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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JORGE ARTURO TELLES-CARRANZA,

Petitioner,

v.

MERRICK B. GARLAND, United States Attorney General,

Respondent.

No. 22-9544
(Petition for Review)

ORDER AND JUDGMENT[*]

Before **HARTZ**, **MATHESON**, and **McHUGH**, Circuit Judges.

Jorge Arturo Telles-Carranza applied for cancellation of removal after the Department of Homeland Security ("DHS") placed him in removal proceedings. The Immigration Judge ("IJ") pretermitted Mr. Telles-Carranza's application, determining Mr. Telles-Carranza's 2012 conviction for felony menacing, under Colo. Rev. Stat. § 18-3-206(1)(a)–(b) (2000),[1] is a conviction for a crime involving moral turpitude

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[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Colo. Rev. Stat. § 18-3-206(1)(a)–(b) was amended after Mr. Telles-Carranza's conviction, in 2022. *See* 2021 Colo. Legis. Serv. Ch. 462 (S.B. 21-271) (West). All references to the statute in this opinion refer to the version in

("CIMT"). As a result, Mr. Telles-Carranza was ineligible for cancellation of removal. The Board of Immigration Appeals ("BIA" or "the Board") agreed and affirmed the IJ's decision in a non-precedential decision. Mr. Telles-Carranza now petitions this court for review of the BIA's decision, arguing felony menacing is not categorically a CIMT. We reject Mr. Telles-Carranza's argument and deny his petition.

I. BACKGROUND

After reciting the facts, we review the legal principles at issue and the procedural history of the case.

A. Factual Background

Mr. Telles-Carranza is a native and citizen of Mexico. He entered the United States through Texas around July 2006, without being admitted or paroled. In May 2012, DHS served Mr. Telles-Carranza with a putative Notice to Appear ("NTA"), charging him as removable pursuant to 8 U.S.C. § 1182(a)(6)(A)(i), for being "an alien present in the United States without being admitted or paroled." A.R. Vol. II at 486. While in removal proceedings, in October 2012, Mr. Telles-Carranza was convicted of felony menacing under Colo. Rev. Stat. § 18-3-206(1)(a)–(b). An individual is guilty of felony menacing under § 18-3-206(1)(a)–(b) if he "by any threat or physical action . . . knowingly places or attempts to place another person in fear of imminent serious bodily injury" "[b]y the use of a deadly weapon or any

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effect at the time of Mr. Telles-Carranza's conviction in 2012, Colo. Rev. Stat. § 18-3-206(1)(a)–(b) (2000).

article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon; or . . . [b]y the person representing verbally or otherwise that he . . . is armed with a deadly weapon."

B. Legal Background: Cancellation of Removal

"Under [8 U.S.C.] § 1229b(a), cancellation of removal is a discretionary form of relief that allows the Attorney General to cancel the removal order of a removable alien." *Torres de la Cruz v. Maurer*, 483 F.3d 1013, 1019 (10th Cir. 2007). To be eligible for cancellation of removal, an individual must not have been convicted of certain criminal offenses, including any CIMT. 8 U.S.C. § 1229b(b)(1)(C); *see also Garcia v. Holder*, 584 F.3d 1288, 1289 (10th Cir. 2009) ("An alien convicted of a CIMT is . . . not eligible for cancellation of removal.").[2] The Immigration and Nationality Act ("INA") does not define a "crime involving moral turpitude," so "its contours have been shaped through interpretation and application by the Attorney General, the [BIA], and federal courts." *Flores-Molina v. Sessions*, 850 F.3d 1150, 1159 (10th Cir. 2017). "[W]e have characterized [CIMT] as perhaps the quintessential example of an ambiguous phrase." *Id.* at 1157 (internal quotation

[2] The other three statutory requirements, not at issue in this petition, are: (1) ten years' physical presence in the United States prior to application; (2) "good moral character" during these ten years; and (3) "establish[ing] that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(C). In addition to meeting these four eligibility requirements, "an eligible noncitizen must persuade the immigration judge that he merits a favorable exercise of discretion." *Patel v. Garland*, 142 S. Ct. 1614, 1619 (2022).

marks omitted). "[M]oral turpitude refers to conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between man and man, either one's fellow man or society in general." *Rodriguez-Heredia v. Holder*, 639 F.3d 1264, 1268 (10th Cir. 2011) (internal quotation marks omitted). "For an offense to involve moral turpitude, it must require a reprehensible or despicable act and necessarily involve an evil intent or maliciousness in carrying out that reprehensible act." *Flores-Molina*, 850 F.3d at 1159 (internal quotation marks and brackets omitted). "A crime involving moral turpitude 'requires two essential elements: reprehensible conduct and a culpable mental state.'" *Matter of J-G-P-*, 27 I&N Dec. 642, 644 (BIA 2019) (quoting *Matter of Silva-Trevino*, 26 I&N Dec. 826, 834 (BIA 2016)). In addition to these broader definitions, "the BIA and courts have espoused what might be characterized as subsidiary definitions and rules applicable to narrower classes of conduct." *Flores-Molina*, 850 F.3d at 1159.

"To determine whether a state conviction is a crime involving moral turpitude, we ordinarily employ the categorical approach." *Rodriguez-Heredia*, 639 F.3d at 1267. "Under the categorical approach, this court looks only to the statutory definition of the offense and not to the underlying facts of the conviction to determine whether the offense involves moral turpitude." *Efagene v. Holder*, 642 F.3d 918, 921 (10th Cir. 2011). When a statute "sets out a single (or 'indivisible') set of elements to define a single crime," *Mathis v. United States*, 579 U.S. 500, 504–05 (2016), to determine whether that crime "is categorically a CIMT, we compare the statutory definition of that offense with the generic definition of CIMT and consider

whether the minimum conduct that would satisfy the former would necessarily also satisfy the latter." *Flores-Molina*, 850 F.3d at 1158 (internal quotation marks omitted). However, if the statute "list[s] elements in the alternative, and thereby define[s] multiple crimes," *Mathis*, 579 U.S. at 505, we consider the statute to be "divisible and apply the *modified*-categorical approach, in which the categorical approach is applied separately to the relevant sub-crime within the statute," *United States v. Cantu*, 964 F.3d 924, 927 (10th Cir. 2020). To determine "which of the alternative elements listed . . . was integral to the defendant's conviction," the modified-categorical approach allows the "sentencing court [to] look[] to a limited class of documents." *Mathis*, 579 U.S. at 505 (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)).

C. Procedural Background

1. Proceedings Before IJ

Mr. Telles-Carranza admitted to being removable as charged in his NTA and sought relief by applying for cancellation of removal pursuant to 8 U.S.C. § 1229b(a).[3] In the alternative, he applied for voluntary departure. In support of his application for cancellation of removal, Mr. Telles-Carranza submitted a criminal

[3] Mr. Telles-Carranza initially sought a continuance in his removal proceedings to seek deferred action. After being denied deferred action, Mr. Telles-Carranza also applied for asylum, withholding of removal, and withholding of removal pursuant to the Convention Against Torture ("CAT"), but he ultimately withdrew these three applications. Mr. Telles-Carranza later sought and received permission from the IJ to apply for cancellation of removal based on the failure of his NTA to include a hearing time and date.

history chart to the IJ, which noted his conviction for felony menacing under Colo. Rev. Stat. § 18-3-206(1)(a)–(b). Mr. Telles-Carranza posited that Colorado felony menacing was not a CIMT as it could be committed with a *mens rea* of "knowingly" and was therefore not a specific intent crime based on this court's holding in *Flores-Molina v. Sessions*, 850 F.3d 1150 (10th Cir. 2017). *Id.* at 109.

