U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Moris, Halim
Moris and O'Shea, LLC
50 Congress Street, Suite # 320
Boston, MA 02109

DHS/ICE Office of Chief Counsel - BOS
P.O. Box 8728
Boston, MA 02114

Name: N[redacted], B[redacted] V[redacted]

A [redacted]060

Date of this notice: 10/6/2017

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:
Pauley, Roger
Cole, Patricia A.
Greer, Anne J.

RusselH
Userteam: Docket

File: [redacted] 060 – Boston, MA

Date: OCT - 6 2017

In re: B[redacted] V[redacted] N[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Halim Moris, Esquire

ON BEHALF OF DHS: Mary Kelley
Assistant Chief Counsel

APPLICATION: Termination; cancellation of removal

The respondent, a native and citizen of Vietnam and a lawful permanent resident of the United States, appeals from an Immigration Judge's March 17, 2015, decision ordering him removed from the United States. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained and the removal proceedings will be terminated.

In December 2000, the respondent was convicted in Massachusetts of assault and battery upon a police officer in violation of MASS. GEN. LAWS ANN. ch. 265, § 13D (hereafter "section 13D") (Exhs. 5, 6). The sole issue on appeal is whether that conviction renders the respondent removable from the United States as an alien convicted of a crime involving moral turpitude ("CIMT"). *See* section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012). Upon de novo review, *see* 8 C.F.R. § 1003.1(d)(3)(ii), we conclude that it does not.

To determine whether the respondent's offense of conviction is a CIMT, we employ the "'categorical approach' by 'comparing the elements of the state offense to those of the generic [definition of a crime involving moral turpitude] to determine if there is a categorical match.'" *See Matter of J-G-D-F-*, 27 I&N Dec. 82, 83 (BIA 2017) (citation omitted); *Matter of Silva-Trevino*, 26 I&N Dec. 826, 831 (BIA 2016); *Coelho v. Sessions*, 864 F.3d 56, 61 & n.1 (1st Cir. 2017). An offense involves moral turpitude if its elements require reprehensible conduct committed with a corrupt mental state. *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1, 3 (BIA 2017) (*citing Matter of Silva-Trevino*, 26 I&N Dec. at 834). Conduct is "reprehensible" if it 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," while a "culpable" mental state is one which requires deliberation or consciousness, such as intent, knowledge, willfulness, or recklessness. *Id.*

In 2000, section 13D provided as follows, in pertinent part:

> Whoever commits an assault and battery upon any public employee when such person is engaged in the performance of his duties at the time of such assault and battery, shall be punished by imprisonment for not less than ninety days nor more than two and one-half years in a house of correction or by a fine of not less than five hundred nor more than five thousand dollars.

MASS. GEN. LAWS ANN. ch. 265, § 13D (West 2000). The offense of "assault and battery" is not statutorily defined in Massachusetts; its elements are derived from the common law. *Commonwealth v. Eberhart*, 965 N.E.2d 791, 798 (Mass. 2012) (citations omitted). The United States Court of Appeals for the First Circuit, in whose jurisdiction this matter arises, recently explained the elements of Massachusetts assault and battery as follows:

> Under the common law [of Massachusetts], there are two theories of assault and battery: intentional battery and reckless battery. [*Eberhart*, 965 N.E.2d] at 798 n.13 (citing *Commonwealth v. Porro*, ... 939 N.E.2d 1157, 1162 (2010)). Intentional assault and battery includes both harmful battery and offensive battery. Harmful battery is defined as "[a]ny touching 'with such violence that bodily harm is likely to result.'" *Eberhart*, 965 N.E.2d at 798 (quoting *Commonwealth v. Burke*, ... 457 N.E.2d 622, 624 (1983)). Offensive battery is defined as any unconsented touching that constitutes an "affront to the victim's personal integrity." *Id.* (quoting *Burke*, 457 N.E.2d at 624). In contrast, reckless battery involves the "wilful, wanton and reckless act which results in personal injury to another." *Id.* (quoting *Commonwealth v. Welch*, 450 N.E.2d 1100, 1102 (Mass. App. Ct. 1983)).

United States v. Faust, 853 F.3d 39, 55 (1st Cir. 2017), *reh'g denied*, No. 14-2292, 2017 WL 3045957 (1st Cir. July 19, 2017); *see also Commonwealth v. Beal*, 52 N.E.3d 998, 1009 (Mass. 2016) ("assault and battery upon a public employee can be committed through a harmful battery, a reckless battery, or an offensive battery.").

In addition to an "assault and battery," section 13D requires proof beyond a reasonable doubt that the offense have been committed against a victim who was then engaged in the performance of his or her duties as a "public employee"—a class of persons which includes (but is not limited to) police officers. *Commonwealth v. Beal*, 52 N.E.3d at 1009. Moreover, the Government must prove that the accused *knew* the victim to be a police officer at the time of the offense. *United States v. Santos*, 363 F.3d 19, 23 (1st Cir. 2004) (citing cases), *cert. denied*, 544 U.S. 92 (2005)).

