UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

IN THE MATTER OF:	)	
MELO-SANTIAGO, BILLY ANDRES	)	**FILE NO.: A-058-195-633**
IN REMOVAL PROCEEDINGS	)	

RESPONDENT'S MOTION TO TERMINATE
PROCEEDINGS AND MEMORANDUM OF LAW IN SUPPORT

Judge: Hon. Walter Durling **Date of Hearing: December 1, 2015**
Individual Hearing

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Respondent, Billy Andres Melo-Santiago ("Respondent"), by and through his Counsel, Raymond G. Lahoud, Esquire, of Baurkot & Baurkot, respectfully requests that this Honorable Court enter an Order Terminating the Removal Proceedings, which the Department of Homeland Security (the "Department" or "DHS") commenced on or about October 6, 2015.

In support, Respondent submits what follows.

I. FACTUAL AND PROCEDURAL HISTORY

Respondent is a native and citizen of the Dominican Republic. See Notice to Appear (the "NTA"). Born in Villa Altragracia, Dominican Republic on April 30, 1989, Respondent entered the United States on May 9, 2006 at Newark, New Jersey, as a Lawful Permanent Resident, classified as F-24, an unmarried son or daughter of lawful permanent resident alien (2nd preference). See NTA. He has remained in the United States continuously since his first entry.

On or about November 28, 2008, Respondent was cited in Lancaster, Pennsylvania for violating Section 3929(a)(1), Title 18 of the Pennsylvania Code (the "PA Code"), Summary Retail Theft (the "Summary"), which carried a maximum term of imprisonment of 90 days. See DHS Ex. C, p. 9; see also 18 Pa.C.S. §§ 15.66(a)(8), 3929(a)(1). Respondent entered a plea of guilty to the Summary on December 5, 2008 and was sentenced only to fines and costs of $272.00. Id.; See Commonwealth v. Billy Melo-Santiago, NT-556-2008 (Lancaster Cty., Penn 2008.).

On or about August 26, 2013, five separate citations were issued against Respondent in Lancaster, Pennsylvania. See DHS Ex. D, pp. 17-21. Each cited Respondent for violating Section 5511(c)(1), Title 18 of the PA Code, Summary Cruelty to Animals (the "5511 Offense or 5511 Offenses"). Id. The five citations were all issued out of the same occurrence, which was on or about July 25, 2013. Id. at 55-81. Respondent entered a plea of guilty to the 5511 Offenses before the Magisterial District Court for the County of Lancaster on April 2, 2015 and he was sentenced only to fines and costs on each citation. Id.; See Commonwealth v. Billy Melo-Santiago, NT-1140-2013, 1141-2013, 1142-2013, 1143-2013, 1144-2013 (Lancaster Cty., Penn , Dis. Ct. No.: 02-1-01).

On October 6, 2015, Department issued and served the NTA, charging removability under Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act (the "Act" or the "INA"), as an alien who "any time after admission has been convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct." INA § 237(a)(2)(A)(ii). The two offenses were the (1) Summary; and (2) the 5511 Offenses.

Respondent appeared with Counsel before this Court for a Master Calendar Hearing on November 2, 2015. Through Counsel, Respondent conceded that he was not a citizen or national

of the United States, was a citizen of the Dominican Republic and that he was convicted of the 5511 Offenses. At that time, Respondent denied that he was convicted of the Summary Offense and denied removability on two grounds: first, the Department failed to meet its removability burden in establishing that the 5511 Offense was a crime involving moral turpitude; and second, should the Department meet the first burden, that the Department lacked evidence to establish that Respondent was convicted of the Summary.

Since Respondent's first Master Calendar Hearing, the Department has served Counsel with evidence in support of Respondent's conviction to the Summary. See DHS Ex. C, p. 9. For purposes of this Motion and Memorandum, Respondent concedes that he was indeed convicted of the Summary and that the Summary is indeed a crime involving moral turpitude. The remaining question, therefore, is whether or not the 5511 Offense is a crime involving moral turpitude. The Department filed a Brief in Support of the argument that the 5511 Offense is categorically a crime involving moral turpitude.

