order of deportation' means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for *determining* whether an alien is deportable, *concluding* that the alien is deportable *or* ordering deportation.") (emphasis added).

This Court held in *Lazo v. Gonzales*, 462 F.3d 53 (2d Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3369 (U.S. Nov. 29, 2006) (No. 06-935), that 8 U.S.C. § 1101(a)(47)(A) authorizes immigration judges, as "special inquiry officer[s]," to issue removal orders in the first instance. *Id.* at 54. The BIA members, as the Attorney General's delegates, *see* 8 C.F.R. § 1003.1(a)(1), are, among other things, "administrative officer[s]" to whom the Attorney General has delegated "the responsibility for determining whether an alien is deportable, [or] concluding that the alien is deportable." Furthermore, and in any event, the BIA's issuance of the removal order in this case was a procedural measure that

was clearly an act "appropriate and necessary for the disposition of the case." 8 C.F.R. § 1003.1(d)(1)(ii).

In this instance, to conclude that the BIA must remand the case to the IJ for the purely ministerial and mechanical act of entering a removal order would not only impose an inefficient formality, but would also contravene the Supreme Court's instruction that "[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978). And since the Attorney General has, by regulation, reasonably and consistently with the INA, accorded the BIA authority to issue removal orders in the first instance, the agency's interpretation is entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Furthermore, a ministerial remand would hinder one of Congress' chief goals in passing the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) – to expedite the removal of aliens who have been convicted of aggravated felonies.

Therefore, principles of agency deference, congressional intent, and administrative efficiency and economy support finding that the BIA is authorized to issue removal orders in the first instance upon determining

as a purely legal matter, that Mr. Rhodes was convicted of an aggravated felony theft offense.

2. The BIA correctly determined that Mr. Rhodes's conviction for first-degree larceny in Connecticut qualifies as a "theft offense," and therefore an aggravated felony, under the INA. 8 U.S.C. § 1101(a)(43)(G). In *Abimbola v. Ashcroft*, *supra*, this Court determined that the elemental definition of larceny contained in the preamble to the Connecticut larceny statute was sufficient to firmly place third-degree larceny, Conn. Gen. Stat. § 53a-124, within the purview of a theft offense for immigration purposes, 378 F.3d at 179. That preamble states that, "[a] person commits larceny when, *with intent to deprive* another of property or to appropriate the same to himself or a third person, he *wrongfully takes, obtains or withholds* such property from *an owner*." Conn. Gen. Stat. § 53a-119 (emphasis added). In deciding that the preamble featured the requisite elements of a theft offense as a categorical matter, this Court rejected the notion that "the Connecticut courts consider this preamble meaningless verbiage." *Abimbola*, 378 F.3d at 179.

Mr. Rhodes was convicted of larceny in the first degree, a Class B felony, and the most severe grade of larceny under Connecticut law. Conn. Gen. Stat. § 53a-122. Since this Court has expressly observed that first-degree larceny, like third-degree larceny, "define[s] larceny by reference to the definition in section 53a-119[,]" *Abimbola*, 378 F.3d at 179, the Court need not in this case proceed beyond the preamble that it found dispositive in *Abimbola*. In other words, there is no

reasonable basis to distinguish the immigration consequences of a conviction for first-degree larceny from those of a conviction for third-degree larceny. Neither larceny category is broader than "theft offense" as defined by 8 U.S.C. § 1101(a)(43)(G).

ARGUMENT

I. THE BIA PROPERLY ISSUED A REMOVAL ORDER IN THE FIRST INSTANCE UPON DETERMINING MR. RHODES WAS CONVICTED OF AN AGGRAVATED FELONY

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing Law and Standard of Review

"An alien may be removed only pursuant to a valid order of removal." *Lazo*, 462 F.3d at 54 (citing 8 U.S.C. § 1227(a)). Moreover, judicial review of orders of deportation is only available for "a final order." 8 U.S.C. § 1252(b)(9).

The language of 8 U.S.C. § 1252(b)(9) establishes that the issuance of a final order is a statutory prerequisite to judicial review. *See* 8 U.S.C. § 1252(b)(9) ("Judicial review of all questions of law or fact . . . arising from any . . . proceeding brought to remove an alien from the United States . . . shall be available *only* in judicial review of a

final order . . . .") (emphasis added). For that reason, Mr. Rhodes's argument that the BIA lacked authority to issue a removal order in the first instance – and that, by inference, a valid final order of removal thereby did not result – implicates this Court's subject matter jurisdiction over the petition for review of the instant matter. This Court, nevertheless, retains jurisdiction to determine whether it has jurisdiction in this case. *Ashton v. Gonzales*, 431 F.3d 95, 97 (2d Cir. 2005).

Under the INA, an order of removal is "the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A); *see Lazo*, 462 F.3d at 54 ("deportable" and "deportation" are interchangeable with "removable" and "removal").

In *Lazo*, this Court held that "the need for an 'order of removal' is satisfied by an IJ's finding of removability." 462 F.3d at 55. The IJ in that case, however, also granted the alien a waiver from removability, which the Government appealed to the BIA. *Id.* at 54. Upon review, the BIA sustained the appeal and ordered the alien removed. *Id.* On petition for review of the BIA's decision to this Court, the alien argued that immigration judges have exclusive power to issue removal orders and that the BIA's order of removal was therefore invalid. *Id.* The Court, however, determined that it was the IJ who had issued the order of removal in that case. This was because the INA defines "order of deportation" "in the disjunctive

– as 'the order of the special inquiry officer . . . concluding that the alien is deportable or ordering deportation.'" *Id.* (quoting 8 U.S.C. § 1101(a)(47)(A)) (ellipsis in *Lazo*). The Court observed that the IJ was the "special inquiry officer" in the immigration proceedings, *id.*, and that "the terms 'deportable' and 'deportation' (respectively) can be used interchangeably with the terms 'removable' and 'removal[,]'" *id.* (quoting *Evangelista*, 359 F.3d at 147 n.1). The Court accordingly determined that "the statutory requirement of an order of removal is satisfied when . . . the IJ *either* orders removal or concludes that an alien is removable." *Id.* (emphasis in original). In that regard, the BIA merely "removed an impediment to the removal that was ordered by the IJ." *Id.* *See Solano-Chicas v. Gonzales*, 440 F.3d 1050, 1054 (8th Cir. 2006) ("[W]here the BIA reverses the IJ's order granting cancellation of removal, the BIA, in essence, gives effect to the IJ's order of removability, for the BIA decision eliminates the impediments to removal."); *Del Pilar v. United States Attorney Gen.*, 326 F.3d 1154, 1156 (11th Cir. 2003) (BIA's reversal of discretionary relief reinstates prior order of removal); *Delgado-Reynua v. Gonzales*, 450 F.3d 596, 601 (5th Cir. 2006) (same). *But see Molina-Camacho v. Ashcroft*, 393 F.3d 937, 941 (9th Cir. 2004) (declining to equate an IJ's finding of removability with an actual order of removal).

This Court did not have occasion in *Lazo* to address the question presented here of whether "the BIA is empowered to issue orders of removal in the first instance." 462 F.3d at 55 n.1.