In *Flores-Molina*, we reviewed the BIA's decision that "giving false information to a city official during an investigation," in violation of Denver Municipal Code ("DMC") § 38-40, was a CIMT. *Flores-Molina*, 850 F.3d at 1155. Recognizing the BIA has created different rules for assessing whether distinct categories of offenses constitute CIMTs, we analyzed the BIA's precedents addressing fraud and deception offenses. *Id.* at 1160–64. We determined "the BIA has identified three categories of deceit-related offenses that qualify as CIMTs: (1) offenses containing an explicit fraudulent intent element; (2) offenses containing an inherent fraudulent intent element; and (3) offenses containing a specific intent element." *Id.* at 1160. Accordingly, we analyzed whether a violation of DMC § 38-40 fell within any of these three categories of fraud CIMTs, including whether the offense "contain[ed] a specific intent element." *Id.* Ultimately, we concluded the conduct proscribed by DMC § 38-40 was distinguishable from fraud and deception offenses the BIA had previously determined were CIMTs as "a false statement [could] violate DMC § 38-40" without "involv[ing] fraud, caus[ing] harm to the government or anyone else, obtain[ing] a benefit for the speaker, or be[ing] given with the intent to achieve any of these ends." *Id.* at 1168.

In Mr. Telles-Carranza's merits hearing, the IJ expressed concern that Mr. Telles-Carranza's conviction for Colorado felony menacing may be a conviction for a CIMT and allowed Mr. Telles-Carranza and the Government to present argument on the issue. Mr. Telles-Carranza told the IJ that he had not come across a Tenth Circuit decision addressing whether Colorado felony menacing was a CIMT but that he was relying upon *Flores-Molina* to argue Colorado felony menacing was not a CIMT. He focused on the requisite *mens rea* for Colorado felony menacing, contending that Colorado felony menacing was not a CIMT because it could be committed with a *mens rea* of knowingly. He did not discuss the differences between the offense at issue in *Flores-Molina* and his conviction for felony menacing—that the *Flores-Molina* court was looking at a fraud and deception offense while felony menacing did not involve fraud or deception. The Government stated only that the conviction was for a CIMT "given that it is a felony." *Id.* at 88.

The IJ rejected Mr. Telles-Carranza's argument, relying upon two BIA precedents to determine Colorado felony menacing was a CIMT. First, addressing the requisite *mens rea* for felony menacing under § 18-3-206(1)(a)–(b), the IJ relied on *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992), for the proposition that "[t]hreatening a person and knowingly causing that person to fear imminent serious harm is intrinsically wrong and requires a 'corrupt mind.'" A.R. Vol. I at 55 (quoting *Matter of Perez-Contreras*, 20 I&N Dec. 615). In *Matter of Perez-Contreras*, the BIA addressed whether an assault offense that could be committed with a *mens rea* of criminal negligence was a CIMT. 20 I&N Dec. at 618–19. The BIA started its

analysis with the general rule that "[a]ssault may or may not involve moral turpitude" and that "[s]imple assault is generally not considered to be a crime involving moral turpitude." *Id.* at 618. The Board then noted it had previously determined offenses were CIMTs "[w]here knowing or intentional conduct is an element of an offense" or where the offense required "criminally reckless conduct." *Id.* at 618 (citing *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988)). The Board concluded third degree assault under Wash. Rev. Code § 9A.36.031(1)(f) was not a CIMT because the offense required only that an individual acted with a *mens rea* of criminal negligence, meaning it required neither "intent . . . nor any conscious disregard of a substantial and unjustifiable risk." *Id.* at 619.

The IJ also cited *In re Ajami*, 22 I&N Dec. 949 (BIA 1999), for the propositions that "several Board cases [] have found that sending threatening letters or engaging in threatening conduct involves moral turpitude" and "the intentional transmission of threats is evidence of a vicious motive or a corrupt mind." A.R. Vol. I at 55. In *In re Ajami*, the Board considered whether a conviction for aggravated stalking, under Mich. Comp. Laws § 750.411i, was a CIMT. 22 I&N Dec. at 951–52. To be convicted for aggravated stalking under § 750.411i, an individual had to engage in a "willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." *Id.* at 951 (quoting Mich. Comp. Laws § 750.411i(1)(e)). Further, this

"course of conduct" had to "include[] the making of 1 or more credible threats against the victim, a member of the victim's family, or another individual living in the victim's household." *Id.* (quoting Mich. Comp. Laws § 750.411i(2)(c)). The Board determined the aggravated stalking offense was a CIMT because "[a] violator of the statute must act willfully, must embark on a course of conduct, as opposed to a single act, and must cause another to feel great fear." *Id.* at 952.

Citing these two decisions, the IJ concluded Mr. Telles-Carranza's conviction for Colorado felony menacing was a conviction for a CIMT, making Mr. Telles-Carranza ineligible for cancellation of removal.[4] The IJ did not address Mr. Telles-Carranza's reliance on *Flores-Molina* in its decision. After pretermitting Mr. Telles-Carranza's application for cancellation of removal, the IJ granted Mr. Telles-Carranza's application for voluntary departure, concluding that Mr. Telles-Carranza had demonstrated rehabilitation since the time of his criminal conviction and had exhibited good moral character in the five years preceding removal.

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[4] The IJ also denied Mr. Telles-Carranza's application for cancellation of removal on the separate basis that he could not satisfy the ten-year physical presence requirement. Mr. Telles-Carranza challenged this determination on appeal, and the BIA concluded the IJ erred in its physical presence determination based on the Supreme Court's holding in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), because Mr. Telles-Carranza's receipt of a hearing notice could not cure his defective NTA for purposes of the stop time rule for calculating physical presence.

2. *Matter of J-G-P-*

Eleven days after the IJ pretermitted Mr. Telles-Carranza's application for cancellation of removal, the BIA issued its first precedential decision analyzing a menacing offense, *Matter of J-G-P-*, and determined menacing under Ore. Rev. Stat. § 163.190 was a CIMT. *See Matter of J-G-P-*, 27 I&N Dec. 642. Under Oregon's menacing statute, "a person commits the crime of menacing if by word or conduct the person intentionally attempts to place another person in fear of imminent serious physical injury." *Id.* at 644 (quoting Ore. Rev. Stat. § 163.190).

