



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: R [REDACTED] R [REDACTED], G [REDACTED] A [REDACTED]-519

Date of this notice: 3/27/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Malphrus, Garry D.
Creppy, Michael J.
Mullane, Hugh G.

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Falls Church, Virginia 22041

File: [REDACTED] 519 – Baltimore, MD

Date: **MAR 27 2018**

In re: G [REDACTED] L [REDACTED] R [REDACTED] R [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Aaron R. Caruso, Esquire

APPLICATION: Special rule cancellation of removal

The respondent, a native and citizen of El Salvador, appeals from the Immigration Judge's September 20, 2013, decision pretermittting his application for special rule cancellation of removal. Section 203 of the Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 105-100, 111 Stat. 2193, 2196 ("NACARA"), *amended by* Pub. L. No. 105-139, 111 Stat. 2644. The Department of Homeland Security has not filed a brief. The record will be remanded.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii).

This case was last before the Board on October 25, 2011, when we remanded the record to the Immigration Judge for further consideration of whether the respondent's Maryland conviction for common law battery was for an aggravated felony, crime of violence under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F). An aggravated felony conviction would render the respondent ineligible for special rule cancellation of removal under NACARA. 8 C.F.R. § 1240.66(a). In our decision, we stated that Maryland common law battery is not categorically an aggravated felony under section 101(a)(43)(F) of the Act and remanded for application of the modified categorical approach. Subsequent to our remand order, the Supreme Court decided *Descamps v. United States*, 133 S.Ct. 2276 (2013) and held that a statute is divisible, and the modified categorical approach applicable, only where the statute includes multiple, alternative elements of the crime and at least one of the categories into which the statute may be divided constitutes, by its elements, the general federal offense. *See Larios-Reyes v. Lynch*, 843 F.3d 146, 153 (4th Cir. 2016) (quoting *Descamps v. United States*, 133 S.Ct. at 2281, 2285, and *United States v. Cabrera-Umanzor*, 728 F.3d 347, 352 (4th Cir. 2013)). In its decision in *Mathis v. United States*, 136 S.Ct. 2243, 2255 (2016), the Court further distinguished between statutes that have multiple sets of elements from those that have one set of elements but multiple means to satisfy those elements.

Maryland common law battery can be committed in several ways, only some of which include the use, attempted use, or threatened use of force. *See Nicolas v. State*, 44 A.3d 396, 406-07 (Md. 2012) ("Under Maryland common law, an assault of the battery variety is committed by causing offensive contact with another person."); *Epps v. State*, 333 Md. 121, 127 (1993)

(the type of offenses that fall within the ambit of common law battery vary widely from, for example, kissing without consent, touching or tapping, jostling, and throwing water upon another, to a fatal shooting or stabbing of the victim).

As of October 1, 1996, common law battery and other common law offenses were abrogated by statutory offenses in Maryland. *See Robinson v. State*, 728 A.2d 698 (Md. 1999). Since that time, what had been common law battery has become one of three ways that the offense of second-degree assault may be committed in Maryland in violation of section 3-203 of the Maryland Criminal Law. *See Snyder v. State*, 63 A.3d 128, 135 (Md. 2013); *see also* Md. Code Ann., Crim. Law § 3-203(a). This case is controlled by *United States v. Royal*, 731 F.3d 333, 341-42 (4th Cir. 2013), wherein the Fourth Circuit concluded that the battery variety of Maryland second-degree assault, which includes any unlawful touching whether violent or nonviolent and no matter how slight, is categorically not an aggravated felony crime of violence. The court found that “offensive physical contact” and “physical harm” are merely alternative means of satisfying a single element of the offense. Accordingly, the respondent is not, as a result of his 1996 Maryland conviction for common law battery, an alien convicted of an aggravated felony under section 101(a)(43)(F) of the Act. *See Descamps v. United States*, 133 S.Ct. at 2282 (holding that the modified categorical approach may not be applied when the crime of which an individual has been convicted has a single, indivisible set of elements). Thus he is not precluded from establishing eligibility for special rule cancellation of removal under NACARA on this basis.