C. Discussion

This Court is presented with the question left open in *Lazo*: whether the BIA is empowered to issue removal orders in the first instance. The relevant statutory language provides as follows: an order of deportation is "the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A).

This Court has already determined that the language of 8 U.S.C. § 1101(a)(47)(A) establishes that the "finding of removability" by an IJ, as a "special inquiry officer," satisfies the need for an "order of removal" under 8 U.S.C. § 1227(a). *Lazo*, 462 F.3d at 54-55. Therefore, the central question in this case is whether BIA members are, as the Attorney General's delegates, "administrative officer[s]" under 8 U.S.C. § 1101(a)(47)(A). Because the BIA members are administrative officers to whom the Attorney General has delegated responsibility for determining the cases before them, under the analysis of *Lazo*, they are empowered to issue removal orders. Moreover, regulations promulgated by the Attorney General support this conclusion: they contemplate the BIA's authority to order the removal of aliens, and expressly permit the BIA to fashion procedural rules for disposition of cases it decides.

"The Attorney General enjoys broad powers with respect to 'the administration and enforcement of [the INA] and all other laws relating to the immigration and

naturalization of aliens.'" *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 279 (4th Cir. 2004) (quoting 8 U.S.C. § 1103(a)(1) (2000)) (alteration in *Blanco de Belbruno*); *see* 8 U.S.C. § 1103(g) (1) (2006). The INA empowers the Attorney General to "establish such regulations, . . . review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section." 8 U.S.C. § 1103(g)(2) (2006).

The Supreme Court has clearly established that the "principles of *Chevron* deference are applicable to [the INA]." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *see Joaquin-Porras v. Gonzales*, 435 F.3d 172, 178 (2d Cir. 2006) ("Ordinarily, we review the BIA's interpretations of the INA with the deference described in *Chevron* . . . and similarly afford 'substantial deference' to the agency's interpretation of its own regulations[.]") (citing *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004)) (internal citation omitted).

The first step of the two-part *Chevron* framework looks to "whether Congress has directly spoken to the precise question at issue." *G&T Terminal Packaging Co., Inc. v. United States Dep't of Agric.*, 468 F.3d 86, 95 (2d Cir. 2006) (quoting *Chevron*, 467 U.S. at 842). If Congress's intent is clear, then the court need proceed no further, and must give effect to the unambiguously expressed intent. *Id.*

Here, Congress has not spoken to the question at issue. The INA, and Section 1101(a)(47)(A) more specifically,

does not expressly address whether the BIA is an "administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, [or] concluding that the alien is deportable." Furthermore, with respect to the BIA's review of the IJ's decisions, codified at 8 U.S.C. § 1101(a)(47)(B),[2] this Court has observed that "[v]arious sections of the Immigration and Nationality Act indicate that Congress did contemplate some form of appellate review of IJ decisions by the BIA. . . . Otherwise, however, Congress was silent as to the manner and extent of any administrative appeal, leaving that determination to the Attorney General, who, in turn, has delegated this responsibility to the BIA." *Zhang v. United States Dep't of Justice*, 362 F.3d 155, 157 (2d Cir. 2004) (per curiam) (addressing BIA streamlining regulations). The Third Circuit, also upon review of a challenge to the BIA's streamlining regulations, commented with respect to 8 U.S.C. § 1101(a)(47)(B):

> It says absolutely nothing about procedures to be employed by the BIA, or the right to, or manner of,

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[2] 8 U.S.C. § 1101(a)(47)(B) provides that:

> The order described under subparagraph (A) shall become final upon the earlier --
>
> (i) a determination by the Board of Immigration Appeals affirming such order; or
>
> (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

> review generally; it only speaks to review by the BIA and its "affirming" the "order" of deportation. Based on the fact that § 1101(a)(47)(B) contains the only mention of the BIA in the INA, it seems clear that Congress has left all procedural aspects of the BIA, especially how it hears cases, entirely to the Attorney General's discretion.

Dia v. Ashcroft, 353 F.3d 228, 237 (3d Cir. 2003) (en banc)).

Thus, neither 8 U.S.C. § 1101(a)(47)(A) nor 8 U.S.C. § 1101(a)(47)(B) speaks precisely to the issue of whether the BIA, in carrying out its appellate function, may issue an order of removal consequent to determining that an alien is removable. And where, as it appears in this case, "'Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *G&T Terminal Packaging Co., Inc.*, 468 F.3d at 95 (quoting *Chevron*, 467 U.S. at 843). "'If the [agency's] reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the [agency's] judgment "controlling weight."'" *In re New Times Sec. Servs. Inc.*, 371 F.3d 68, 80 (2d Cir. 2004) (quoting *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (quoting *Chevron*, 467 U.S. at 844)) (alteration added).

The Attorney General has, pursuant to the interpretive latitude provided by Congress, promulgated regulations regarding the organization and powers of the BIA. *See, e.g.,* 8 C.F.R. §§ 1003.1-1003.8; *see also,* 8 C.F.R. §§ 1241.1, 1241.31, & 1241.33. According to 8 C.F.R. § 1003.1(a)(1), the BIA members "shall be attorneys appointed by the Attorney General *to act as the Attorney General's delegates* in the cases that come before them." (emphasis added). *See* 8 C.F.R. § 1001.1(g) (defining case as "any proceeding arising under any immigration or naturalization law, Executive order, or Presidential proclamation, or preparation for or incident to such proceedings, including preliminary steps by any private person or corporation preliminary to the filing of the application or petition by which any proceeding under the jurisdiction of the Service or the Board is initiated").

As the Attorney General's delegates, BIA members are directed to "exercise their independent judgment and discretion in *considering* and *determining* the cases coming before the Board." 8 C.F.R. § 1003.1(d)(1)(ii) (emphasis added). Furthermore, the regulations expressly empower BIA members to "take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case." 8 C.F.R. § 1003.1(d)(1)(ii). Through these regulations, the Attorney General has delegated authority to the BIA to determine and decide the issues that come before them, including removability, and to issue orders "appropriate and necessary" to dispose of the case. *Compare* 8 U.S.C. § 1101(a)(47)(A) (order of deportation is an order of an "administrative officer to whom the Attorney General has delegated the responsibility for *determining* whether an

alien is deportable, *concluding* that the alien is deportable or ordering deportation") (emphasis added).

Moreover, other regulations expressly contemplate the BIA's issuance of removal orders. For instance, in a regulation defining when a removal order is final, 8 C.F.R. § 1241.1(d), provides that a removal order may become final "[i]f certified to the Board or Attorney General upon the date of the subsequent *decision ordering removal*." (emphasis added). Also, 8 C.F.R. § 1241.1(f) provides that:

> [i]f an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure period upon overstay of the voluntary departure period except where the respondent has filed a timely appeal with the Board. In such a case, the order shall become final upon *an order of removal by the Board or the Attorney General*, or upon overstay of any voluntary departure period granted or reinstated by the Board or the Attorney General.

8 C.F.R. § 1241.1(f) (emphasis added). *See also* 8 C.F.R. § 1241.31 (providing, for certain cases, that an order of deportation shall be final upon the occurrence of a number of events "or, if such an order is issued by the Board, or approved by the Board upon certification, it shall be final as of the date of the Board's decision"); 8 C.F.R. § 1241.33 (providing, for certain cases, that an order of deportation is final and subject to execution upon the occurrence of a number of events including when the "[BIA] enters an order of deportation on appeal, without

granting voluntary departure or other relief"). Taken together, these regulations demonstrate that the Attorney General has contemplated that the BIA can, and will, issue removal orders; this decision is entitled to deference.