The BIA started its analysis with the basic rule that "[i]n the context of assault crimes, a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense." *Id.* at 645 (quoting *In re Solon*, 24 I&N Dec. 239, 242 (BIA 2007)). Looking to state of mind, the BIA determined § 163.190 "require[d] a defendant to act with the specific intent to cause a victim to apprehend or fear imminent *serious* physical injury." *Id.* at 644. Turning to level of harm, the BIA noted § 163.190 required "a defendant [to] cause a reasonable person to fear imminent *serious* physical injury." *Id.* at 647. The Board concluded that the requirement that an individual act with specific intent, combined with the harm of invoking fear of serious physical injury as opposed to any lesser physical injury, demonstrated the greater culpability necessary in a CIMT. *Id* at 650.

The appellant argued that menacing under § 163.190 was not a CIMT because it was comparable to simple assault, which the BIA has previously held is not a CIMT. *Id.* at 644. The appellant also argued that menacing under § 163.190 was not a

CIMT because the statute did "not require a defendant to actually inflict an injury on the victim." *Id.* The BIA noted that "menacing under section 163.190 derives in part from the common-law crime of assault and the definition of simple assault in the Model Penal Code," but determined the offense was distinguishable from simple assault because it required the defendant to cause the victim to fear imminent serious injury. *Id.* at 645. The BIA was "persuaded by the DHS's argument that certain criminal threat crimes . . . involve a fear on the part of the victim that is injurious *because of* its seriousness." *Id.* at 650. In sum, the BIA determined menacing under § 163.190 was a CIMT in part because it required the defendant to act with specific intent and in part because it required the defendant to cause the victim to fear a serious injury. *Id.*

3. Proceedings Before the BIA

Mr. Telles-Carranza appealed the IJ's decision to the BIA, arguing the IJ erred in concluding Mr. Telles-Carranza's 2012 conviction for felony menacing is a conviction for a CIMT. Specifically, Mr. Telles-Carranza argued Colorado felony menacing could not "constitute a CIMT, as the *mens rea* is 'knowingly' and does not involve specific or evil intent." A.R. Vol. I at 21. First, Mr. Telles-Carranza cited the BIA's decision *Matter of Flores*, 17 I&N Dec. 225, 227 (1980), for the rule that "the test to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind." *Id.* at 19. After citing the BIA's rules about CIMTs generally, as he did before the IJ, Mr. Telles-Carranza shifted his argument to rely on this court's decision in *Flores-Molina*. Specifically,

Mr. Telles-Carranza highlighted language from *Flores-Molina* stating some fraud offenses were CIMTs only if committed with specific intent in support of his argument that Colorado felony menacing could not be a CIMT because it could be committed with a *mens rea* of knowingly. In Mr. Telles-Carranza's view, the language in *Flores-Molina* about intent applies to CIMTs generally.

Mr. Telles-Carranza also pointed to the BIA's statement in *Matter of Perez-Contreras*, 20 I&N at 619, that "manslaughter in the second degree does not involve moral turpitude since no evil intent was involved," as supporting his argument that Colorado felony menacing could not be a CIMT because it could be committed with a *mens rea* of knowingly. As discussed above, in *Matter of Perez-Contreras,* the BIA held that third degree assault under Wash. Rev. Code § 9A.36.031(1)(f) was not a CIMT where it could be committed with a *mens rea* of criminal negligence. *See Matter of Perez-Contreras*, 20 I&N Dec. at 619. Although he submitted his brief to the BIA after *Matter of J-G-P-* was published, Mr. Telles-Carranza did not cite the decision.

The Government moved for summary affirmance of the IJ's decision, arguing the IJ properly determined Colorado felony menacing is a CIMT based on *Matter of Perez-Contreras*, 20 I&N 615, and *In re Ajami*, 22 I&N 949. The Government also contended that "[s]ince the merits hearing, the Board has further confirmed that menacing, as defined by Colorado statutes, is a CIMT," citing *Matter of J-G-P-* as "holding that [a] substantially similar Oregon menacing statute is [a] CIMT." *Id.* at 26 (citing *Matter of J-G-P-*, 27 I&N Dec. 642).

The BIA dismissed Mr. Telles-Carranza's appeal, holding the IJ correctly pretermitted Mr. Telles-Carranza's application for cancellation of removal because Mr. Telles-Carranza's 2012 conviction for felony menacing is a conviction for a CIMT. After reviewing the elements of felony menacing under Colo. Rev. Stat. § 18-3-206(1)(a)–(b), the BIA rejected Mr. Telles-Carranza's argument that the offense did not constitute a CIMT because it required only general, rather than specific, intent. According to the Board, Mr. Telles-Carranza's "argument ignore[d] the fact that a felony violation of section 18-3-206 combines a knowing mental state with an aggravating element that substantially increases its culpability—the use (or representation) of a deadly weapon." *Id.* at 4. The BIA explained that Mr. Telles-Carranza had interpreted this court's holding in *Flores-Molina* too broadly in arguing a crime could be a CIMT only if it required specific intent. *Id.* at 4 n.2. According to the BIA, *Flores-Molina* considered only the requisite intent necessary for "a *fraud* offense" to be a CIMT. *Id.* The BIA concluded its precedents looking at assault offenses, rather than fraud offenses, were instructive to whether Colorado felony menacing was a CIMT.

The Board summarized rules developed through several precedential decisions looking at assault offenses, starting with the baseline rule "that simple assault committed with general intent and not resulting in bodily harm is not a CIMT." *Id.* at 5 (citing *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 466 (BIA 2011); *Matter of Fualaau*, 21 I&N Dec. 475, 477–78 (BIA 1996); *Matter of E-*, 1 I&N Dec. 505, 507 (BIA 1943)). The BIA further noted that assault offenses requiring an individual to

act with the specific intent to harm someone and resulting in bodily harm are categorically CIMTs, while offenses that are committed with a *mens rea* of criminal negligence are not CIMTs, regardless of the harm done. *Id.* (citing *In re Solon*, 24 I&N Dec. at 245; *Matter of Tavdidishvili*, 27 I&N Dec. 142, 144 (BIA 2017)). Turning to the *mens rea* at issue in this case, knowingly, the BIA cited four of its precedential decisions as demonstrating that "assault statutes which require a state of mind falling between specific intent and criminal negligence (e.g., knowingly, recklessly, etc.)" may be CIMTs when they "require proof of some aggravating element (or attendant circumstance) that serves to increase the crime's culpability." *Id.* (citing *Matter of Sejas*, 24 I&N Dec. 236, 237–38 (BIA 2007); *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006); *Matter of O-*, 3 I&N Dec. 193, 196 (BIA 1948)). One such aggravating element, according to the BIA, is "the use of a deadly weapon or force likely to produce great bodily injury." *Id.* (citing *Matter of Wu*, 27 I&N Dec. at 11–14).

