Matter of Mouafak AL SABSABI, Respondent

Decided March 29, 2021

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) The "offense clause" of the Federal conspiracy statute, 18 U.S.C. § 371 (2012), is divisible and the underlying substantive crime is an element of the offense.

(2) Because the substantive offense underlying the respondent's Federal conspiracy conviction—namely, selling counterfeit currency in violation of 18 U.S.C. § 473 (2012)—is a crime involving moral turpitude, his conviction for conspiring to commit this offense is likewise one for a crime involving moral turpitude.

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FOR THE DEPARTMENT OF HOMELAND SECURITY: Matthew Sidebottom, Assistant Chief Counsel

BEFORE: Board Panel: MALPHRUS, Deputy Chief Appellate Immigration Judge; HUNSUCKER and PETTY, Appellate Immigration Judges.

PETTY, Appellate Immigration Judge:

The Department of Homeland Security ("DHS") appeals from the Immigration Judge's March 6, 2018, decision concluding that the respondent's conviction for conspiracy under 18 U.S.C. § 371 (2012) is not one for a crime involving moral turpitude and terminating the removal proceedings against the respondent. We conclude that the Immigration Judge erred by applying the categorical approach to only the conspiracy statute without considering the turpitudinous nature of the underlying offense the respondent conspired to commit. Upon our de novo review, we conclude that the respondent was convicted of a crime involving moral turpitude and that he is removable. Accordingly, the DHS's appeal will be sustained, the Immigration Judge's order terminating proceedings will be vacated, and the record will be remanded to the Immigration Judge for further proceedings.

I. FACTUAL BACKGROUND

The respondent is a native and citizen of Syria who was admitted to the United States on September 6, 2013, as a lawful permanent resident. On May 31, 2016, he was convicted of the offense of conspiracy in violation of

18 U.S.C. § 371. The DHS charged the respondent with removability under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i) (2012), as an alien who, within 5 years of admission, was convicted of a crime involving moral turpitude. The Immigration Judge determined that the DHS did not meet its burden to establish that the respondent is removable as charged and terminated proceedings. Specifically, the Immigration Judge concluded that 18 U.S.C. § 371 is indivisible because its statutory language criminalizes only conspiracy and the underlying criminal object of a conspiracy is merely a means of committing conspiracy. The DHS contends that the Immigration Judge erred in terminating proceedings because the respondent was convicted of conspiring to sell counterfeit currency, and the substantive offense the respondent was convicted of conspiring to commit is a crime involving moral turpitude. Whether the respondent's offense is a crime involving moral turpitude that renders him removable is a question of law we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii) (2020).

II. DISCUSSION

We apply the categorical approach to determine if a criminal offense is a crime involving moral turpitude. *See Matter of Ortega-Lopez*, 27 I&N Dec. 382, 384 (BIA 2018). The respondent's statute of conviction, 18 U.S.C. § 371, reads in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose . . . each shall be fined under this title or imprisoned not more than five years, or both.

As discussed in *Matter of Nemis*, 28 I&N Dec. 250, 252–54 (BIA 2021), this statute is divisible. It can be violated either by conspiring to defraud the United States or one of its agencies (the "defraud clause") or by conspiring to commit another federal offense (the "offense clause"). *Id.* Here, the conviction record reflects that the respondent was convicted under the "offense clause." *See Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (noting that courts may look to the conviction record "to determine what crime . . . a defendant was convicted of").

Next, we must determine whether the "offense clause" is itself divisible based on the underlying crime that was the object of the conspiracy or whether, as the Immigration Judge concluded, the object of the conspiracy merely constitutes the means of unlawfully conspiring. *See, e.g.*, *United States v. Taylor*, 843 F.3d 1215, 1222–23 (10th Cir. 2016) (applying the categorical approach to both alternative statutory provisions and

sub-alternatives under those provisions). To do this, we may look to authoritative sources such as the statutory text, judicial opinions, jury instructions, and record of conviction. *See Mathis*, 136 S. Ct. at 2249; *see also Shaw v. Sessions*, 898 F.3d 448, 454 (4th Cir. 2018) ("Without the power to consult the indictment, the Board would have been unable to learn the object of that conspiracy."). We conclude that the "offense clause" of 18 U.S.C. § 371, is divisible and the underlying crime is an element of the offense.

