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NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA

In the Matter of

[REDACTED]

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IN REMOVAL PROCEEDINGS
File No: A [REDACTED]

RESPONDENT'S APPEAL BRIEF

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I. INTRODUCTION

██████████ submits this brief in response to the Department of Homeland Security's argument that the Immigration Judge erred when he found that Mr. ██████ conviction for Assault III is not a crime involving moral turpitude ("CIMT") and he terminated removal proceedings.

II. ISSUE PRESENTED

Is a conviction under Oregon Rev. Statute § 163.165 (1)(e) a CIMT since it is a general intent crime that requires no specific intent to cause physical injury, does not require the victim sustain serious physical injury and lacks an aggravating factor that renders the offense reprehensible?

III. STANDARD OF REVIEW

The Board of Immigration Appeals reviews finding of fact, including credibility findings, to determine whether the findings were clearly erroneous. 8 C.F.R § 1003.1(d)(3)(i). Questions of law, discretion, judgment and all other issues are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

IV. SUMMARY OF THE ARGUMENT

Mr. ██████ is not subject to removal based on the Department of Homeland Security's charge that he committed a crime involving moral turpitude within 5 years from the date of his admission for which a sentence of one year or more can be

sentenced. The statute under which Respondent was convicted, Oregon Rev. Statute § 163.165 (1)(e), is not a CIMT.

V. STATEMENT OF THE CASE

Mr. [REDACTED] is a citizen of Mexico and has been a lawful permanent resident of the United States since November 7, 2013, however he has lived in the United States since he was a child. On June 9, 2015 he was convicted in Multnomah County, Oregon of Felony Assault 3. The factual recitation in the plea petition in the Assault III record of conviction states “I plead Guilty because, in Multnomah County, Oregon, I did the following: on or about 2/23/2015 I knowingly, while being aided by [REDACTED] [REDACTED] and other people actually present, caused physical injury to [REDACTED].” Mr. [REDACTED] was sentenced to 36 months probation, \$730 in restitution, and court fees.

The Department of Homeland Security served Mr. [REDACTED] with a Notice to Appear on September 1, 2015 and charged him as removable based on INA § 237(a)(2)(A)(i) “in that you have been convicted of a crime involving moral turpitude committed within five years after admission for which a sentence of one year or longer may be imposed.” The Respondent contested the charge and both sides submitted briefs to the Immigration Judge in Portland, Oregon. In a decision dated May 3, 2017 the Immigration Judge did not sustain the charge and further ordered that proceedings be terminated proceedings. The government filed this appeal with the Board of Immigration Appeals.

VI. ARGUMENT - ORS 163.165(1)(e) Assault in the Third Degree is not CIMT under the modified categorical approach.

In making the determination whether a crime is a CIMT, the Court should employ the categorical approach by comparing the elements of the state statute with the generic definition of a crime involving moral turpitude. *Matter of Jing Wu* 27 I&N Dec. 8 (BIA 2017). A crime involving moral turpitude requires two essential elements: reprehensible conduct and a culpable mental state. *Matter of Silva-Trevino*, 26 I&N Dec. 826, 834 (BIA 2016). The Immigration Judge correctly held that Oregon Assault III is not categorically a CIMT because not all sections of the statute describe acts that constitute a CIMT. Section (e) is not a CIMT because it is a general intent crime resulting in physical injury without a severe aggravating factor.

Oregon Revised Statute 163.165 (Assault III) provides:

(1) A person commits the crime of assault in the third degree if the person:

(a) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon;

(b) Recklessly causes serious physical injury to another under circumstances manifesting extreme indifference to the value of human life;

(c) Recklessly causes physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life;

(d) Intentionally, knowingly or recklessly causes, by means other than a motor vehicle, physical injury to the operator of a public transit vehicle while the operator is in control of or operating the vehicle. As used in this paragraph, "public transit vehicle" has the meaning given that term in ORS 166.116 (**Interfering with public transportation**);

(e) While being aided by another person actually present, intentionally or knowingly causes physical injury to another;

(f) While committed to a youth correction facility,

intentionally or knowingly causes physical injury to another knowing the other person is a staff member while the other person is acting in the course of official duty;

(g) Intentionally, knowingly or recklessly causes physical injury to an emergency medical services provider, as defined in ORS **682.025(Definitions)**, while the emergency medical services provider is performing official duties;

(h) Being at least 18 years of age, intentionally or knowingly causes physical injury to a child 10 years of age or younger;
or

(i) Intentionally, knowingly or recklessly causes, by means other than a motor vehicle, physical injury to the operator of a taxi while the operator is in control of the taxi.

(2)(a) Assault in the third degree is a Class C felony.

(b) Notwithstanding paragraph (a) of this subsection, assault in the third degree under subsection (1)(a) or (b) of this section is a Class B felony if:

(A) The assault resulted from the operation of a motor vehicle; **and**

(B) The defendant was the driver of the motor vehicle and was driving while under the influence of intoxicants.