The earliest case cited by the BIA was *Matter of O-*, where the BIA determined the appellant's conviction for aggravated assault with a deadly and dangerous weapon under Conn. Gen. Stat. § 6195 (1939) was a conviction for a CIMT. *See Matter of O-*, 3 I&N at 193. In *Matter of O-*, the BIA noted that "[s]imple assaults have generally been held not to involve moral turpitude" and that "aggravated assaults where the use of a deadly or dangerous weapon is not an element, or where the statute does not require an intent to inflict bodily harm" are also typically not CIMTs. *Id.* at 194. Analyzing the statute and Connecticut courts'

treatment of the offense, the BIA determined "a specific intent to inflict serious bodily harm or injury" was not an element needed for conviction. *Id.* at 197. However, the BIA concluded that the offense was "inherently base . . . because an assault aggravated by the use of a dangerous or deadly weapon is contrary to accepted standards of morality in a civilized society." *Id.* at 197. The BIA determined "it is quite obvious that an assault by use of a dangerous or deadly weapon always constituted conduct contrary to acceptable human behavior." *Id.*

In the next decision cited by the BIA, *Matter of Sanudo*, the BIA held that domestic battery in violation of Cal. Penal Code §§ 242 and 243(e)(1) is not a CIMT. 23 I&N Dec. at 968. The Board first determined the offense required "an unprivileged touching of the victim by means of force or violence." *Id.* at 969 (internal quotation marks omitted). Looking to California caselaw, the BIA determined that although "battery is a 'specific intent' crime in California, the requisite intent pertain[ed] only to the commission of the 'touching' that complete[d] the offense, and not to the infliction of harm on the victim." *Id.* (quoting *People v. Mansfield*, 245 Cal. Rptr. 800, 803 (Cal. Ct. App. 1988)). The BIA then noted that whether assault or battery offenses are CIMTs varies on a case-by-case basis because "not all crimes involving the injurious touching of another reflect moral depravity on the part of the offender, even though they may carry the label of assault, aggravated assault, or battery under the law of the relevant jurisdiction." *Id.* at 971. The BIA stated that assault and battery crimes involving "aggravating factors that significantly increased their culpability" may be CIMTs, listing the examples of "assault and

battery with a deadly weapon," offenses that "necessarily involved the *intentional* infliction of *serious* bodily injury," and offenses where an individual knowingly or intentionally harmed a "person whom society views as deserving of special protection, such as a child, a domestic partner, or a peace officer." *Id.* at 971–72. The BIA determined the respondent's domestic battery conviction was not for a CIMT, despite involving a victim that society views as deserving of special protection, because the statute allowed for conviction based on "minimal nonviolent 'touching.'" *Id.* at 972–73.

In *Matter of Sejas*, the BIA similarly determined "assault and battery against a family or household member in violation of section 18.2-57.2 of the Virginia Code is not categorically a crime involving moral turpitude." 24 I&N Dec. at 236. Like in *Matter of Sanudo*, the BIA observed the conviction at issue did "not require the actual infliction of physical injury" and could be based on "any touching, however slight." *Id.* at 238. The BIA determined the requisite intent under the Virginia statute required, at minimum, only the intent to touch someone in a rude or angry manner, not the intent to do bodily harm. *Id.* at 238. Accordingly, the BIA concluded that, like the domestic battery conviction at issue in *Matter of Sanudo*, the respondent's Virginia assault and battery conviction was not a conviction for a CIMT. *Id.* The BIA commented that "[a]lthough as a general rule, a simple assault and battery offense does not involve moral turpitude, an aggravating factor can alter [its] determination." *Id.* at 237.

Finally, in the last case relied upon by the BIA, *Matter of Wu*, the BIA determined "[a]ssault with a deadly weapon or force likely to produce great bodily injury under California law is" a CIMT. 27 I&N Dec. at 8. First, identifying the elements of the conviction at issue, the BIA determined a conviction for assault with a deadly weapon or force likely to produce great bodily injury, under Cal. Penal Code § 245(a)(1), required that

> (1) the defendant did an act that by its nature would directly and probably result in the application of force to a person, using either (a) a deadly weapon or instrument, or (b) force likely to produce great bodily injury to another; (2) the defendant did the act willfully; and (3) when the defendant acted, he or she (a) was *aware of facts* that would lead a reasonable person to realize that his or her act by its nature would directly and probably result in the application of force to someone and (b) had the present ability to apply such force.

Id. at 12 (citing Judicial Council of California Criminal Jury Instruction 875 (Oct. 2016)). Looking to California caselaw, the BIA determined that although assault under § 245(a)(1) was a "general intent crime," it required an individual to "*be aware of the facts* that would lead a reasonable person to realize that a battery would *directly, naturally and probably* result from his conduct." *Id.* at 13 (quoting *People v. Williams*, 29 P.3d 197, 202 (Cal. 2001)). The BIA noted that simple assault and battery convictions are generally not CIMTs, but that "assault and battery offenses that require a state of mind falling between specific intent and criminal negligence—for instance, general intent and recklessness—are morally turpitudinous if they 'necessarily involve[] aggravating factors that *significantly increase[] their culpability*' relative to simple assault." *Id.* at 11 (quoting *Matter of Sanudo*, 23 I&N

Dec. at 971). "One such aggravating factor is the use of a deadly or dangerous weapon or instrument—conduct that magnifies the danger posed by the perpetrator and demonstrates his or her heightened propensity for violence and indifference to human life." *Id.* Because conviction under § 245(a)(1) "require[d] that a perpetrator willfully engage in dangerous conduct, by means of either an object employed in a manner likely to cause great bodily injury or force that is, in and of itself, likely to cause such an injury" and further "that a perpetrator have knowledge, while not of the risk of causing such injury, of the facts that make such an injury likely," the BIA held the conviction "necessarily involve[d] a culpable mental state that falls within the definition of a crime involving moral turpitude." *Id.* at 14.

Based on these four precedents, the BIA concluded that, although felony menacing under § 18-3-206(1)(a)–(b) required an individual to act only knowingly, it was a CIMT because the offense included the aggravating element of requiring that the individual use, display, or represent that he has a deadly weapon. Specifically, the BIA determined that the aggravating factor necessary for conviction under § 18-3-206(1)(a)–(b)—the use, simulation, or representation of a deadly weapon—"increase[d] the crime's culpability" to make it a CIMT by "substantially increas[ing] the level of fear caused by the offender's conduct while dramatically increasing the risk of escalating violence, either directly, by endangering the victim's life or physical safety, or indirectly, by inducing the terrorized victim to use lethal violence in his own defense." A.R. Vol. I at 5. The BIA did not cite *Matter of J-G-P-* in its decision. The BIA also reinstated the IJ's grant of voluntary departure.

Mr. Telles-Carranza timely filed a petition for review with this court. For the reasons we now explain, we deny his petition.

II. DISCUSSION

Mr. Telles-Carranza asks us to review the BIA's decision holding that the IJ correctly pretermitted his application for cancellation of removal because his prior conviction for felony menacing under Colo. Rev. Stat. § 18-3-206(1)(a)–(b) is a conviction for a CIMT. We begin our analysis by explaining our scope and standard of review and then turn to the parties' arguments.

A. Scope and Standard of Review

"We do not have jurisdiction to review the BIA's discretionary determinations under [8 U.S.C.] § 1229b regarding applications for cancellation of removal, [8 U.S.C.] § 1252(a)(2)(B)(i), but we do have jurisdiction to review questions of law arising in removal proceedings, [8 U.S.C.] § 1252(a)(2)(D)." *Zarate-Alvarez v. Garland*, 994 F.3d 1158, 1161 (10th Cir. 2021); *see also* 8 U.S.C. § 1252(a)(2)(D) ("Nothing in . . . any . . . provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."). We have jurisdiction over Mr. Telles-Carranza's petition because it raises only a question of law: whether Colorado felony menacing is categorically a CIMT.