While Respondent is sympathetic to the Department's position and supportive of the rights of animals, he respectfully submits that the Department's contention that the 5511 Offense is categorically a crime involving moral turpitude ("CIMT") is misplaced and lacks any support in law. The Department, therefore, failed to meet its burden to establish removability pursuant to Section 237(a)(2)(A)(ii) of the Act. Given this, Respondent now submits this Motion and Memorandum in Support, seeking an Order terminating the instant proceedings.

II. ARGUMENT

a. The Department Failed to Meet its Burden as to Removability Because the 5511 Offense is Not Categorically a Crime Involving Moral Turpitude, and, Therefore, this Court Must Terminate Respondent's Proceedings.

The Department clearly failed to meet its burden of removability under Section 237(a)(2)(A)(ii) of the Act, as the 5511 Offense is not categorically a crime involving moral turpitude. It is well-settled that the act does not define the term "moral turpitude." The Board of Immigration Appeals (the "Board") and the Third Circuit Court of Appeals, however, have both

> defined morally turpitudinous conduct as conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, either individually or to society in general . . . the hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation. Additionally, it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.

Hernandez-Cruz v. Att'y Gen., 764 F.3d 281, 284 (3d Cir. 2014) (citing Knapik v. Ashcroft, 384 F.3d 84, 88 (3d Cir.2004); Partyka v. Att'y Gen., 417 F.3d 408, 414 (3d Cir.2005); Totimeh v. Att'y Gen., 666 F.3d 109, 114 (3d Cir. 2012)). To determine whether a conviction constitutes a CIMT, this Court must apply the categorical approach. See Hernandez-Cruz, 764 F.3d at 284; see also Jean–Louis v. Att'y Gen., 582 F.3d 462, 465–66 (3d Cir.2009). The categorical approach requires the Court to "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—i.e., the offense as commonly understood." Descamps v. United States, 133 S.Ct. 2276, 2281 (2013). In making this assessment, this Court must consider hypothetical conduct criminalized under the statute at issue, "[s]pecifically . . . look[ing] to the elements of the statutory offense to ascertain the least culpable conduct

hypothetically necessary to sustain a conviction under the statute. See Jean–Louis, 582 F.3d at 471. The mere "possibility of conviction for non-turpitudinous conduct, however remote, is sufficient to avoid removal." Id. (emphasis added).

Here, Respondent was convicted of the 5511 Offense. A 5511 Offense is not categorically a CIMT. A review of its elements clearly establishes that it possibly includes a conviction for non-turpitudinous conduct. The 5511 Offense states, in relevant part, that a

> person commits an offense if he wantonly or cruelly illtreats, overloads, beats, otherwise abuses any animal, or neglects any animal as to which he has a duty of care, whether belonging to himself or otherwise, or abandons any animal, or deprives any animal of necessary sustenance, drink, shelter or veterinary care, or access to clean and sanitary shelter which will protect the animal against inclement weather and preserve the animal's body heat and keep it dry.

The culpability requirement of the 5511 Offense is "wantonness or cruelty." Commonwealth v. Crawford, 24 A.3d 396 (PA. Super. Ct. 2011) (emphasis added). The "words 'wanton' and 'cruel' are to be construed according to their common and approved usage." Id. In the context of a Section 5511 Offense, the Pennsylvania Appellate Courts have approved of the following definition of "wanton:"

> [w]anton misconduct means that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences.

Commonwealth v. Shickora, No. 1550 MDA 2014 (Pa. Super. Ct. 2015) (citing Commonwealth v. Tomey, 884 A.2d 291, 294 (Pa. Super. Ct. 2005)); Crawford, 24 A.3d at 396. Wanton conduct is conduct that is unreasonable – could, very possibly, at a minimum, be negligent

conduct, or, Respondent submits, reckless conduct, at most. Alternatively, the 5511 Offense mens rea may be "cruel," which, "in its common usage, is defined as disposed to inflict pain or suffering, devoid of humane feelings, causing or conducive to injury, grief, or pain, and unrelieved by leniency." Shickora, No. 1550 MDA 2014 (internal citations omitted). The minimum mens rea is acting in an "unreasonable" manner, in a "disregard of a risk . . . so obvious that he must be taken to have been aware of it. . . ." Id. It is showing, at most, and not always, but usually, a "conscious indifference to the consequences," which is that any harm may or could possibly follow. Id. The minimum mens rea that defines "wanton" is, quite simply, criminal negligence, approaching recklessness at most. The Department submits that the mens reas alone should be sufficient to allow this Court to categorically declare a 5511 Offense a CIMT. When the mere "possibility of a conviction for non-turpitudinous conduct [exists], however remote, [this possibility] is sufficient to avoid removal. See Jean–Louis, 582 F.3d at 471. Here, conduct that could equate that of criminal negligence is certainly outside of the scope of a CIMT – so far out that Respondent's removal is clearly avoided. Id.