The scope and extent of the BIA's authority upon review of decisions by the IJ is further evidence that the BIA has authority to order an alien's removal. The BIA reviews questions of law *de novo*, *see* 8 C.F.R. § 1003.1(d)(3)(ii), and its decisions are final and binding on the immigration judges, *see* 8 C.F.R. § 1003.1(d)(7); 8 C.F.R. § 1003.1(g) ("Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States."). What is more, the BIA has discretion over whether to remand the case to the IJ for further proceedings. *See* 8 C.F.R. § 1003.1(d)(7) ("The Board *may* return a case to the Service or an immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case.") (emphasis added).

In this case, judicial imposition of a ministerial remand to the IJ would be incongruous with the Attorney General's regulations reasonably granting the BIA plenary control over determining issues of law and fashioning procedures to handle the cases before it. Indeed, in the instant case, since the BIA made a legal determination sufficient to render Mr. Rhodes removable, the concurrent issuance of a removal order was essentially a practical,

procedural measure, *see* 8 C.F.R. § 1003.1(d)(4), and an act "appropriate and necessary for the disposition of the case," 8 C.F.R. § 1003.1(d)(1)(ii). There was nothing further to be done as a substantive matter, and the BIA was not obligated by statute or regulation to remand the case to the IJ for the purely formalistic step of entering a removal order. This is in contrast to numerous regulations that specify conditions that mandate the BIA to remand a case to the IJ. *See, e.g.,* 8 C.F.R. §§ 241.14(h)(4)(iii) (remand to consider continued detention of removable alines), 245.13(d)(2) (remand to consider adjustment of status of certain nationals), 245.15(p)(3) (same). The thread that unites these remand provisions is that something else – such as additional fact-finding – is required of the IJ. There is no similar procedural regulation that requires the BIA to remand the case to the IJ directing him to, in effect, rubber-stamp the BIA's final determination. Furthermore, this Court has stated that such procedural concerns are the province of the administrative agency. *See Kambolli v. Gonzales*, 449 F.3d 454, 464 (2d Cir. 2006) (per curiam) (declining to review BIA's procedural practices "[b]ecause it is 'absolutely clear' that '[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties'") (quoting *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 543).

The BIA's practice of determining removability and ordering aliens removed is well established, and reflected in numerous cases. *See, e.g., Aguirre-Aguirre*, 526 U.S. at 422 (BIA order vacating IJ's order and ordering alien

deported); *Gousse v. Ashcroft*, 339 F.3d 91, 93 (2d Cir. 2003) (BIA reversed IJ's termination of proceedings, and ordered alien removed based on BIA's conclusion that alien was convicted of an aggravated felony); *Drakes v. INS*, 330 F.3d 600, 601-02 (3d Cir. 2003) (noting that the court had previously affirmed the BIA's reversal of the IJ's decision to terminate proceedings and the BIA's attendant entry of an order of removal based on its finding that the petitioner had, in fact, been convicted of aggravated felonies for removal purposes); *In re Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002) (vacating IJ's decision and ordering alien removed); *In re Salazar-Regino*, 23 I. & N. Dec. 223, 235 (BIA 2000) (same); *In re Wojtkow*, 18 I. & N. Dec. 111, 113 (BIA 1981) (reversing IJ's decision and ordering alien deported); *In re Hill*, 18 I. & N. Dec. 81, 86 (BIA 1981) (reversing IJ's decision and ordering alien excluded); *In re B-*, 7 I. & N. Dec. 1, 30 (BIA 1955, AG 1956) ("During the oral argument before this Board . . . the Service representative strenuously urged us to reverse the special inquiry officer and order deportation and our power to do so was not questioned"); *In re L-*, 6 I. & N. Dec. 666, 669 (BIA 1955) (reversing the decision of the hearing officer and ordering alien deported); *In re Y-*, 4 I. & N. Dec. 752, 755 (BIA 1952) (same).

Reviewing courts should "accord particular deference to an agency interpretation of 'longstanding' duration." *Alaska Dep't of Envtl. Cnsvtn. v. E.P.A.*, 540 U.S. 461, 487 (2004) (quoting *Barnhart v. Walton*, 535 U.S. 212, 220 (2002)); *cf. Zhang*, 362 F.3d at 158-59 (looking to BIA practices prior to promulgation of streamlining regulations). The Court should be especially deferential

where, as here, neither Congress nor the Attorney General has acted to curtail the BIA's practice of issuing removal orders. *See Salazar v. Reich*, 940 F. Supp. 96, 100 (S.D.N.Y. 1996) ("The Attorney General's acquiescence in the BIA's issuance of such stays further demonstrates her approval of the practice.").

That the BIA has authority to issue removal orders in the first instance also is consistent with basic principles of administrative efficiency and economy. *See, e.g., Blanco de Belbruno*, 362 F.3d at 280 ("The agency operates in an environment of limited resources, and how it allocates those resources to address the burden of increasing claims is a calculation that courts should be loathe to second guess.") (addressing adoption of streamlining regulations). To hold that the BIA lacks authority to issue removal orders in the first instance would unnecessarily delay proceedings. This is of particular concern in this case because the BIA ordered Mr. Rhodes removed based on its determination that he was convicted of an aggravated felony. This Court has recently explained that "[o]ne of Congress's principal goals in introducing § 1252(a)(2)(C)'s jurisdiction-stripping provision was to expedite the removal of aliens who have been convicted of certain types of crimes." *Santos-Salazar v. United States Dep't of Justice*, 400 F.3d 99, 103 (2d Cir. 2005) (citing *Durant v. INS*, 393 F.3d 113, 116 (2d Cir. 2004)); *see Zhang v. INS, supra,* 274 F.3d 103, 108 (2d Cir. 2001) ("[I]t is beyond cavil that one of Congress's principal goals in enacting IIRIRA was to expedite the removal of aliens who have been convicted of aggravated felonies."); *Conteh v. Gonzales*, 461 F.3d 45, 56 (1st Cir. 2006) ("Congress clearly intended to facilitate an efficient

removal process, especially in aggravated felony cases, and not to impede unduly the Executive Branch's exercise of the civil removal power."); *Bamba v. Riley*, 366 F.3d 195, 201 (3d Cir. 2004) (legislative history reveals Congressional intent to expedite removal of criminal aliens). To require the BIA to remand this case to the IJ for the mechanical entry of a removal order would unnecessarily delay proceedings in direct contravention of Congress's clear intention to expedite the removal of aliens convicted of aggravated felonies. *See also Solano-Chicas*, 440 F.3d at 1054 ("It would be an imprudent expenditure of resources to require that the case nonetheless be remanded to the IJ for an actual order of removability to be entered, a proposition that we believe neither Congress nor the Attorney General intended.").[3]

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[3] A conclusion that the BIA lacked authority to enter a removal order in this case would call into question this Court's jurisdiction over this petition for review. If the BIA lacked authority to enter an order of removal, then there is no final order of removal in this case, and arguably no basis for this Court to exercise jurisdiction over the petition for review. *See Molina-Comacho*, 393 F.3d at 941-42 (because BIA did not remand for entry of order of removal, there was no order of removal to serve as basis of jurisdiction under § 1252); *but see Del Pilar*, 326 F.3d at 1156-57 (holding that BIA's order was final and therefore subject to judicial review even though BIA had remanded case to IJ for subsequent proceedings to allow alien to designate a country for removal). If this Court lacks jurisdiction, it cannot then proceed to decide the substantive issue presented by Mr. Rhodes, namely whether his larceny conviction is an aggravated felony under the immigration (continued...)