"We review de novo the BIA's conclusions on questions of law, including whether a particular state conviction results in ineligibility for discretionary relief."

Zarate-Alvarez, 994 F.3d at 1161. In cases such as this, where "a single member of the BIA decided [Mr. Telles-Carranza's] appeal and issued a brief opinion pursuant to 8 C.F.R. § 1003.1(e)(5), we review the BIA's decision as the agency's final order of removal." *Flores-Molina*, 850 F.3d at 1157. Because the BIA issued an independent decision, rather than summarily affirming the IJ, "we will not affirm on grounds raised in the IJ decision unless they [we]re relied upon by the BIA in its affirmance." *Uanreroro v. Gonzales*, 443 F.3d 1197, 1204 (10th Cir. 2006). Although "we do not defer to the BIA's interpretation of the substance of the state . . . offense at issue," "because determining whether a given offense is a CIMT for purposes of the INA requires interpreting that statutory phrase, we may owe deference to the BIA's decision under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Id.* BIA decisions issued by a single member are non-precedential and not subject to *Chevron* deference unless the decision "is based on a prior precedential BIA decision addressing the same question." *Id.* at 1157–58 (internal quotation marks omitted). "Where *Chevron* deference is not appropriate, we consider whether the BIA's decision has the power to persuade and is therefore entitled to *Skidmore* deference." *Id.* at 1158 (internal quotation marks omitted).

B. Analysis

Mr. Telles-Carranza argues the BIA's decision here is not subject to deference under *Chevron* or *Skidmore*, and that the Board erred in determining felony menacing under Colo. Rev. Stat. § 18-3-206(1)(a)–(b) is a CIMT. Specifically, Mr. Telles-Carranza contends "all of the cases relied upon by the Board contain either specific

intent and/or actual physical harm and an aggravating factor," and because his felony menacing conviction did not require specific intent or actual physical harm, it is not a conviction for a CIMT. Petitioner's Br. at 34. The Government counters that the BIA correctly decided Colorado felony menacing is a CIMT and its decision is entitled to deference under *Chevron* and *Skidmore* because it applied a rule based on its precedential decisions. We start our analysis by reviewing the elements necessary for conviction under Colo. Rev. Stat. § 18-3-206(1)(a)–(b). We then turn to what deference, if any, is owed to the BIA's decision and the parties' arguments.

1. Colorado Felony Menacing

Under § 18-3-206(1), "[a] person commits the crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury." Serious bodily injury is defined as "bodily injury which . . . involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree." Colo. Rev. Stat. § 18-1-901(3)(p) (2011). Menacing becomes a class 5 felony if the crime of menacing is committed "(a) [b]y the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon; or (b) [b]y the person representing verbally or otherwise that he or she is armed with a deadly weapon." Colo. Rev. Stat. § 18-3-206(1)(a)–(b). Colorado defines "deadly weapon" as "(I) [a] firearm, whether loaded or unloaded; (II) [a] knife; (III) [a] bludgeon; or (IV) [a]ny other weapon,

device, instrument, material, or substance, whether animate or inanimate" "which in the manner it is used or intended to be used is capable of producing death or serious bodily injury." Colo. Rev. Stat. § 18-1-901(3)(e) (2011).

Neither Mr. Telles Carranza nor the Government argued before the BIA, or argues on appeal, that § 18-3-206(1)(a)–(b) is a divisible statute, listing alternative elements, rather than alternative means of committing a single element, of felony menacing. *See* A.R. Vol. 1 at 18–21, 26–27; Petitioner's Br.; Respondent's Br.; *see also United States v. Mathis*, 579 U.S. 500, 505–06 (2016). Because neither party argues that § 18-3-206(1)(a)–(b) is divisible, we assume without deciding that § 18-3-206(1)(a)–(b) is not divisible and do not apply the modified categorical approach.

At the time of Mr. Telles-Carranza's conviction, the elements necessary for a conviction of felony menacing under Colorado law were "1. [t]hat the defendant, 2. in the State of Colorado, at or about the date and place charged, 3. knowingly, 4. by any threat or physical action, 5. placed or attempted to place another person in fear of imminent serious bodily injury," Colorado Pattern Jury Instructions 3-2:30 Menacing (2014),[5] and that the defendant "committed the menacing by the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article was a deadly weapon, or by representing verbally or otherwise that he [she] was armed with a deadly weapon," Colorado Pattern Jury Instructions 3-2:31 Menacing—Interrogatory (Use, or Suggested Use, of a Deadly

[5] There were no changes to § 18-3-206(1)(a)–(b) between 2012 and 2014.

Weapon) (2014).[6] In the context of felony menacing, to act knowingly means the offender is "aware that he is placing or attempting to place another person in fear of imminent serious bodily injury by the use of a deadly weapon, regardless of whether or not the offender had a conscious objective to cause such fear in the other person." *People v. Crump*, 769 P.2d 496, 499 (Colo. 1989). Although "'what the victim saw or heard during the course of a felony menacing incident' is relevant to determining the defendant's intent," "the proper focus is on the intent and conduct of the actor, not of the victim." *People v. Shawn*, 107 P.3d 1033, 1035 (Colo. App. 2004) (quoting *People v. Saltray*, 969 P.2d 729, 732 (Colo. App.1998)). Accordingly, "[t]he prosecution need only prove the defendant was aware that his or her conduct was practically certain to cause fear," regardless of whether the victim actually experienced fear of imminent serious bodily injury. *Id.*

2. Deference

a. Chevron *deference*

As discussed above, non-precedential decisions by the BIA are subject to deference under *Chevron* only if they rely upon a precedential decision addressing the same question. *Flores-Molina*, 850 F.3d at 1157–58. Mr. Telles-Carranza argues the BIA's decision here is not subject to deference under *Chevron* because although "the Board's decision cited several published Board decisions, none of them set a binding interpretation of the question at issue for [Mr.] Telles-Carranza." Petitioner's

[6] The parties agree these are the elements required for a conviction under § 18-3-206(1)(a)–(b). *See* Petitioner's Br. at 24; Respondent's Br. at 27–29.

Br. at 14. The Government counters that the BIA's decision here "merits this [c]ourt's deference under *Chevron* insofar as it articulates a definitional framework for assessing whether an assault offense categorically constitutes a CIMT, because the Board drew that definition from at least seventy-five years of precedent[ial] decisions addressing that same question and arriving at a reasonable answer." Respondent's Br. at 25–26.