Now, let's be clear: this is not the Commonwealth of Pennsylvania's "animal fighting" statute. This is the absolute minimum "criminal" conduct that exists under the Commonwealth of Pennsylvania's animal protection statutory scheme. See generally 18 Pa.C.S. § 5511. This is the "catchall" provision that, pretty much, includes every kind of possible conduct: a dirty house, not walking your dog, not changing the cat litter box, not picking up after your dog in your own back yard, not being able to take your animal to the vet at a certain immediate time because you simply do not have money or because a son or daughter needs to go to a pediatrician first, not getting a dog tag, not taking an animal indoors as soon as it starts raining, not having a leash on an animal,

having one too many cats in a house, a family's dog running loose two, three or four times in a neighborhood because it jumps out every time the front door opens, even though the homeowner was warned once before, or, yes, maybe even for burying a family pet in a backyard. It is possible that a hunter could very well fall within the scope of a 5511 Offense violation, for hunting a day after hunting season ends, or a gentle lady in her older years—maybe 80, 90 or, even 100 years old, who only has a few cats to keep her company as she sits alone in her home and she is unable to clean up after them as quickly as others, or, she keeps them, even though she cannot necessarily care for all of them. One could easily be convicted of a 5511 Offense by leaving their animal unattended in a car (even with a window open) for five minutes. Similarly, a pet owner could be convicted of a 5511 Offense by leaving an animal poolside, unattended. Or, for scalding his or her pet in hot bath water after failing to check the water temperature. The list goes on.

Moreover, a Section 5511 Offense criminalizes not doing something—omissions—, in its penalization of duties of care that may or may not be owed—one's failure to act. It forces one to do something—a father who is working all day can be charged because his minor son did not walk the dog or feed him or let the dog loose and could not catch it. It criminalizes a landlord's not following up on a complaint from a neighbor about a smell of cat urine, only later learning that his tenant had 15 or 20 cats in her home. It also criminalizes "overloading," which has no dictionary definition at all.

A literal read of the Section 5511 Offense makes it even more "all-encompassing." Specifically, the 5511 Offense is not limited in scope – it includes any animal. Yes—any animal with no definition for "animal," and no limitation on "any." This is only supported by the presence of subsection (1)(ii)(A)-(B) under the 5511 Offense which serves as a "sentencing enhancement"

for those convicted of the 5511 Offense for a second, separate time only when the animal involved is a dog or cat. 18 Pa.C.S. § 5511(C)(1)(ii)(A)-(B). There is no definition to "animal" within the 5511 Offense nor in the entire statutory scheme of the Pennsylvania animal rights law. See generally 18 Pa.C.S. § 5511. An animal could include a fly, a rat, a mouse, a bat, an ant – it literally includes any animal. While animals should indeed be protected, it is important to note that a 5511 Offense charge is not a typical criminal statute. Unlike nearly every other criminal offense (especially offenses that could lead to removability), the power to initiate criminal proceedings for a 5511 Offense violation is not limited to legitimate law enforcement agencies; rather, "[a]n agent of any society or association for the prevention of cruelty to animals, incorporated under the laws of the Commonwealth, shall have the same powers to initiate criminal proceedings provided for police officers by the Pennsylvania Rules of Criminal Procedure." 18 Pa.C.S. § 5511(i).