(3) As used in this section:

(a) "Staff member" means:

(A) A corrections officer as defined in ORS **181A.355 (Definitions for ORS 181A.355 to 181A.670)**, a youth correction officer, a youth correction facility staff member, a Department of Corrections or Oregon Youth Authority staff member or a person employed pursuant to a contract with the department or youth authority to work with, or in the vicinity of, inmates, youth or youth offenders; **and**

(B) A volunteer authorized by the department, youth authority or other entity in charge of a corrections facility to work with, or in the vicinity of, inmates, youth or youth offenders.

(b) "Youth correction facility" has the meaning given that

term in ORS 162. 135.

Oregon Assault III is not categorically a CIMT, and the Immigration Judge found that the statute is divisible. (The government has not argued the Immigration Judge erred with respect to this finding and Respondent agrees.) Therefore, the Immigration Judge was permitted to look at record of conviction to determine whether the section of law for which Respondent, was convicted, section (e), involves moral turpitude.¹

A. The record of conviction indicates that Respondent pled guilty to committing an act “knowingly”, which is a general intent *mens rea*.

An assault committed under Oregon’s mental state of knowingly is a general intent crime. In its brief the Department of Homeland Security argues “the evil nature of the mental state is reflected in the perpetrator’s knowledge or the assaultive nature of the conduct, as well as the knowledge that the conduct in fact caused the victim physical injury.” This reasoning goes against well settled precedent that if an actor acts with specific intent to cause physical injury he has committed a CIMT. Intentional conduct is a one of the elements of a CIMT. In Oregon knowingly does not refer to any intention to cause physical injury.

¹ In its Appeal Brief the Department of Homeland Security presents an argument that the elements based categorical approach set for in *Taylor v. United States* 495 U.S. 575 (1990) should not be used in analyzing whether a state conviction is a CIMT. The Department urges the Board to hold that the record of conviction should be consulted at the onset of the court’s CIMT analysis and disregard the categorical and modified categorical approach. “An ‘elements-only inquiry,’ *Mathis*, 136 at 2252-53, cannot resolve whether an offense is a CIMT, and the Board is not precluded from taking the modest and previously unremarkable step of consulting the record of conviction.” DHS brief at 11. The Respondent’s position is that the Board should continue to employ the traditional categorical approach and only consult the record of conviction when the statute is divisible and as a second step in the modified categorical approach after further review of the elements of the divisible statute. As recently as April 13, 2017 while analyzing whether California assault statute is a CIMT, the Board stated “[w]e begin our analysis by employing the categorical approach in which we examine whether the elements defining section 245(a)(1) ‘fit[] within the generic definition of a crime involving moral turpitude.” *Matter of Jing Wu* 27 I&N Dec.8, 10 (BIA 2017).

ORS 161.085 provides the definitions with respect to culpability.

(7) Knowingly or with knowledge, when used with respect to conduct or to a circumstance described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists.

The Oregon Supreme Court, in examining the mental state of knowingly, as used in Oregon Assault III Statute, held that the statutory definition of “knowingly is restricted to awareness of conduct; it does not define awareness as to result”. *State v Barnes*, 329 Or. 327 (Or. 1999). The court concluded that the trial court did not err in refusing to allow the defendant’s jury instruction that would have required the state to prove the defendant acted knowing his actions would result in serious physical injury to the victim. The Court explained “[t]hus, unlike the definitions for ‘intentionally’, ‘recklessly’ and ‘criminally negligent’, the definition of ‘knowingly addresses only ‘conduct’ and ‘circumstances’ and does not also include a reference to ‘result.’ Even though the drafters of the 1971 Criminal Code enacted several ‘knowingly cause’ assault provisions, they specifically omitted from the definition of ‘knowingly’ the wording that would have prescribed a knowledge requirement for the result element of those offenses.” *Id.* at 337.

The Court in *Barnes* went on to discuss how Oregon’s definition of knowingly deviates from the Model Penal Code’s definition, because it omits any reference to a result. The MPC defines knowingly as

“A person acts knowingly with respect to a material element of an offense when:
i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of the nature or that such circumstances exist; and

- ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.”

Model Penal Code General Requirements of Culpability § 2.02(2)(b).

Therefore, while in some states, where culpability definitions track the MPC, the *mens rea* of knowing is analogous to intentional or willful, because the state must prove that a person acted with awareness that his conduct would cause a particular result, this is not the case in Oregon. Without having to prove that a person acted with the awareness to produce a particular result, but only with regard to being aware of one’s own conduct, an assault conviction reached under Oregon’s knowingly *mens rea* is in fact a general intent crime and not necessarily a CIMT.