We agree with Mr. Telles-Carranza that the BIA's decision is not entitled to deference under *Chevron.* Although the BIA cited several of its related precedential decisions, none of these precedential decisions analyzed an offense with the same elements as felony menacing under Colo. Rev. Stat. § 18-3-206(1)(a)–(b). The precedential decisions relied upon by the BIA analyzed offenses that included as an element the use, or attempted use, of physical force. *See Matter of Wu*, 27 I&N Dec. at 12 (listing "the defendant did an act that by its nature would directly and probably result in the application of force to a person" as element necessary for conviction); *Matter of Sejas*, 24 I&N Dec. at 238 (determining that at minimum, offensive touching was required for conviction); *Matter of Sanudo*, 23 I&N Dec. at 969 (conviction at issue included element of "unprivileged touching of the victim by means of force or violence" (internal quotation marks omitted)).[7] In contrast, felony

[7] In the final precedential decision cited by the BIA, *Matter of O-*, it is not clear from the BIA's decision, or the statute at issue, whether aggravated assault with a deadly and dangerous weapon in violation of Conn. Gen. Stat. § 6195 (1939) required the use of force. *See Matter of O-*, 3 I&N Dec. at 198; *see also* Conn. Gen. Stat. § 6195 (1939) ("Any person who shall make an assault upon another with any

menacing under § 18-3-206(1)(a)–(b) may be committed by "any threat or physical action." Colo. Rev. Stat. § 18-3-206(1)(a)–(b). Accordingly, the precedential decisions relied upon by the BIA did not address "the *same* question" as the BIA addressed here, and the BIA's decision is not subject to *Chevron* deference. *Rangel-Perez v. Lynch*, 816 F.3d 591, 597 (10th Cir. 2016)*; see also Flores-Molina*, 850 F.3d at 1167 (not applying *Chevron* deference where nonprecedential BIA decision assessed whether conviction was a CIMT with significant differences from convictions analyzed in precedential BIA cases cited).

b. Skidmore *deference*

"Where *Chevron* deference is not appropriate, we consider whether the BIA's decision has the power to persuade and is therefore entitled to *Skidmore* deference." *Flores-Molina*, 850 F.3d at 1158 (10th Cir. 2017) (internal quotation marks omitted). In *Skidmore*, the Supreme Court held "that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)). Accordingly, although non-precedential single-member BIA decisions such as the one here are not subject to *Chevron*

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deadly or dangerous weapon shall be guilty of an aggravated assault and shall be fined not more than $500 or imprisoned not more than 3 years or both."). Because the *actus reus* of the offense is not discussed in the decision, we will not assume the decision addressed the same question as the BIA addressed here.

deference, they are "entitled to respect." *Skidmore*, 323 U.S. at 140. The weight to be given an administrative decision under *Skidmore* "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* "The paramount consideration is whether the BIA's decision has 'the power to persuade.'" *Carpio v. Holder*, 592 F.3d 1091, 1098 (10th Cir. 2010) (quoting *Skidmore*, 323 U.S. at 140).

Mr. Telles-Carranza argues the BIA's decision is not subject to deference under *Skidmore* because "its reasoning does not compellingly explain its departure from precedent." Petitioner's Br. at 34. Specifically, Mr. Telles-Carranza contends the BIA does not explain how felony menacing under § 18-3-206(1)(a)–(b) can be a CIMT where it does not require either that an individual act with specific intent or that the offense cause actual physical harm. The Government counters that the BIA's decision has "the power to persuade" under *Skidmore* because the BIA articulated a "sliding scale definition of assault CIMTs" that it drew from its precedents and then applied that sliding scale definition to determine Colorado felony menacing is a CIMT. Respondent's Br. at 22, n.5. We review the BIA's analysis and ultimately determine we need not decide whether *Skidmore* deference is appropriate here because Mr. Telles-Carranza's only argument on appeal is unavailing.

The BIA typically starts its CIMT analysis by identifying "subsidiary definitions and rules applicable to narrower classes of conduct." *Flores-Molina*, 850 F.3d at 1159. Here, the BIA looked to "subsidiary definitions and rules" it has

applied in previous precedential decisions analyzing assault-type offenses. *Id.* This was a reasonable starting place for its analysis as menacing is a type of assault offense.[8] *Compare Assault*, Black's Law Dictionary (11th ed. 2019) (defining "assault" as "[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact") *with* Colo. Rev. Stat. § 18-3-206(1) (defining "menacing" as "knowingly plac[ing] or attempt[ing] to place another person in fear of imminent serious bodily injury . . . by any threat or physical action."). Further, outside of cases looking at assault-type offenses, Mr. Telles-Carranza cited only *Flores-Molina*, 850 F.3d 1150, this court's decision analyzing a fraud and deception offense, in his brief before the BIA. We agree with the BIA's conclusion that felony menacing is more similar to assault-type offenses than fraud and deception offenses.

After identifying the subcategory of CIMT offenses at issue in this case, the BIA accurately described its precedents, summarizing how assault-type offenses may or may not be CIMTs based on the requisite *mens rea* and "gravity of the danger

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[8] Although Mr. Telles-Carranza states generally that the BIA's "analysis of the requisite mental state for an assault offense with completely different elements to the offense in question tells this Court nothing about the requisite mental state or conduct for a menacing offense," he never develops an argument that a rule other than the one applied to assault-type offenses should apply to a menacing conviction. Petitioner's Br. at 27. Instead, Mr. Telles-Carranza returns throughout his briefing to his argument that the BIA extracted the wrong rule from its assault precedents, rather than proposing the precedents did not apply. The Government noted this in its responsive brief, stating Mr. Telles-Carranza's "position depends on assault CIMTs being the right CIMT subtype against which to compare his offense: his entire theory of the case is that Colorado felony menacing is not an assault CIMT and therefore is not a CIMT at all." Respondent's Br. at 23–24.

contemplated by the offender's conduct." A.R. Vol. I at 5. Looking to its precedential decisions analyzing offenses with a *mens rea* similar to felony menacing under Colo. Rev. Stat. § 18-3-206(1)(a)–(b), the BIA concluded that "assault statutes which require a state of mind falling between specific intent and criminal negligence (e.g., knowingly, recklessly, etc.) are not CIMTs *unless* they also require proof of some aggravating element (or attendant circumstance) that serves to increase the crime's culpability," with the use of a deadly weapon being such an aggravating element. *Id.* (citing *Matter of Wu*, 27 I&N Dec. at 11–14; *Matter of Sejas*, 24 I&N Dec. at 237–38; *Matter of Sanudo*, 23 I&N Dec. at 971; and *Matter of O-*, 3 I&N Dec. at 196). Applying this rule to Mr. Telles-Carranza's offense, the BIA concluded the IJ did not err in determining Colorado felony menacing is a CIMT as the offense "requires a mental state of knowingly," a mental state more culpable than criminal negligence but less culpable than specific intent, and "requires as an aggravating element that the accused use or display an actual or simulated deadly weapon or represent that he is armed with such a weapon." *Id.* The BIA commented that "[t]his aggravating factor substantially increases the level of fear caused by the offender's conduct while dramatically increasing the risk of escalating violence, either directly, by endangering the victim's life or physical safety, or indirectly, by inducing the terrorized victim to use lethal violence in his own defense." *Id.*[9] The BIA determined