We will remand the record for consideration of the respondent’s application for special rule cancellation of removal under NACARA. The Immigration Judge may consider any other ground of eligibility. Furthermore, if the respondent is eligible for NACARA special rule cancellation of removal, the Immigration Judge may consider the underlying circumstances of the respondent’s crime in a discretionary determination.

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



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

File: [REDACTED] 519

September 20, 2013

In the Matter of

G [REDACTED] L [REDACTED] R [REDACTED] RA [REDACTED])
RESPONDENT) IN REMOVAL PROCEEDINGS
)
)

CHARGES: Immigration and Nationality Act Section 212(a)(6)(A)(i) as one who is present in the United States without having been admitted or paroled or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATIONS: Special rule cancellation of removal pursuant to NACARA, and in the alternative, voluntary departure.

ON BEHALF OF RESPONDENT: AARON R. CARUSO

ON BEHALF OF DHS: BRIAN M. FISH

POST-REMAND DECISION AND ORDER OF THE IMMIGRATION JUDGE

The matter has been remanded to the Immigration Court from the Board of Immigration Appeals on a decision dated October 25th, 2011. In that decision, the Board of Immigration Appeals undertook a de novo review of a previous decision entered by the Immigration Judge, in which the Immigration Judge found that the conviction for battery under Maryland common law is an offense that is "categorically a crime of violence". The Board has remanded the case with an indication that " the

offense of common-law battery in Maryland is not categorically a crime of violence because it may be committed in several ways, only some of which require the use, attempted use, or threatened use of force" and for that position, the Board cites United States v. Sims, 441 F.3d 313, 315 (4th Cir. 2006), citing the United States v. Kirksey, 138 F.3d 120 (4th Cir. 1998).

In the Kirksey decision, the United States Court of Appeal for the Fourth Circuit noted that in Maryland battery includes kissing without consent, touching or tapping, jostling or throwing water upon an individual, and the Board set forth in its remand of October 25, 2011, that "after the Immigration Judge decided this case we held that the use of physical force as required by 18 USC Section 16(a) means pursuant to Johnson v. United States, 130 Supreme Court 1265 (2010), the use of violent force". The Board also cited its decision in Matter of Velasquez, 25 I&N Dec. 278 (BIA 2010) to show its ascent to the decision of the United States Supreme Court in Johnson v. United States, supra.

It is noted as well in the Board's remand that because at least one of the ways that a battery can be consummated in the state of Maryland involves the use, attempted use, or threatened use of force against another, it is necessary to engage in the "modified categorical approach to determine whether the respondent's offense constitutes a crime of violence".

At today's date, the respondent, through counsel, argues that a more recent decision by the United States Supreme Court in Descamps v. U.S., 133 SCT 2276 (SCT 2013), and U.S. v. Cabrera Umanzor, decided by the Fourth Circuit on August 26, 2013, holdings make it clear that the modified categorical approach does not apply in the instant case primarily because in the instant case there is a single indivisible set of elements related to the offense of common-law battery in the state of Maryland.

For its part, the Department of Homeland Security asserts that the Board remand, for one, requires the Court to undertake the modified categorical approach and that two, the cases cited by the respondent instantly did not apply in the context of the facts and circumstances before the Court at hand.

A crime of violence is defined in Section 18 United States Code Section 16; unfortunately a term of imprisonment of one year is imposed as it is required to find an individual has been convicted of an aggravated felony under the Immigration and Nationality Act. The crime of violence is defined as "any offense that has an element the use or attempted use or threatened use of physical force against the person or property of another, or any other offense that is a felony and that by its nature involves a substantial risk of that physical force against the person or property of another may be used in the course of committing the offense". The United States Supreme Court has decided that although a physical force would encompass any slight touching under a common law, the phrase physical force under a statutory definition means a violent force; that is, "force capable of causing physical pain or injury to another person". See Johnson v. United States, 559 US 133 (2010). Thus, a conviction for a crime of violence under the state statute requires a determination of whether or not the alien was convicted of an offense that has an element of violent force.