"Section 371's use of the term 'conspire' incorporates long-recognized principles of conspiracy law." *Ocasio v. United States*, 136 S. Ct. 1423, 1429 (2016). "[U]nder established case law, the fundamental characteristic of a conspiracy is a joint commitment to an 'endeavor which, if completed, would satisfy all of the elements of [the underlying] criminal offense.'" *Id.* (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)). Accordingly, jury instructions from the United States Court of Appeals for the Tenth Circuit explain that the defendant must have not only "agreed with at least one other person to violate the law" as a general matter, but also that the defendant "knew the essential objective of the conspiracy." Pattern Crim. Jury Instr. 10th Cir. 2.19 (2021). This requires the jury to determine whether the defendant had knowledge of a specific unlawful objective. *See United States v. DiTommaso*, 817 F.2d 201, 218 (2d Cir. 1987) (stating that a conspiracy conviction "cannot be sustained unless the Government establishe[s] beyond a reasonable doubt that [the defendant] had the specific intent to violate the substantive statute" (citation omitted)); *Jordan v. United States*, 370 F.2d 126, 128 (10th Cir. 1966). That knowledge of the essential objective—the underlying criminal goal—is submitted to a jury strongly suggests that the criminal objective is an element of the conspiracy. *Mathis*, 136 S. Ct. at 2248 (noting that elements "are what the jury must find beyond a reasonable doubt to convict the defendant").

Other authority points to the same conclusion. For example, the United States Sentencing Guidelines premise the base offense level for a guidelines sentence under 18 U.S.C. § 371 on "the offense that the defendant was convicted of . . . conspiring to commit." U.S. Sent'g Guidelines Manual § 2X1.1(a) & cmt. n.2 (U.S. Sent'g Comm'n 2018). This sentencing scheme suggests that the underlying crime is an element rather than a means of committing a conspiracy. *Cf. Mathis*, 136 S. Ct. at 2256 ("[I]f statutory alternatives carry different punishments, then under *Apprendi* they must be elements."); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (requiring a jury to agree on any circumstance increasing a statutory penalty). Divisibility as to the underlying offense is also implicit in the requirement that conspiracy to commit a particular substantive offense requires proof of at least the same degree of criminal intent necessary to commit that

underlying offense. *See United States v. Feola*, 420 U.S. 671, 686 (1975); *Ingram v. United States*, 360 U.S. 672, 678 (1959). Finally, a review of the pertinent criminal records reflects that the respondent was charged with and convicted of conspiring to commit specific enumerated offenses. *See Mathis*, 136 S. Ct. at 2257 (noting that an indictment can indicate by referencing one alternative term to the exclusion of all others that the alternative terms are elements "each one of which goes toward a separate crime"). In sum, the *Mathis* analysis strongly suggests that the identity of the underlying offense—the criminal object of the conspiracy—is an element of a conspiracy conviction under § 371.

This conclusion is consistent with our decades-old approach under which Immigration Judges look to the offense underlying a conspiracy conviction to determine the immigration consequences of that conviction. *See Matter of Vo*, 25 I&N Dec. 426, 428 (BIA 2011); *Matter of Bader*, 17 I&N Dec. 525, 529 (BIA 1980); *Matter of Flores*, 17 I&N Dec. 225, 228 (BIA 1980); *Matter of McNaughton*, 16 I&N Dec. 569, 573 n.2 (BIA 1978), *aff'd*, *McNaughton v. INS*, 612 F.2d 457 (9th Cir. 1980) (per curiam); *Matter of M-*, 8 I&N Dec. 535, 543 (BIA 1960); *Matter of S-*, 2 I&N Dec. 225, 228 (BIA 1944). As we explained more than 60 years ago, "[t]he character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Matter of M-*, 8 I&N Dec. at 543. To do otherwise would render the very idea of a criminal conspiracy unintelligible. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 552 (2001) (explaining "common inchoate offenses" including conspiracy "attach to [other] criminal conduct"). There is no conspiracy in the air; one cannot unlawfully conspire without a specific criminal purpose. *Shaw*, 898 F.3d at 454 ("Shaw necessarily conspired to do something."); *Mizrahi v. Gonzales*, 492 F.3d 156, 161 (2d Cir. 2007) ("[A] defendant is guilty not of generic conspiracy, but of conspiracy to *murder*; not of generic attempt, but of attempt to *kidnap*; not of generic solicitation, but of solicitation to *sell drugs*."). This is so because absent a *specific* criminal purpose there can be no *shared* criminal purpose, and without a shared criminal purpose there is no conspiracy. *See Ocasio*, 136 S. Ct. at 1429; *Salinas*, 522 U.S. at 63; *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