Comparing section 13D to the CIMT definition, we ask first whether its elements require the commission of "reprehensible conduct." Over the years the Board and the Federal courts have established some ground rules for determining when an offense involving forcible interference with a police officer is "reprehensible" enough to qualify as a CIMT. The baseline rule is that knowingly interfering with a police officer by committing a simple assault and battery—i.e., an offensive but non-injurious "touching" committed with general intent—is *not* a CIMT. *See Matter of B-*, 5 I&N Dec. 538 (BIA 1953), *modified in part by Matter of Danesh*, 19 I&N Dec. 669, 672-73 (BIA 1988); *Garcia-Meza v. Mukasey*, 516 F.3d 535, 537 (7th Cir. 2008); *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758 (2d Cir. 1933); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465, 466 (D. Mass. 1926).

When an alien is convicted of interfering with a law enforcement officer under a statute that includes elements more serious than those associated with a simple assault or battery, however, the moral turpitude inquiry is less straightforward and requires a relative weighing of the gravity

of the danger contemplated by the offense as well as the offender's degree of mental culpability. Thus, we have held that knowingly interfering with a police officer *does* involve moral turpitude if the statute of conviction requires either: (1) injury to the officer, *see Matter of Danesh*, 19 I&N Dec. at 670-73,[1] or (2) use of a deadly weapon, *see Matter of Logan*, 17 I&N Dec. 367, 368-69 (BIA 1980). Conversely, we have held that infliction of injury upon an officer does not involve moral turpitude if the statute defining the offense does not require knowledge on the part of the offender that the victim was an officer. *See Matter of O-*, 4 I&N Dec. 301, 311 (BIA 1951).[2] With this background in mind, we return to the elements of the respondent's offense.

As noted previously, "assault and battery upon a public employee [in Massachusetts] can be committed through a harmful battery, a reckless battery, or an offensive battery." *Commonwealth v. Beal*, 52 N.E.3d at 1009. Under *Matter of B-*, an "offensive battery" upon a police officer *is not* a CIMT, even if committed intentionally. Under *Matter of Danesh*, however, a "harmful battery" upon a known police officer *is* a CIMT. We have never squarely decided whether moral turpitude inheres in a "reckless assault" that causes bodily injury to a known police officer; thus far, we have only found reckless assault to be a CIMT where the offense involved either the use of a deadly weapon or the use of force capable of inflicting *serious* bodily injury upon the victim. *Matter of Wu*, 27 I&N Dec. 8, 15 (BIA 2017); *Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996); *Matter of Medina*, 15 I&N Dec. 611, 612-13 (BIA 1976). We find it unnecessary to conclusively resolve that question here, however—the fact that section 13D covers offensive but non-injurious batteries upon police officers is sufficient, without more, to demonstrate that it is "categorically overbroad" vis-à-vis the CIMT definition.

Further, even if we assume that section 13D is a "divisible" statute with respect to the CIMT definition, so as to warrant consideration of the conviction record under the modified categorical approach, *see Matter of Silva-Trevino*, 26 I&N Dec. at 833, the admissible documents contained in the present record do not meaningfully narrow down the elements of the respondent's offense of conviction. The criminal complaint charges that the respondent "did assault and beat" a police officer (Exh. 5, tab A, at 3), but it neither specifies the mental state with which that act was committed nor clarifies whether the battery was of the "harmful" or "offensive" variety. And while the record does contain a police report which describes the respondent's offense conduct

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[1] Several federal courts have taken a slightly different tack, concluding that the crucial question for moral turpitude purposes is not whether the officer was injured in fact, but rather whether the offender *intended* to injure the officer by violence. *See Cano v. U.S. Atty. Gen.*, 709 F.3d 1052, 1054-55 (11th Cir. 2013) (Florida offense of resisting an officer with violence held a CIMT, even if the officer is uninjured, because the statute requires use or threatened use of violent physical force against the officer); *Partyka v. U.S. Atty. Gen.*, 417 F.3d 408, 413-15 (3d Cir. 2005) (New Jersey offense of aggravated assault of law enforcement officer held not a CIMT, despite requiring injury to the officer, because such injury can be inflicted unintentionally).

[2] We emphasize, however, that an assault statute requiring both the specific intent to injure and the actual infliction of bodily harm upon a victim defines a categorical CIMT, regardless of whether the victim was a police officer. *See Matter of Solon*, 24 I&N Dec. 239 (BIA 2007).

(Exh. 5, tab B, at 11), that document cannot be considered under the modified categorical approach. *Shepard v. United States*, 544 U.S. 13, 21-26 (2005).[3]

In conclusion, section 13D is a categorically overbroad statute vis-à-vis the CIMT definition. Further, even if we assume the statute's divisibility, application of the modified categorical approach does not help to narrow down the elements of the respondent's offense of conviction in a manner that would suffice to carry the DHS's burden of proving his removability by clear and convincing evidence. In so holding, we do not minimize the seriousness of the respondent's crime; indeed, we have no doubt that many individual violations of section 13D involve moral turpitude. Under the categorical approach, however, we are concerned only with the minimum conduct that has a realistic probability of being prosecuted under the statute's elements. Those elements do not define a CIMT, and thus we will sustain the respondent's appeal, vacate the Immigration Judge's removal order, and terminate the proceedings.

ORDER: The appeal is sustained and the removal proceedings are terminated.

FOR THE BOARD

[3] The Immigration Judge, relying on the law then in effect, properly concluded that she was authorized to consider this police report in sustaining the respondent's CIMT charge (IJ at 10-11). *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 699-702 (A.G. 2008). Under current law, however, such documents may no longer be considered in removal proceedings.