Mr. Rhodes relies on decisions by the Ninth and Fifth Circuits to support his view that the BIA lacks authority to issue removal orders in the first instance. *See* Pet. Br. at 51-53. The Ninth Circuit held in *Noriega-Lopez v. Ashcroft*, 335 F.3d 874 (9th Cir. 2003), that "only an IJ (or another administrative officer designated by the Attorney General, *a provision not applicable here*), may issue orders of deportation. The BIA . . . is restricted to affirming such orders, not issuing them in the first instance." *Id.* at 883 (emphasis added). The Fifth Circuit adopted the Ninth Circuit's reasoning in *James v. Gonzales*, 464 F.3d 505, 514 (5th Cir. 2006).

The Ninth Circuit's holding and reasoning are unpersuasive.[4] In *Noriega-Lopez*, the Ninth Circuit explicitly declined to consider critical statutory language that authorizes the BIA to issue removal orders. Specifically, without explanation, the Ninth Circuit noted that the statutory language "or other such administrative officer to whom the Attorney General has delegated the responsibility" was not applicable to the analysis. *Id.* at

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[3] (...continued)
statutes. Thus, although the parties and this Court have already spent considerable time briefing and considering this issue, if this Court lacks jurisdiction, the petition would have to be dismissed and the substantive issue could only be resolved after the Government goes through the mechanical exercise of obtaining a removal order from an IJ and the parties re-brief this issue upon a new petition for review.

[4] The Fifth Circuit in *James* simply adopted the Ninth Circuit's *Noriega-Lopez* decision. 464 F.3d at 514.

883. But as this Court noted in *Lazo*, without expressing an opinion on the issue, that language is the precise statutory provision that would apply to an analysis of whether the BIA may issue a removal order in the first instance. 462 F.3d at 55 n.1.

In addition, the Ninth Circuit's analysis in *Noriega-Lopez* relied heavily on the following INA provision explaining how removal orders become final:

> The order described under subparagraph (A) shall become final upon the earlier of –
>
> (i) a determination by the Board of Immigration Appeals affirming such order; or
>
> (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

8 U.S.C. § 1101(a)(47)(B). The Ninth Circuit made the following observation based on the foregoing language: "[t]he BIA (in its sole appearance in the statute) is restricted to affirming such orders, not issuing them in the first instance." *Noriega-Lopez*, 335 F.3d at 883. Furthermore, the Ninth Circuit perceived that Congress envisioned in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1213 (Apr. 24, 1996), "a sequential process involving (1) entry of a removal order by an IJ and (2) subsequent review of this order by the BIA." *Noriega-Lopez*, 335 F.3d at 883.

However, rather than interpreting the sparse description of the BIA's appellate operations in the INA as a narrow conferral of authority, this Court has taken the opposite view, noting that while the INA clearly contemplates some form of appellate review, it is "silent as to the manner and extent of any administrative appeal, leaving that determination to the Attorney General, who, in turn, has delegated this responsibility to the BIA." *Zhang v. United States Dep't of Justice*, 362 F.3d at 157 (addressing BIA streamlining regulations). This silence, according to the Court, leaves to the agency the responsibility and authority for establishing the rules of procedure. *Id.* Thus, to the extent that the BIA issues a removal order upon its appellate review and reversal of an IJ's legal decision, such action is consistent with the Attorney General's broad and historic delegation of substantive and procedural appellate authority to the BIA. For that reason, the practice is entitled to *Chevron* deference.

The Eighth Circuit as well has disagreed with the Ninth Circuit's restrictive view of the BIA's authority, noting that "contrary to the Ninth Circuit's view, the BIA's power is not just one of merely affirming or reversing IJ decisions; it may order relief itself." *See Solano-Chicas*, 440 F.3d at 1054. With this background, the Eighth Circuit stated, "We find it entirely consistent that the BIA also may deny status and order an alien removed." *Id.* This outlook is entirely reasonable. To be sure, the BIA is authorized to review appeals from decisions by the IJ, but that power does not logically preclude the authority to issue a removal order in the first instance.

In conclusion, a finding by this Court that the BIA acted within its authority when it ordered Mr. Rhodes's removal would appropriately accord deference to the Attorney General's broad delegation of authority to the BIA in deciding and handling the cases before it, as well as Congress's goal of expediting the removal of aggravated felons. Such a finding would also promote administrative efficiency and economy. Accordingly, this Court should hold that the BIA was empowered to order Mr. Rhodes removed upon concluding that he had been convicted of an aggravated felony.

II. THE BIA CORRECTLY CONCLUDED THAT MR. RHODES WAS CONVICTED OF A THEFT OFFENSE AND, THEREFORE, AN AGGRAVATED FELONY UNDER THE IMMIGRATION AND NATIONALITY ACT

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing Law and Standard of Review

Under INA § 237(a)(2)(A)(iii), "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii) (2000 & Supp. IV 2004); *Vargas-Sarmiento v. United States Dep't of Justice*, 448 F.3d 159, 165 (2d Cir. 2006). In turn, INA § 101(a)(43) identifies a range of crimes that fall within the statutory definition of "aggravated felony,"

including, as relevant here, "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101 (a)(43)(G) (2000 & Supp. IV 2004); *see Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815, 818 (2007).

In deciding whether a particular offense constitutes a "theft offense" under the INA, this Court has applied the same two-step test that the Supreme Court established in *Taylor v. United States*, 495 U.S. 575, 599-602 (1990), for deciding whether an offense is a "burglary" under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (2000 & Supp. IV 2004). *See Duenas-Alvarez*, 127 S. Ct. at 818 (noting that lower courts "uniformly have applied the approach this Court set forth in *Taylor v. United States*" in determining whether a criminal conviction qualifies as removable offense) (citing *Abimbola*, 378 F.3d at 176-77).

Under the first step of the test, courts employ a "categorical" approach, comparing the statute under which the alien was convicted with the "generic" definition of "theft offense" to determine whether all conduct covered by the statute falls within the generic definition. *Id.* If it does, the alien has been convicted of a theft offense. If the statute covers both conduct that falls within the generic definition and conduct that does not, the statute is deemed "divisible," *Abimbola*, 378 F.3d at 177, and reference to the record of conviction is permitted "for the limited purpose of determining whether the alien's conviction was under the branch of the statute that permits removal[,]" *Vargas-Sarmiento*, 448 F.3d at 167.