A person need only incorporate a company in Pennsylvania and note on the articles of incorporation that the new company will "prevent cruelty to animals," and the person—however insane he or she is—is provided statutory authority to commence 5511 Offense criminal proceedings. Id. When coupled with the idea that "any" animal is included, it is quite possible for one who uses fertilizers on a lawn, or sprays bug spray to stop further infestation of roaches in a home, or who removes a birds' nest from a clogged gutter, to be charged, if not convicted of a 5511 Offense. A 5511 Offense is a rather disturbing combination of an all-encompassing statute with respect to conduct, or lack thereof, and what that conduct, or lack thereof, could effect, and anyone's apparent unchecked ability to initiate criminal proceedings, as though that person was a police officer. It is possible that one could be charged and convicted for violating the 5511 Offense

for swatting and killing a fly, if that person has a fly-collecting neighbor and recently incorporated an association in the Commonwealth of Pennsylvania with a mission statement that seeks to prevent cruelty to all animals, including flies, ants and yes, roaches.

The 5511 Offense criminalizes a broad swath of conduct. It imposes a duty on animal owners and others to not risk any kind of harm at all. See Hernandez-Cruz., 764 F.3d at 284 (holding that a Pennsylvania reckless endangerment statute involving a minor child is not a CIMT as it involves conduct that is broad in nature, including that which clearly is not turpitudinous). The 5511 Offense does not even require actual harm that would actually injure an animal. Nor does the 5511 Offense state a requirement that an animal or animals be in imminent threat of physical harm. Moreover, as already discussed, the 5511 Offense plainly prohibits omissions of an act. As already detailed, there are countless examples of non-turpitudinous conduct that could be criminalized under the 5511 Offense. While possibly upsetting, these examples do not involve conduct that is "inherently base, vile, or depraved, contrary to the accepted rules of morality." Knapik, 384 F.3d at 89. These examples are not CIMTs.

While "proof of actual application of the statute of conviction to the conduct asserted is unnecessary," when making a CIMT determination, it is instructive to consider cases in the Commonwealth of Pennsylvania where convictions have been upheld in the absence of morally turpitudinous conduct. In Commonwealth v. Tomey, for example, a defendant the Pennsylvania Superior Court upheld a 5511 Offense conviction because the home where the defendant lived with his animals was "unclean and unsanitary." 884 A.2d 291 (Pa. Super. Ct. 2005). In another case, the Supreme Court sustained a 5511 Offense conviction based on a pet owner's attempt to turn her cat into a "gothic cat," by piercing its ears with earrings. Crawford, 24 A. 3d 396 (Pa.

Super. 2011). Again, in Commonwealth v. Shickora, the Superior Court upheld a 5511 Offense conviction of a wheelchair bound, elderly defendant who had been in the hospital for the week prior. No. 1550 MDA 2014. A neighbor called about loud barking and when the local animal protection officer approached, he found seventeen dogs and one cat living in the defendant's home. Id. The home was not clean, smelled of urine and the animals appeared to be flea infested. Id. The animals were fed and not malnourished. Id. The seventeen dogs and one cat were taken and were all treated with bathing, worming for flea infestation and grooming. Id. The 5511 Offense conviction was upheld upon the finding of the owner's failure to recognize her inability to care for all the animals – animals which she loved. Indeed, these actions or inactions may have endangered the animals' welfare. Clearly, however, there is nothing "inherently base, vile, or depraved" having too many pets nor is there anything "inherently base, vile, or depraved" about exposing animals to filthy living conditions. Hernandez-Cruz., 764 F.3d at 281 (finding that "there is nothing inherently base, vile, or depraved about failing to check bath water before placing a child in a tub nor is there anything inherently base, vile, or depraved about exposing children to filthy living conditions," when reviewing a Pennsylvania child reckless endangerment statute, which is strikingly similar to the conduct the 5511 Offense seems to criminalize with respect to animals.).

Because the least culpable conduct necessary to sustain a conviction under a 5511 Offense does not implicate moral turpitude, Respondent's 5511 Offense conviction does not categorically qualify as a CIMT. Given this, the Department failed to meet its burden of removability under Section 237(a)(2)(A)(ii) of the Act, as Respondent has not been convicted of two CIMTs any time after his admission as a Lawful Permanent Resident. 8 U.S.C. § 237(a)(2)(A)(ii).

III. CONCLUSION

For the reasons set forth herein, Respondent, Billy Andres Melo-Santiago, respectfully requests that this Honorable Court enter an Order terminating the instant proceedings.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: _____

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