[9] Section 18-3-206(1)(a)–(b) "does not require that, in order to commit the felony offense, the perpetrator . . . induce a greater degree of fear in the victim than would be required for a misdemeanor conviction." *People v. Zieg*, 841 P.2d 342, 343

that this aggravating factor "increases the crime's culpability" such that felony menacing under § 18-3-206(1)(a)–(b) is categorically a CIMT. *Id.*

The BIA acknowledged Mr. Telles-Carranza's argument that felony menacing is not a CIMT because it does not require specific intent but concluded that specific intent is not a requirement for all types of offenses to be CIMTs. *Id.* at 4 n.2. In one of the precedential decisions the BIA cited, *Matter of Wu*, the BIA held that "assault and battery offenses that require a state of mind falling between specific intent and criminal negligence—for instance, general intent and recklessness—are morally turpitudinous if they 'necessarily involve[] aggravating factors that *significantly increase[] their culpability*' relative to simple assault." *Matter of Wu*, 27 I&N Dec. at 11 (quoting *Matter of* Sanudo, 23 I&N Dec. at 971)). Applying this rule, the BIA determined Colorado felony menacing could be a CIMT, despite not requiring an individual to act with specific intent, because it included the aggravating factor of the use or display or a real or simulated deadly weapon or an individual representing that he was armed with a deadly weapon.

(Colo. App. 1992). The definitions of both misdemeanor and felony menacing under § 18-3-206(1)(a)–(b) require that an individual knowingly "place[] or attempt to place[] another in fear of imminent serious bodily injury." The difference between the offenses is how the offender places or attempts to place the victim in fear—with felony menacing requiring the display or use of a real or simulated deadly weapon or a representation that the offender is armed with a deadly weapon. *See* Colo. Rev. Stat. § 18-3-206(1)(a)–(b). We interpret the BIA's statement that the aggravating element necessary for conviction of felony menacing "substantially increases the level of fear caused by the offender's conduct," A.R. Vol. I at 5, as referring to the fear expected to occur based on the use or display of a real, simulated, or represented deadly weapon, not an element necessary for conviction.

3. Mr. Telles-Carranza's Argument

Mr. Telles-Carranza argues the BIA erred in determining Colorado felony menacing is a CIMT because assault-type offenses involving aggravating elements are CIMTs only "where the offense requires proof as an element of the offense specific intent or actual physical harm." Petitioner's Br. at 36. To support this argument, Mr. Telles-Carranza points to the precedential decisions the BIA cited in its decision and to *Matter of J-G-P-*. Mr. Telles-Carranza's argument fails because the BIA has previously determined assault-type offenses which required neither specific intent nor actual physical harm were CIMTs. Rather, the BIA's precedents reflect the rule the BIA applied here—assault-type offenses may be CIMTs if they "require a state of mind falling between specific intent and criminal negligence" and "also require proof of some aggravating element . . . that serves to increase the crime's culpability." A.R. Vol. I at 5. Further, we do not consider the BIA's decision erroneous here for failing to cite *Matter of J-G-P-* where Mr. Telles-Carranza did not cite the case in his brief before the BIA and the analysis in *Matter of J-G-P-* is consistent with the BIA's analysis here.

a. Matter of Wu

Mr. Telles-Carranza's proposed rule is directly contradicted by the BIA's decision in *Matter of Wu*. The conviction at issue in *Matter of Wu*, assault "with a deadly weapon or force likely to produce great bodily injury" under Cal. Penal Code § 245(a)(1), required neither specific intent nor actual physical harm. *See Matter of Wu*, 27 I&N Dec. at 9.

First, the BIA determined the requisite *mens rea* for an assault conviction under § 245(a)(1) of the California Penal Code was a "knowledge requirement" that was less than specific intent. *Id.* at 13. To be convicted under § 245(a)(1), a defendant had to "*be aware of the facts* that would lead a reasonable person to realize that a battery would *directly, naturally and probably* result from his conduct." *Id.* at 9, 13 (quoting *Williams*, 29 P.3d at 202). The BIA determined the statute has "a culpable mental state greater than recklessness and criminal negligence" because it requires that "a perpetrator have knowledge, while not of the risk of causing [great bodily] injury, of the facts that make such an injury likely." *Id.* at 15. The BIA noted it "would reach a different conclusion if faced with a statute . . . that does not require knowledge that the conduct is itself dangerous or of the facts that make the proscribed conduct dangerous." *Id.* at 14 n.10. Like the statute analyzed in *Matter of Wu*, § 18-3-206(1)(a)–(b) requires that an individual act with knowledge "of the facts that make the proscribed conduct dangerous," *id.*, because it requires an individual to be "aware that he is placing or attempting to place another person in fear of imminent serious bodily injury by the use of a [real, simulated, or represented] deadly weapon," *Crump*, 769 P.2d at 499. It is this placement or attempted placement of the victim in fear of imminent serious bodily injury by the use of a real, simulated, or represented deadly weapon that makes the proscribed conduct dangerous.

Second, actual physical harm was not an element under § 245(a)(1) because the statute required only that "the defendant did an act that by its nature would

directly and probably result in the application of force to a person." *Id.* at 12.[10] The statute did not require that the defendant's culpable act actually result in the application of force to a person or the infliction of bodily injury. *Id.* Rather, the statute criminalizes knowing conduct that is likely to result in great bodily injury. Accordingly, *Matter of Wu* demonstrates that Mr. Telles-Carranza's proposed rule—requiring an element of specific intent or actual bodily injury in addition to an aggravating element for assault-type offenses to be CIMTs—does not square with the BIA's precedents.

Rather, the BIA's precedents support its articulation of a general rule that assault-type offenses may be CIMTs if they require a *mens rea* greater than criminal negligence and a significant aggravating factor. *See id.* at 11 ("[W]e have concluded that assault and battery offenses that require a state of mind falling between specific intent and criminal negligence—for instance, general intent and recklessness—are morally turpitudinous if they 'necessarily involve[] aggravating factors that *significantly increase*[] *their culpability*' relative to simple assault.") (quoting

[10] Mr. Telles-Carranza relies on Colorado's statute defining first-degree assault, Colo. Rev. Stat. § 18-3-202, to argue the BIA's assault offense precedents looked at offenses that required actual bodily harm. This argument is not persuasive because the elements of Colorado first degree assault differ from the elements of the assault offenses addressed in the BIA's precedents. *Compare* Colo. Rev. Stat. § 18-3-202(1)(a) (requiring individual to actually "cause[] serious bodily injury") *with* Cal. Penal Code § 240 (defining "assault" as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another"). The relevant inquiry is not how Colorado felony menacing is distinguishable from Colorado first degree assault but how it aligns with the offenses analyzed in the BIA's precedents relied upon in the BIA's decision.