The BIA in *In re V-Z-S-* explained that the definition of "theft offense" in INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G), "should be given a 'uniform definition independent of labels employed by the various States' criminal codes.'" 22 I. & N. at 1341-42 (quoting *Taylor,* 495 U.S. at 592). The BIA derived this "federal standard," *id.* at 1341, for "theft offense" from examining various sources, including, but not limited to, federal statutes, state provisions, and the Model Penal Code, *id.* at 1342-46. Those sources supported an understanding of "theft offense" under federal law that is "broader than commonlaw larceny." *Id.* at 1342 (quoting *United States v. Turley*, 352 U.S. 407, 414 (1957)). According to the BIA, the taking of property is sufficiently a theft offense "whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent." *Id.* at 1346.

In *Abimbola*, this Court approved the BIA's definition of "theft offense" because it was reasonable and, therefore, consistent with *Chevron*, "given controlling weight." 378 F.3d at 175-76 (quoting *Chevron*, 467 U.S. at 844). Indeed, this Court deemed appropriate the BIA's "generic" view in light of the Supreme Court's observation that

> Congress intended to use a "generic" view of "burglary" in order to prevent "offenders from invoking the arcane technicalities of the common-law definition of burglary to evade the sentence-enhancement provision, and protected offenders from the unfairness of having enhancement depend upon the label employed by the State of conviction."

Id. at 176 (quoting *Taylor*, 495 U.S. at 589). And since, according to this Court, "the *Taylor* analysis is analogous to the INA and weighs heavily in favor of a broad understanding of 'theft offense[,]' . . . the BIA's interpretation of 'theft offense' is reasonable." *Id.*

Nevertheless, while the BIA's interpretation of undefined terms in the INA, such as "theft offense" is accorded substantial deference in accordance with *Chevron*, *see, e.g., Evangelista v. Ashcroft*, 359 F.3d 145, 150 (2d Cir. 2004), *cert. denied*, 543 U.S. 1145 (2005), this Court reviews *de novo* "whether a particular conviction qualifies as an aggravated felony within the parameters established by the INA," *Kamagate v. Ashcroft*, 385 F.3d 144, 151 (2d Cir. 2004); *Vargas-Sarmiento*, 448 F.3d at 165 ("[W]e owe no deference to [the BIA's] interpretations of state or federal criminal laws, because the agency is not charged with the administration of such laws.") (internal quotation marks omitted); *cf. Rodriguez v. Gonzales*, 451 F.3d 60, 63 (2d Cir. 2006) ("Because the BIA has no particular expertise in construing federal and state criminal statutes, we review *de novo* the BIA's finding that a particular crime of conviction falls within its definition of a [crime involving moral turpitude.").

The state law at issue in this case is the Connecticut larceny statute. Petitioner Rhodes was convicted of larceny in the first degree under Conn. Gen. Stat. § 53a-122. This statute provides, in pertinent part, that:

> (a) A person is guilty of larceny in the first degree when he commits larceny, as defined in

> section 53a-119, *and*: (1) The property or service, regardless of its nature and value, is obtained by extortion, (2) the value of the property or service exceeds ten thousand dollars, (3) the property consists of a motor vehicle, the value of which exceeds ten thousand dollars, or (4) the property is obtained by defrauding a public community, and the value of such property exceeds two thousand dollars.

Conn. Gen. Stat. § 53a-122 (emphasis added). A conviction under this statute presupposes that a defendant is guilty of larceny as defined in § 53a-119. *See Connecticut v. Burrus*, 759 A.2d 149, 153 (Conn. App. Ct. 2000) ("A conviction for larceny in the first degree, pursuant to § 53a-122(a)(4), requires that a person commit larceny as defined by § 53a-119 and that the property be obtained by defrauding a public community."). According to § 53a-119:

> A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. Larceny includes, but is not limited to:
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> . . . .
>
> (6) Defrauding of public community. A person is guilty of defrauding a public community who (A) authorizes, certifies, attests or files a claim for benefits or reimbursement from a local, state or federal agency which he knows is false; or (B)

> knowingly accepts the benefits from a claim he knows is false; . . .

Conn. Gen. Stat. § 53a-119. In addition, the statutory definition of "owner" is "any person who has a right to possession superior to that of a taker, obtainer or withholder." Conn. Gen. Stat. § 53a-118.

As this Court observed in *Abimbola*, "the Connecticut Supreme Court recently noted that '[i]n order to sustain a conviction under Connecticut's larceny provisions, . . . we require proof of the existence of a felonious *intent to deprive* the owner of the property permanently' and that 'a specific intent to deprive' is an 'essential element of larceny,' which 'must be proved beyond a reasonable doubt.'" 378 F.3d at 179 (quoting *Connecticut v. Calonico*, 770 A.2d 454, 470 (Conn. 2001)) (emphasis and alterations in *Abimbola*); *see Connecticut v. Dell*, 894 A.2d 1044, 1046 (Conn. App. Ct.) ("Because larceny is a specific intent crime, the state must show that the defendant acted with the subjective desire or knowledge that his actions constituted stealing. Larceny involves both taking and retaining. The criminal intent involved in larceny relates to both aspects.") (internal citation and quotation marks omitted), *cert. denied*, 901 A.2d 44 (Conn. 2006).

C. Discussion

The question presented is whether Mr. Rhodes's conviction for first-degree larceny in Connecticut, Conn. Gen. Stat. § 53a-122, constitutes a theft offense under 8 U.S.C. § 1101(a)(43)(G), and thereby a removable

aggravated felony. The answer to this question is "yes," based on (1) this Court's finding that the BIA's broad definition of "theft offense" is reasonable, discussed *supra*; (2) this Court's analysis of the Connecticut larceny provisions in *Abimbola*; and (3) the Connecticut courts' understanding of those provisions.

This Court recognized in *Abimbola* that a natural reading of Connecticut's larceny provisions places a conviction thereunder within the BIA's broad construction of "theft offense." *See generally, Abimbola*, 378 F.3d at 177-80. To be sure, the precise larceny statute before this Court in *Abimbola* was for third-degree larceny, Conn. Gen. Stat. § 53a-124, *see Abimbola*, 378 F.3d at 175, rather than for first-degree larceny. However, in reaching the conclusion that third-degree larceny was a theft offense, this Court focused not on the unique terms of § 53a-124. Rather, the foundational definition of larceny, common to all categories and grades of larceny, provided this Court with the elements that it determined fit within "theft offense" as defined by the BIA.

Mr. Rhodes was convicted of first-degree larceny pursuant to Conn. Gen. Stat. § 53a-122. JA 106. That statute, as with § 53a-124, merely designates the severity of Mr. Rhodes' larceny conviction,[5] and, also like § 53a-

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[5] The Connecticut Appellate Court has explained that,

> [t]he crime of defrauding a public community was first enacted as a part of the original penal code, effective October 1, 1971. Public Acts 1969, No. 828, §§ 121(f),

(continued...)

124, expressly relies on § 53a-119 for the definition of the criminal conduct at issue. *See* Conn. Gen. Stat. § 53a-122(a) ("A person is guilty of larceny in the first degree *when he commits larceny, as defined in section 53a-119*, ...") (emphasis added). It is manifest, therefore, that § 53a-119 is the statute relevant to a determination of whether a conviction for larceny is a theft offense.