We therefore conclude that under the "offense" clause of 18 U.S.C. § 371, the underlying offense that formed the criminal object of the conspiracy is an element of the conspiracy offense. It follows that a conspiracy is categorically a crime involving moral turpitude if the underlying criminal object of the conspiracy is itself a crime involving moral turpitude. *Matter of S-*, 2 I&N Dec. at 228 ("[I]f the substantive offense is one involving moral turpitude, then it follows as a matter of law that the conspiracy to commit

that offense also involves moral turpitude.").[1] Accordingly, we proceed to determine whether a violation of the underlying offense the respondent conspired to commit is categorically a crime involving moral turpitude.

For an offense to constitute a crime involving moral turpitude, it must have "two essential elements: reprehensible conduct and a culpable mental state" of specific intent, knowledge, willfulness, or recklessness. *Matter of Aguilar-Mendez*, 28 I&N Dec. 262, 264 (BIA 2021) (citation omitted). Generally, moral turpitude refers to conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Id.* (citation omitted). However, some categories of crimes are inherently turpitudinous. In this regard, "crimes in which fraud is an ingredient are regarded as involving moral turpitude" though fraud need not be an explicit element of the offense. *Afamasaga v. Sessions*, 884 F.3d 1286, 1289 (10th Cir. 2018) (citation omitted); *see also Jordan v. De George*, 341 U.S. 223, 227–28 (1951); *Matter of Martinez*, 16 I&N Dec. 336, 337 (BIA 1977). Of particular relevance here, fraud that impairs a governmental function is a crime involving moral turpitude. *Flores-Molina v. Sessions*, 850 F.3d 1150, 1158–59 (10th Cir. 2017); *Rodriguez v. Gonzales*, 451 F.3d 60, 64 (2d Cir. 2006) (per curiam); *Notash v. Gonzales*, 427 F.3d 693, 698–99 (9th Cir. 2005); *Matter of Kochlani*, 24 I&N Dec. 128, 131 (BIA 2007); *Matter of Tejwani*, 24 I&N Dec. 97, 98 (BIA 2007); *Matter of Jurado*, 24 I&N Dec. 29, 35 (BIA 2006); *Matter of Flores*, 17 I&N Dec. at 229.

The respondent concedes that the underlying offense for his conspiracy conviction is selling counterfeited currency, and the conviction record establishes that one of the underlying statutes the respondent conspired to violate was 18 U.S.C. § 473 (2012).[2] *See Shepard v. United States*, 544 U.S.

[1] This conclusion is consistent with our long-standing precedent reflecting that the approach to inchoate crimes generally must recognize that they "presuppose a purpose to commit another crime." *Matter of Beltran*, 20 I&N Dec. 521, 526–27 (BIA 1992) (analyzing attempts); *cf. Lorillard Tobacco Co.*, 533 U.S. at 552. It is also consistent with the approach taken by the courts of appeals. *See Shaw*, 898 F.3d at 453–54; *Barragan-Lopez v. Mukasey*, 508 F.3d 899, 903 (9th Cir. 2007); *Mizrahi*, 492 F.3d at 161; *Peters v. Ashcroft*, 383 F.3d 302, 306–07 (5th Cir. 2004).

[2] The respondent contends that because the indictment also references 18 U.S.C. § 470 (2012), which contains a cross-reference to 18 U.S.C. § 474 (2012), which, in turn, may extend to conduct that is not categorically turpitudinous, it is unclear which underlying crime he was convicted of conspiring to violate. *See Matter of Lethbridge*, 11 I&N Dec. 444, 445 (BIA 1965). We disagree. The indictment was phrased in the conjunctive and the respondent was convicted as charged in the indictment. The respondent was therefore convicted of conspiring to violate *both* 18 U.S.C. § 473 *and* 18 U.S.C. § 470. Because we conclude conspiracy to violate § 473 is a crime involving moral turpitude, we need not address whether § 470 is as well. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976)

13, 26 (2005) (describing the judicial records that may be considered). Count One of the indictment provides that the respondent was charged with conduct contrary to both 18 U.S.C. §§ 470 and 473. The docket sheet reflects that the indictment was never amended, and the judgment reflects that the respondent was convicted of violating 18 U.S.C. § 371 as charged in Count One of the indictment.