Matter of Sanudo, 23 I&N Dec. at 971)); *see also Matter of Sanudo*, 23 I&N Dec. at 971 ("recogniz[ing] that assault and battery offenses may appropriately be classified as crimes of moral turpitude if they necessarily involved aggravating factors that significantly increased their culpability"). We applied this same framework when determining whether a conviction for making terroristic threats was a CIMT in *Birhanu v. Wilkinson*, 990 F.3d 1242, 1255–57 (10th Cir. 2021) (finding two of this court's unpublished decisions "recogniz[ing] that reckless conduct coupled with an 'aggravating factor' constitutes a CIMT" persuasive), *judgment vacated on other grounds sub nom. Wolie Birhanu v. Garland*, 142 S. Ct. 2862 (2022).

b. Matter of J-G-P-

Mr. Telles-Carranza also notes the BIA failed to cite a relevant precedential decision, *Matter of J-G-P-*, 27 I&N Dec. 642, where the BIA determined a conviction for menacing under Or. Rev. Stat. § 163.190 was a conviction for a CIMT. He contends the outcome in *Matter of J-G-P-* supports the rule he argues the BIA should have applied here, although he acknowledges his proposed rule is not consistent with the BIA's analysis in the decision. The BIA's failure to cite *Matter of J-G-P-* does not render its decision erroneous where Mr. Telles-Carranza did not cite the decision in his brief before the BIA and the analysis in *Matter of J-G-P-* is consistent with the precedents the BIA relied upon here.

In *Matter of J-G-P-*, the BIA analyzed menacing under Or. Rev. Stat. § 163.190 and determined the offense is a CIMT. *Matter of J-G-P-*, 27 I&N Dec. at 647. As it did here, the BIA analyzed "the state of mind and the level of harm

required to complete the offense." *Id.* at 645 (quoting *In re Solon*, 24 I&N Dec. at 242). Recognizing that simple assault offenses are not CIMTs, the BIA concluded menacing under Ore. Rev. Stat. § 163.190 involved more culpable conduct than simple assault because it required (1) an individual to act with specific intent and (2) "that a defendant [] cause a reasonable person to fear imminent *serious* physical injury." *Id.* at 647.

Mr. Telles-Carranza proposes the BIA reached the right conclusion in *Matter of J-G-P-* but erred by looking to the seriousness of the threatened injury, where the BIA should have relied on the rule Mr. Telles-Carranza articulates in his brief to determine menacing under Ore. Rev. Stat. § 163.190 is a CIMT—that an assault-type offense is a CIMT only if it requires both an aggravating factor and either specific intent or actual physical harm. Mr. Telles-Carranza explains the BIA would have reached the same outcome under his proposed rule because the Oregon menacing conviction required an individual to act with specific intent. As discussed above, however, Mr. Telles-Carranza's proposed rule is not consistent with BIA precedent. The BIA has previously found assault-type offenses to be CIMTs when there is an aggravating factor but no requirement of specific intent or actual bodily injury. *See Matter of Wu*, 27 I&N Dec. at 12–13. Because Mr. Telles-Carranza's proposed rule is

not consistent with BIA precedent, and is not the rule the BIA actually applied to a menacing conviction in *Matter of J-G-P-*, this argument is not persuasive.[11]

Although the BIA did not cite to *Matter of J-G-P-*, the decision is consistent with the BIA's analysis in this case. The menacing conviction at issue in *Matter of J-G-P-* is distinguishable from Mr. Telles-Carranza's conviction for felony menacing under Colorado law because the Oregon statute required an individual to act with specific intent, while a conviction under Colo. Rev. Stat. § 18-3-206(1)(a)–(b) requires an individual only to act knowingly. *See id.* at 645–46. Further, the Oregon menacing statute did not require the use, simulated use, or representation by an individual that he had a deadly weapon. *Compare* Ore. Rev. Stat. § 163.190 (2011)

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[11] Mr. Telles-Carranza also argues we should not defer to the BIA's reasoning in *Matter of J-G-P-* because the decision was inconsistent with Ninth Circuit caselaw. We do not defer to the BIA's reasoning in *Matter of J-G-P-* because the BIA did not rely on *Matter of J-G-P-* here. We discuss *Matter of J-G-P-* simply to establish that nothing in that case contradicts the BIA's analysis here. Regardless, the Ninth Circuit cases Mr. Telles-Carranza cites as inconsistent with *Matter of J-G-P-* are not on point. Mr. Telles-Carranza identifies cases where the Ninth Circuit held that misdemeanor convictions for simple domestic assault under Arizona law and for unlawful laser activity under California law were not convictions for CIMTs. *See Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1167 (9th Cir. 2006) ("A simple assault statute which permits a conviction for acts of recklessness, or for mere threats, or for conduct that causes only the most minor or insignificant injury is not limited in scope to crimes of moral turpitude."); *Coquico v. Lynch*, 789 F.3d 1049, 1055 (9th Cir. 2015) (determining misdemeanor conviction for pointing a laser at a peace officer was not for a CIMT). These cases offer little guidance in assessing whether felony menacing under Section 18-3-206(1)(a)–(b) is a CIMT as neither of the convictions included the aggravating element of the use of a real or fabricated deadly weapon or a representation that the individual had a deadly weapon. *See Coquico*, 789 F.3d at 1052 (determining BIA erred in concluding statute criminalizing unlawful laser activity prohibited the use of "a device which gives the appearance or facade of the use of a deadly weapon" because the statute covered lasers broadly, including lasers not associated with weapons); *see also Fernandez-Ruiz*, 468 F.3d at 1164.

with Colo. Rev. Stat. 18-3-206(1)(a)–(b). Still, as in this case, in *Matter of J-G-P-*, the BIA determined the offense was a CIMT based on the requisite level of intent and the seriousness of the potential harm. *Matter of J-G-P-*, 27 I&N Dec. at 647. Specifically, the BIA's conclusion that "certain criminal threat crimes . . . involve a fear on the part of the victim that is injurious *because of* its seriousness," *id.* at 650, is consistent with the BIA's conclusion here that felony menacing under § 18-12-106(1)(a)–(b) is a CIMT because

> us[ing] or display[ing] an actual or simulated deadly weapon or represent[ing] that he is armed with such a weapon . . . . substantially increases the level of fear caused by the offender's conduct while dramatically increasing the risk of escalating violence, either directly, by endangering the victim's life or physical safety, or indirectly, by inducing the terrorized victim to use lethal violence in his own defense.

A.R. Vol. I at 5.

In sum, Mr. Telles-Carranza's sole argument—that assault-type offenses are CIMTs only if they include an aggravating factor and require either specific intent or actual bodily injury—is not supported by BIA precedent. Instead, that precedent shows the BIA did not err in concluding Mr. Telles-Carranza's conviction for felony menacing under § 18-3-206(1)(a)–(b) was a conviction for a CIMT. The statute required that Mr. Telles-Carranza through "threat or physical action" "knowingly place[] or attempt[] to place another person in fear of imminent serious bodily injury" "[b]y the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon; or [b]y the person representing verbally or otherwise that he or she is armed with a deadly

weapon." Colo. Rev. Stat. § 18-3-206(a)–(b). Accordingly, the statute required a mental state more culpable than criminal negligence—a *mens rea* of knowingly—and an aggravating factor that significantly increased the risk of serious harm—the use, simulated use, or representation of a deadly weapon. *See Matter of Wu*, 27 I&N Dec. at 11.

III. CONCLUSION

We DENY Mr. Telles-Carranza's petition for review.

Entered for the Court

Carolyn B. McHugh
Circuit Judge