According to § 53a-119, "[a] person commits larceny when, with *intent* to deprive another of property or to appropriate the same to himself or a third person, he *wrongfully takes, obtains or withholds* such property from an *owner*." Conn. Gen. Stat. § 53a-119 (emphasis added). The plain language of the statute easily maps onto the generic definition of theft offense, which results "whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent." *In re V-S-Z-*, 22 I. & N. Dec. at 1346.

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[5] (...continued)

215. Its degree of severity for classification as felony or misdemeanor and for permissible punishment was determined by the value of the property or services involved in the larceny. General Statutes §§ 53a-121 through 53a-125. That was the scheme or design created by the penal code for the various forms of larceny defined and prohibited by § 53a-119.

Connecticut v. Waterman, 509 A.2d 518, 524 (Conn. App. Ct. 1986).

Despite the correspondence between the definitions of a generic theft offense under federal immigration law and of larceny in § 53a-119, Mr. Rhodes advances two main arguments in an effort to thwart the conclusion that he was convicted of an aggravated felony theft offense. First, Mr. Rhodes suggests that "larceny can be committed by an act meeting the elements listed in an individual subsection even when the act does not meet the elements listed in the prefatory language." Pet. Br. at 30. This proposition is belied by the plain language of Connecticut's larceny statute. The preamble to §53a-119 supplies the basic constitutive elements common to all species of larceny, and Connecticut courts have consistently noted that a first-degree larceny conviction entails the elements of larceny specified in § 53a-119, which include, *inter alia*, the "intent to deprive another of property," and the "wrongful[] tak[ing] . . . [of] such property from an owner." *See, e.g., Burrus*, 759 A.2d at 375 ("A conviction for larceny in the first degree, pursuant to § 53a-122(a)(4), requires that a person commit larceny as defined by § 53a-119 *and* that the property be obtained by defrauding a public community.") (emphasis added); *Connecticut v. Oliphant*, 702 A.2d 1206, 1208 n.1 (Conn. App. Ct. 1997) (noting statutory structure).

Moreover, this Court has effectively recognized that the elements of larceny in the preamble apply to all instances of larceny that follow it. *See Abimbola*, 378 F.3d at 180 ("The most reasonable construction of section 53a-119 includes reading the intent to deprive requirement into all of the subsections except in the case of receipt of

stolen goods – a theft related crime.").[6] Indeed, this Court rejected the notion that "the Connecticut courts consider this preamble meaningless verbiage." *Id*. at 179 (citing Connecticut authority); *see Connecticut v. Lutters*, 853 A.2d 434, 443-44 (Conn. 2004) ("'[W]e will not impute to the legislature an intent that is not apparent from unambiguous statutory language in the absence of a compelling reason to do so.'") (quoting *Home Ins. Co. v. Aetna Life & Cas. Co.*, 663 A.2d 1001 (Conn. 1995)); *Connecticut v. Waterman*, 509 A.2d 518, 523 (Conn. App. Ct. 1986) ("The construction of statutes requires that 'the application of common sense to the language of a penal law is not to be excluded in a way which would involve absurdity or frustrate the evident design of the lawgiver.'") (quoting *Connecticut v. Pastet*, 363 A.2d 41, 46 (Conn. 1975)). But adopting Mr. Rhodes's position that it is proper to view in isolation the definition of "defrauding of public community" in § 53a-119(6) would disregard the clear language of the preamble, and would thereby render the preamble superfluous. *See Tablie v. Gonzales*, 471 F.3d 60, 64 (2d Cir. 2006) ("We are . . . obliged 'to give effect, if possible, to every clause and word of a statute,' and to render none superfluous.") (quoting *Collazos v. United States*, 368 F.3d 190, 199 (2d Cir. 2004) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *Hall v. Gilbert & Bennett Mfg. Co.*, 695 A.2d 1051, 1063 (Conn. 1997) ("We presume that the legislature had a purpose for each sentence, clause or phrase in a legislative enactment,

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[6] In this regard, Mr. Rhodes errs in claiming that defrauding of a public community does not entail the intent element contained in the preamble to § 53a-119. Pet. Br. at 41.

and that it did not intend to enact meaningless provisions.").

Second, Mr. Rhodes avers that defrauding a public community is not a theft offense because, he alleges, it does not require showing "an unconsented taking of property to which one is not entitled, nor an intent to obtain property to which one is not entitled." Pet. Br. at 31. In support of his argument, Mr. Rhodes relies on two cases: *Robins*, *supra,* Pet. Br. at 32-34, and *Waterman, supra*, Pet. Br. at 35. Neither case helps Mr. Rhodes.

The court in *Robins* held that, with regard to a conviction for defrauding of a public community, "§ 53a-119 does not require the state to establish specifically that the defendant was not entitled to receive assistance." *Robins*, 643 A.2d at 885. Mr. Rhodes argues that this holding establishes that lack of consent is not an element of defrauding a public community, and that it is therefore a form of larceny that falls outside an aggravated felony theft offense. Pet. Br. at 32-34.

The *Robins* decision, however, did not address the issue of consent. The defendant in *Robins* applied for welfare assistance and made a number of misrepresentations in his application. He was convicted of larceny in the form of defrauding a public community, and on appeal argued that the state had to show not only that he made false statements to obtain assistance and that he received the assistance, but also that he would have been ineligible for assistance had he not made the misstatements. 643 A.2d at 884. The appellate court rejected this argument, finding no basis in the statute for

requiring the state to prove he was not entitled to receive assistance. *Id.* at 885. The court did not discuss "consent," or even the required "intent" element because those issues were not raised by the defendant in that case.

In any event, the BIA's definition of theft offense – as expressly approved by this Court – does not require a showing of lack of consent. *See Abimbola*, 378 F.3d at 176 (a theft offense exists when there is a taking of property "whenever there is a criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent") (quoting *In re V-Z-S-*, 22 I. & N. Dec. at 1346); *In re V-Z-S-*, 22 I. & N. Dec. at 1351-52 ("[W]here the conviction in question had as an element the specific intent to temporarily or permanently deprive the owner of title to and possession of the vehicle, we are satisfied that the conviction is for a 'theft offense' as such offenses have been understood in the federal law.").

But even accepting Mr. Rhodes's argument that lack of consent is necessary for a theft offense,[7] it is evident that

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[7] The Supreme Court in *Duenas-Alvarez* was not required to decide whether lack of consent was essential to a theft offense. Rather, the issue before the Court was "whether the term 'theft offense' in [8 U.S.C. § 1101(a)(43)(G)] includes the crime of '*aiding and abetting*' a theft offense." 127 S. Ct. at 818 (emphasis in original). Thus, the Court did not render a holding with respect to the elements of "theft offense" in general, or to a lack of consent element in particular. This is evidenced by the Court's apparent approval of both generic (continued...)

a conviction for larceny in Connecticut indeed requires proving lack of consent by the owner. Connecticut courts have repeatedly construed § 53a-119 to require the state to prove lack of consent. *See, e.g.*, *Dell*, 894 A.2d at 1046 ("Larceny involves both taking and retaining. . . The taking must be wrongful, that is, without color of right or excuse for the act . . . and without the knowing consent of the owner. . . .") (quoting *Calonico*, 770 A.2d at 471) (second and third ellipses in *Dell*); *Connecticut v. Coltherst*, 864 A.2d 869, 880 n.11 (Conn. App. Ct.) ("'Connecticut courts have interpreted the essential elements of larceny as (1) the wrongful taking or carrying away of the personal property of another; (2) the existence of a felonious intent in the taker to deprive the owner of [the property] permanently; and (3) the lack of consent of the owner.'") (quoting *Connecticut v. Flowers*, 797 A.2d 1122, 1131 (Conn. App. Ct. 2002)), *cert. denied*, 871 A.2d 371 (2005); *Connecticut v. Smith*, 860 A.2d 801, 805 (Conn. App. Ct. 2004) (same); *Connecticut v. Rodriguez*,