The statute defining the underlying offense, 18 U.S.C. § 473, reads:

> Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined under this title or imprisoned not more than 20 years, or both.

We have little difficulty concluding that a conviction under § 473 inherently involves both fraud generally and fraud resulting in the impairment of a governmental function. As we explained in *Matter of Flores*, 17 I&N Dec. at 230, criminal conduct involving deliberate deception is morally turpitudinous. Intentionally passing counterfeit securities as genuine inherently involves deception. Long ago, the Supreme Court held that counterfeiting was "plainly" a crime involving moral turpitude. *United States ex rel. Volpe v. Smith*, 289 U.S. 422, 423 (1933); *see also De George*, 341 U.S. at 230 (same); *Fiswick v. United States*, 329 U.S. 211, 221 n.7 (1946) (same). A conviction under § 473 is no different. It requires an intent to defraud—to "pass off something valueless as being something of value." *Winestock v. INS*, 576 F.2d 234, 235 (9th Cir. 1978) ("We have difficulty distinguishing [the intent required under § 473] from a general intent to defraud."); *see also United States v. Anzalone*, 626 F.2d 239, 244 (2d Cir. 1980) ("Section 473 requires a showing of intent to pass the obligations as genuine . . . ."). The crime defined by 18 U.S.C. § 473 is therefore "intrinsically wrong," *Matter of Flores*, 17 I&N Dec. at 227, and for that reason alone it is categorically a crime involving moral turpitude.

Beyond deceiving and defrauding the recipient, passing counterfeit securities as genuine also impairs governmental functions. The power "[t]o coin Money [and] regulate the Value thereof" is reserved exclusively to the Federal Government, as is the concomitant power to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States." U.S. Const. art. I, § 8, cls. 5–6. Congress has sweeping powers under these provisions "to regulate every phase of the subject of currency," *United States v. Ware*, 608 F.2d 400, 402 (10th Cir. 1979), including "the correspondent and necessary power and obligation to protect and to

(per curiam) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

preserve . . . this constitutional currency for the benefit of the nation," *United States v. Marigold*, 50 U.S. (9 How.) 560, 568 (1850). Indeed, "[e]very contract for the payment of money . . . is necessarily subject to the constitutional power of the government over the currency." *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 549 (1870). Passing counterfeit securities as genuine infringes on this authority and depletes public trust. *See Barbee v. United States*, 392 F.2d 532, 536 (5th Cir. 1968). On a large enough scale, passing counterfeit currency may diminish the Government's ability to implement monetary policy, or even have destabilizing effects. *See generally* Bruce G. Carruthers & Melike Arslan, *Sovereignty, Law, and Money: New Developments*, 15 Ann. Rev. L. & Soc. Sci. 521, 527–28 (2019) (describing counterfeiting attacks on France and Czechoslovakia in the 1920s that caused significant inflation, resulting in "serious problem[s] for the legitimacy of these states and their currencies"). For these reasons as well, a conviction under 18 U.S.C. § 473 is categorically a crime involving moral turpitude.

The categorical approach has made determinations of whether a conspiracy is categorically turpitudinous more complex, but it has not altered the fundamental fact that the morality of a conspiracy cannot be assessed in a vacuum. Recourse to the underlying substantive offense is needed to make sense of it. *See Shaw*, 898 F.3d at 453–54. Here, because the underlying substantive offense, a violation of 18 U.S.C. § 473, is categorically a crime involving moral turpitude, the respondent's conviction for having conspired to violate that statute is likewise one for a crime involving moral turpitude. *See Matter of Bader*, 17 I&N Dec. at 529; *Matter of Flores*, 17 I&N Dec. at 228; *Matter of S-*, 2 I&N Dec. at 228; *see also Matter of Gonzalez Romo*, 26 I&N Dec. 743, 746 (BIA 2016).

The respondent was convicted of a crime involving moral turpitude within 5 years of his admission to the United States. The DHS has therefore met its burden by clear and convincing evidence that the respondent is removable pursuant to section 237(a)(2)(A)(i) of the Act. *See* section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A) (2018). Thus, the Immigration Judge erred in terminating proceedings. *See Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 468 (A.G. 2018). Accordingly, the DHS's appeal is sustained, the respondent's removal proceedings are reinstated, and the record is remanded for further proceedings.

ORDER: The appeal of the Department of Homeland Security is sustained, the decision of the Immigration Judge is vacated, and the removal proceedings are reinstated.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.