Under the categorical approach, a Court would look only to the statutory language of the offense for which the defendant was convicted. See United States v. Gomez, 690 F.3d (4th Cir. 2012), for example, in determining whether a crime is a violent felony. The Courts consider the offense generically; in other words, the Court will examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion. Therefore, the Court would not look to the record of conviction to reach that determination.

A Court will digress or vary from the categorical approach and adopt what is referred to as a modified categorical approach in limited circumstances; that is, where there are different types of behavior that might satisfy an element of the offense and its proscribed behaviors constitute at least two separate elements. See, for example, United States v. Rivers, 595 F.3d 558 (4th Cir. 2010).

Under the modified categorical approach, Courts generally will not consider the particular facts disclosed by the record of conviction. See Taylor v. United States, 195 US 575 (1990). Rather, the Courts will examine only the limited set of documents known as Shepard-approved type documents which are the charging document, a written plea agreement, a transcript of a plea colloquy, and any explicit findings by the trial Judge through which the defendant assented. See Shepard v. United States, 544 US 13 (2005).

As noted by the Board of Immigration Appeals in its remand, the Court would be incorrect in concluding that the offense of battery in the state of Maryland is categorically a crime of violence, thus the Court will retreat from any finding that battery under the statute at issue is categorically a crime of violence. Thus, consistent with the spirit of the Board's remand, this Court takes the modified categorical approach to determine whether or not the respondent before the Court standing convicted of common-law battery in the state of Maryland has been convicted of a crime of violence and hence an aggravated felony for Immigration purposes.

As noted by the Court, in taking the modified categorical approach in these proceedings, there are certain documents the Court can look to and certain documents the Court cannot look to in keeping with the spirit of the United States Court of Appeals for the Fourth Circuit in Shepard, supra. In the instant case, there is a plea colloquy via the transcript of proceedings set forth at Exhibit R-1-L. In that transcript, attached

thereto, there is a description of the nature of the offense. It was pointed out in the transcript in the course of the plea to which the respondent acknowledges it was a battery, that it was "a very serious event where a weapon or a tool actually was used to beat the victim in the head and the face". The information in the plea transcript establishes as well that the victim sustained eye damage as is reflected in the victim impact statement as a part of the record of conviction. The victim of the assault required medical treatment for a very serious assault with a very dangerous weapon. Thus, taking the modified categorical approach in these proceedings, this Court will reach the determination today that the offense for which the respondent was convicted was a crime of violence in that it included the element or use or attempted use or threatened use of physical force against another person and that that was indeed in violent force under the circumstances which would satisfy the definition of a crime of violence as set forth in the United States Supreme Court decision in Johnson v. United States, 559 US 133 (2010).

The cases cited by the respondent's counsel today are not decided in the context of an interpretation of the common-law battery statute which is before the Court today. Thus, the Court is not persuaded that the decision in Descamps v. U.S., 133 SCT 2276 (2013) or U.S. v. Cabrera Umanzor, decided by the United States Court of Appeals for the Fourth Circuit on August 2013, are dispositive of the matter before the Court. Indeed, as indicated by the Board, this Court is required to take the modified categorical approach; I have done so and in that determination, I reached the conclusion that the respondent has indeed been convicted of an aggravated felony. As noted previously by the Court, an individual convicted of an aggravated felony is statutorily ineligible for special-rule cancellation of removal pursuant to NACARA, and therefore the respondent's request for relief will be denied and the respondent will be ordered

removed from the United States to El Salvador as charged.

ORDER

IT IS HEREBY ORDERED that the respondent's application for special rule cancellation of removal pursuant to NACARA be, and the same is hereby, denied;

IT IS FURTHER ORDERED that the respondent be removed from the United States to El Salvador as charged.

September 20, 2013

Please see the next page for electronic

signature

PHILLIP T. WILLIAMS
Immigration Judge

//s//

Immigration Judge PHILLIP T. WILLIAMS

williaph on January 30, 2014 at 5:32 PM GMT