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[7] (...continued)
definitions of theft adopted by the Ninth Circuit and the Second Circuit. 127 S. Ct. at 820. The Ninth Circuit has adopted a generic definition that, *inter alia*, requires a taking without consent. *Id.* (citing *Penuliar v. Gonzales*, 435 F.3d 961, 969 (9th Cir. 2006)). But this Court in *Abimbola*, while mindful of the Ninth Circuit's definition, 378 F.3d at 176, did not impose a lack of consent requirement. Rather, this Court endorsed the BIA's interpretation of "theft offense" "to include the taking of property 'whenever there is a criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent.'" *Abimbola*, 378 F.3d at 176 (quoting *In re V-Z-S-*, 22 I. & N. Dec. at 1346).

796 A.2d 611, 618 (Conn. App. Ct. 2002) (same); *Calonico*, 770 A.2d at 466 (same); *Connecticut v. Toro*, 772 A.2d 648, 654 (Conn. App. Ct. 2001) (same). *But see Burrus*, 759 A.2d at 153 (rejecting defendant's claim that he was denied a fair trial because of trial court's failure to instruct jury that lack of consent is an element of larceny in the first degree). Since Connecticut courts impose a "lack of consent" element when they have applied the larceny statute, Mr. Rhodes gains no traction when he argues that "in order for a criminal conviction to constitute an aggravated felony theft offense, it must include a taking of property committed without the consent of the owner." Pet. Br. at 15.

Mr. Rhodes's reliance on *Waterman*, too, is misplaced. Pet. Br. 35-36. The defendant in *Waterman* was convicted of first-degree larceny by defrauding a public community. 509 A.2d at 520. The defendant was a public official charged with creating a sham trucking company, Dale Trucking, to haul sand for the town of Suffield from Westfield Sand and Gravel Company, in Westfield, Massachusetts, to Suffield. *Id.* at 521. Without authorization from the town's board of finance, the defendant began purchasing sand from Westfield Sand and Gravel. *Id.* The town's receipt of sand was monitored only with "trip tickets," which reflected the amount of sand taken by the transporting truck. *Id.* But rather than submit the tickets printed by Westfield Sand and Gravel, the defendant prepared fictitious tickets and bills for submission to the town for payment. *Id.* at 329-30. He then cashed the town's checks issued to Dale Trucking and

deposited the money into his personal accounts. *Id.* at 330.[8]

The court focused on the elements of defrauding a public community in §53a-119, beyond the universal larceny elements in the preamble, pertinent to the defendant in *Waterman*: "(1) the defendant must be an officer or agent of a public community; (2) he must appropriate its property to the use of any person or draw any order upon its treasury or present or aid in procuring or allowing a fraudulent claim against such community; and (3) he must do so with the intent to prejudice the community." *Id.* at 525 (listing elements of crime under earlier version of statute then applicable to the defendant). Based on these statutory elements, the court properly rejected the defendant's contention that the state must show actual prejudice to the town. There was no dispute in *Waterman* that the general framework of § 53a-119 applied to the case, including application of the preamble. *See* 509 A.2d at 522-23. The additional elements only underscore the requirements that the defendant deprive the owner of property and that he intended to deprive the owner of the property. If the appellate court in *Waterman* can be understood to suggest that an actual taking is not a necessary element for a conviction under §53a-122, *see* Pet. Br. at 36, it would be inconsistent with numerous subsequent decisions by the Connecticut Supreme Court, as well as the appellate court, *see supra*, at 44-45.

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[8] In this regard, the defendant in *Waterman* surely did benefit from his unlawful actions. *See* Pet. Br. at 35.

Mr. Rhodes additionally opines that *Abimbola* does not direct the outcome of this case because that case dealt with third-degree larceny, which does not cover defrauding a public community. Pet. Br. at 44, 46. In *Abimbola*, this Court did, in fact, consider the consequences of a conviction under first-degree larceny. Moreover, the Court effectively commented that first-, second-, and third-degree larceny should not be distinguished with respect to establishing a theft offense:

> [F]irst- and second-degree larceny both define larceny by reference to the definition in section § 53a-119. *See* Conn. Gen. Stat. §§ 53a-122, 53a-123. The difference in severity depends on factors such as the value of property involved or whether extortion was used in commission of the crime. *Id.* Accepting Abimbola's position would require a conclusion that intent to deprive is not a requirement of first- and second-degree larceny in Connecticut.

Abimbola, 378 F.3d at 179.

Finally, the array of hypotheticals Mr. Rhodes presents in his brief, *see* Pet. Br. at 42-43, do not undercut the firm placement of first-degree larceny within the BIA's generic definition of theft offense. For the Supreme Court in *Duenas-Alvarez* stated

> in our view, to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the

> application of legal imagination to a state statute's language. It requires 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. To show that realistic possibility, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the states courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Duenas-Alvarez, 127 S. Ct. at 822. Mr. Rhodes neither points to his own case nor to other cases in which Connecticut courts applied Conn. Gen. Stat. § 53a-122 in any of the nongeneric manners he conceived.

Since Mr. Rhodes' conviction for first-degree larceny fits within the generic definition of theft offense contained in 8 U.S.C. § 1101(a)(43)(G), the BIA correctly concluded that he is removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). The petition for review should therefore be dismissed for lack of jurisdiction. 8 U.S.C. § 1252(a)(2)(C); *Vargas-Sarmiento*, 448 F.3d at 162.

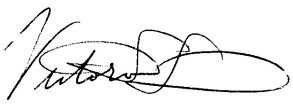
CONCLUSION

For the foregoing reasons the instant petition should be denied.

Dated: February 2, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



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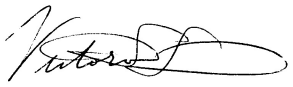
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,315 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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Addendum

8 U.S.C. § 1101. Definitions (2006)

(a) As used in this chapter –

....

(43) The term "aggravated felony" means –

....

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

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

(47)(A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding the alien is deportable or ordering deportation.

(B) The order described under subparagraph (A) shall become final upon the earlier of –

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

8 U.S.C. § 1103. Powers and duties of the Secretary, the Under Secretary, and the Attorney General (2006)

(g) Attorney General

(1) In general

The Attorney General shall have such authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.

(2) Powers

The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such

other acts as the Attorney General determines to be necessary for carrying out this ssection.

8 U.S.C. § 1227. Deportable aliens (2006)

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

. . . .

(2) Criminal offenses

(A) General crimes

. . . .