A general intent crime is defined as “actual intent to perform some act, but without a wish for the consequences that result from that act.” *see* Legal Information Institute, Cornell University School of Law² While a specific intent crime is defined as “actual intent to perform some act, along with a wish for the consequences that result from that act.” *Id.* Assaults that only require general intent are usually not considered to be CIMT. *Ceron v. Holder* 747 F.3d 773, 783 (9th Cir. 2014) *citing In re Solon* 24 I&N Dec. at 241. “Offenses characterized as ‘simple’ assaults are generally not considered to be crimes involving moral turpitude.” *Id.* *citing Matter of Perez-Contreras* 20 I&N Dec. 949, 950 (BIA 1999); *Matter of Short*, 20 I&N Dec. 236, 139 (BIA 1989). “This is so because they require general intent only and may be committed without the evil intent, depraved or vicious motive or corrupt mind associated with moral turpitude.” *In re Solon* at 241.

² Accessed at: www.law.cornell.edu

B. The assailant need not cause serious physical injury to the victim in order to prove criminal liability.

Both the Ninth Circuit and the Board of Immigration Appeals have held that as the level of *mens rea* decreases from intentional to reckless, in order to find that an assault is a CIMT the level of physical injury to the victim must increase or there must be some other aggravating factor, such as the use of a deadly or dangerous weapon or some special relationship between the actor and the victim must exist.

The Ninth Circuit has held

“[A] finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm. *Ceron v. Holder*, 747 F.3d 773, 783 (9th Cir. 2014) (en banc) (quoting *In re Solon*, 24 I. & N. Dec. 239, 242 (BIA 2007)).

The Respondent’s state statute of conviction section (e) includes the element that the victim sustain physical injury. ORS 161.015 defines the two types of injuries found in Assault III statute; ORS 161.015 (7) "Physical injury" means impairment of physical condition or substantial pain, and (8) "Serious physical injury" means physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ. For a person to be guilty of violating ORS 163.165(e) the

jury must only find the victim suffered physical injury. The Immigration Judge rightly found that the physical injury required by the Oregon statute is not meaningfully greater than an offensive touching. IJ decision at p. 5. The Department of Homeland Security argues that because under Oregon law there is a difference between physical injury and an offensive touching, the former rises to the level of harm required to make Respondent's conviction a CIMT. However, the Immigration Judge explained in his decision that the element of proving physical injury can be "satisfied by a 'a headache or pain' that lasted 'an hour or so'. IJ decision at p. 5 quoting *State ex rel Juv. Dept. v. Greenwood*, 813 P.2d 58, 61 (or App. 1991). The categorical approach dictates that the Board must focus on the minimum conduct that has a realistic probability of being prosecuted under those elements. *Jing Wu* supra at 10 citing *Hernandez-Gonzalez v. Holder* 778 F.3d 793, 801 (9th Cir. 2015). Since Assault III is a general intent crime the level of physical injury must be meaningful in order for the court to find that the statute is a CIMT. The government cites several Oregon cases that provide examples of the type of harm sufficient to constitute physical injury. DHS brief at p. 18. The Board should not be persuaded. The Department would have the Court conflate physical injury with the "serious physical injury" that requires meaningful and protracted injury or impairment. The Board must rely on the minimum conduct test described above.

C. Being aided by another person actually present is not a severe enough aggravating factor to make Respondent's conviction a CIMT

Mr. [REDACTED] argues that committing an assault while being aided by another, as is broadly described under Oregon law, is not a serious enough aggravating factor that would turn a simple assault into a CIMT because the person doing the "aiding" can

be far removed from the actual assault. The fact that another person is nearby or offering verbal encouragement without engaging in actually touching the victim is not enough to make an assault with no intentional act “inherently base, vile or depraved”. The Oregon Court of Appeals found that a person waiting with a get-away car 25 feet away is enough to support a conviction under Assault III (e). “*State v. Jackson*, 212 Or. App. 51, *rev. den.*, 343 Or. 206, 166 P.3d 535 (2007)” *State v. Hessedahl*, 269 P.3d 90, 290 (Or. Ct. App. 2011). Case law with respect to what may constitute an aggravating factor lists such elements as the use of a deadly or dangerous weapon, the existence of a special relationship between the victim and the defendant, such as parent or child, or if serious physical injury is required for a conviction. *In re Solon* at 245. However, the presence of an aggravating factor does not necessarily make an assault a CIMT. *Ceron v. Holder* supra at 784 citing *In re Sejas*, 24 I.&N. Dec. 236, 238 (BIA 2007).

Mr. ██████████'s conviction is not a CIMT. He therefore asks this Court to dismiss the Department of Homeland Security's appeal

Respectfully submitted on this the 15th day of November, 2017

Rachel Game, Attorney for the Respondent

CERTIFICATE OF SERVICE

The undersigned hereby declares as follow:

I am a citizen of the United States over the age of 18 years and not a party to the within-entitled action. I am the attorney for the Respondent with my business address at 1130 SW Morrison St. Suite 604, Portland, OR 97205

I served a true and correct copy of the foregoing document by sending a true copy to him/her by regular mail, postage prepaid to the following address:

Department of Homeland Security
Immigration and Customs Enforcement
Office of the Chief Counsel
1220 SW 3rd ave Suite 300
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Dated November 15, 2017

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