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. § 1228. Expedited removal of aliens convicted of committing aggravated felonies (2006)

(a) Removal of criminal aliens

(1) In general

The Attorney General shall provide for the availability of special removal proceedings at certain Federal, State, and local correctional facilities for aliens convicted of any criminal offense covered in section 1227(a)(2)(A)(iii), (B), (C), or (D), of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1227(a)(2)(A)(i) of this title. Such proceedings shall be conducted in conformity with section 1229a of this title (except as otherwise provided in this section), and in a manner which eliminates the need for additional detention at any processing center of the Service and in a manner which assures expeditious removal following the end of the alien's incarceration for the underlying sentence. . . .

8 U.S.C. § 1252. Judicial review of orders of removal (2005)

(a) Applicable provisions

(1) General orders of removal
Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

. . . .

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section

1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(b) Requirements for review of orders of removal

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28, or any other habeas corpus provision by section 1361 or 1651 of such title, or by other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 C.F.R. § 1001.1. Definitions

(g) Unless the context otherwise requires, the term case means any proceeding arising under any immigration or naturalization law, Executive order, or Presidential proclamation, or preparation for or incident to such proceeding, including preliminary steps by an private person or corporation preliminary to the filing of the application or petition by which any proceeding under the jurisdiction of the Service or the Board is initiated.

8 C.F.R. § 1003.1. Organization, jurisdiction, and powers of the Board of Immigration Appeals.

(a)(1) Organization. There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review (EOIR). The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them. . . .

(d) Powers of the Board –

> (1) Generally. The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney general may by regulation assign to it. The Board shall resolve the questions before it in a

manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.

> (ii) Subject to these governing standards, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.

. . . .

(4) Rules of practice. The Board shall have authority with the approval of the Director, EOIR, to prescribe procedures governing proceedings before it.

. . .

(6) Identity, law enforcement, or security investigations or examinations.

> (i) The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal, or other immigration benefit, as

provided in 8 C.F.R. § 1003.47(b), that requires completion of identity, law enforcement, or security investigations or examinations if; . . .

(7) Finality of decision. The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (g) of this section. The Board may return a case to the Service or an immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

(g) Decisions as precedents. Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board or the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of immigration laws of the United States. . . .

8 C.F.R. § 1003.38. Appeals

(b) The Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR-26) shall be filed directly with the Board of Immigration Appeals within 30 calendar days after the stating of an Immigration Judge's oral decision or the mailing of an Immigration Judge's written decision. . . .

8 C.F.R. § 1241.1. Final order of removal

An order of removal made by the immigration judge at the conclusion of proceedings under section 240 of the Act shall become final:

(a) Upon dismissal of an appeal by the Board of Immigration Appeals;

(b) Upon waiver of appeal by the respondent;

(c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time;

(d) If certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal;

(e) If an immigration judge orders an alien removed in the alien's absence, immediately upon entry of such order; or

(f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period except where the respondent has filed a timely appeal with the Board. In such a case, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of any voluntary departure period granted or reinstated by the Board or the Attorney General.

8 C.F.R. § 1241.31. Final order of deportation

Except as otherwise required by section 242(c) of the Act for the specific purposes of that section, an order of deportation, including an alternate order of deportation coupled with an order of voluntary departure, made by the immigration judge in proceedings under 8 CFR part 1240 shall become final upon dismissal of an appeal by the Board of Immigration Appeals, upon waiver of appeal, or upon expiration of the time allotted for an appeal when no appeal is taken; or, if such an order is issued by the Board or approved by the Board upon certification, it shall be final as of the date of the Board's decision.

8 C.F.R. § 1241.33. Expulsion

(a) Execution of order. Except in the exercise of discretion by the district director, and for such reasons as are set forth in § 1212.5(b) of this chapter, once an order of deportation becomes final, an alien shall be taken into custody and the order shall be executed. For the purposes of this part, an order of deportation is final and subject to execution upon the date when any of the following occurs:

(1) A grant of voluntary departure expires;

(2) An immigration judge enters an order of deportation without granting voluntary departure or other relief, and the alien respondent waives his or her right to appeal;

(3) The Board of Immigration Appeals enters an order of deportation on appeal, without granting voluntary departure or other relief; or

(4) A Federal district or appellate court affirms an administrative order of deportation in a petition for review or habeas corpus action.

Conn. Gen. Stat. § 53a-118. Definitions generally

(a) The following definitions are applicable to this part:

> (5) An "owner" means any person who has a right to possession superior to that of a taker, obtainer or withholder.

Conn. Gen. Stat. § 53a-119. Larceny defined

A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. Larceny includes, but is not limited to:

. . . .

(6) Defrauding of public community. A person is guilty of defrauding a public community who (A) authorizes, certifies, attests or files a claim for benefits or reimbursements from a local, state, or federal agency which he knows is false, or (B) knowingly accepts the benefits from a claim he knows is false; or (C) as an officer or agent of any public community, with intent to prejudice it, appropriates its property to the use of any person or draws any order upon its treasury or presents or aids in procuring to be allowed any fraudulent claim against such community. For purposes of this subdivision such order or claim shall be deemed to be property.

Conn. Gen. Stat. § 53a-122. Larceny in the first degree: Class B felony

(a) A person is guilty of larceny in the first degree when he commits larceny as defined in section 53a-119, and (1) The property or service, regardless of its nature or value, is obtained by extortion, (2) the value of the property or service exceeds ten thousand dollars, (3) the property consists of a motor vehicle, the value of which exceeds ten thousand dollars, or (4) the property is obtained by defrauding a public community, and the value of such property exceeds two thousand dollars.

Conn. Gen. Stat. § 53a-123. Larceny in the second degree: Class C felony

(a) A person is guilty of larceny in the second degree when he commits larceny, as defined in section 53a-119, and (1) The property consists of a motor vehicle, the value of which exceeds five thousand dollars; (2) the value of the property or service exceeds five thousand dollars, (3) the property, regardless of its nature or value, is taken from the person of another; (4) the property is obtained by defrauding the public community, and the value of such property is two thousand dollars or less, or (5) the property, regardless of its nature or value, is obtained by embezzlement, false pretenses or false promise and the victim of such larceny is sixty years of age or older or is blind or physically disabled, as defined in section 1-1f.

Conn. Gen. Stat. § 53a-124. Larceny in the third degree: Class D felony

(a) A person is guilty of larceny in the third degree when he commits larceny as defined in section 53a-119, and (1) The property consists of a motor vehicle, the value of which is five thousand dollars or less; (2) the value of the property or service exceeds one thousand dollars; (3) the property consists of a public record, writing or instrument kept, held or deposited according to law with or in keeping of any public office or public servant; or (4) the property consists of sample, culture, microorganism, specimen, record, recording, document, drawing or any other article, material, device or substance which constitutes, represents, evidences, reflects or records a secret scientific or technical process, invention or formula or any phase or part thereof. A process, invention or formula is "secret" when it is not, and is not intended to be, available to anyone other than the owner thereof or selected persons having access thereto for limited purposes with his consent, and when it accords or may accord the owner an advantage over competitors or other persons who do not have knowledge or the benefit thereof.

ANTI-VIRUS CERTIFICATION

Case Name: Rhodes-Bradford v. Gonzales

Docket Number: 05-4134-ag

I, Karen Wrightson, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 2/2/2007) and found to be VIRUS FREE.

/s/Karen Wrightson
Karen Wrightson
Record Press, Inc.

Dated: February 2, 2007