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5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Hunter, Philip James
Scott Law Firm
10636 Linkwood Ct.
Baton Rouge, LA 70810

DHS - ICE Office of Chief Counsel - OAKDALE 2
1010 E. Whatley Rd.
OAKDALE, LA 71463

Name: GONZALEZ ALONSO, SANTIAGO **A 077-898-496**

Date of this notice: 8/28/2020

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:
Donovan, Teresa L.
O'Connor, Blair
Pepper, S. Kathleen

Trans
Userteam: Docket

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File: A077-898-496 – Oakdale, LA[1]

Date: AUG 20 2020

In re: Santiago GONZALEZ ALONSO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Philip J. Hunter, Esquire

APPLICATION: Termination

In a decision dated March 18, 2020, an Immigration Judge found that the respondent was removable as charged and ordered him removed from the United States.[2] The respondent has appealed from this decision. The Department of Homeland Security ("DHS") has not filed an opposition to the appeal. The appeal will be sustained, and the respondent's removal proceedings will be terminated.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Mexico, who entered the United States without inspection, admission, or parole and later adjusted to lawful permanent resident status in 2001 (IJ at 2; Exh. 1). On May 25, 2017, he was convicted of an attempted crime against nature in violation of sections 14:27 and 14:89 of the Louisiana Statutes and sentenced to 7 years in prison for this offense (IJ at 2; Exhs. 1-3).[3] Based on this conviction, the respondent was placed in

[1] In accordance with Operating Policies and Procedures Memorandum No. 04-06, removal proceedings before the Immigration Judge in this matter were completed in Oakdale, Louisiana. The case was docketed for hearing in Oakdale, Louisiana, the respondent was located in Oakdale, Louisiana, and the Immigration Judge who was sitting in Falls Church, Virginia, heard the case through video conference pursuant to section 240(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(2)(A) (2018). Accordingly, we will consider the respondent's claim under the precedent of the United States Court of Appeals for the Fifth Circuit.

[2] The Immigration Judge's removability analysis is contained in a written decision prepared on January 16, 2020 (IJ at 2-8; Tr. at 37, 43). All citations to the Immigration Judge's decision refer to the January 16, 2020, order.

[3] Contrary to the respondent's contentions, the "CRIMINAL MINUTES" of his sentencing proceedings, the jury's responsive verdict, and the State appellate court document documenting his conviction are proof of his conviction for attempted crime against nature under Louisiana law (IJ at 2; Exh. 2 at Tabs E-F; Exh. 3; Respondent's Br. at 6-7). Sections 240(c)(3)(B)(iv), (vi) of the Act, 8 U.S.C. §§ 1229a(c)(3)(B)(iv), (vi) (providing that "[o]fficial minutes of a court proceeding" or "[a]ny document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction").

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removal proceedings and charged with removability under section 237(a)(2)(A)(iii) of the Act, as an alien convicted of an aggravated felony—namely, attempted sexual abuse of a minor under sections 101(a)(43)(A) and (U) of the Act, 8 U.S.C. §§ 1101(a)(43)(A) and (U) (IJ at 2; Exh. 1). He was also charged with removability under section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i), as an alien convicted of a crime of child abuse (IJ at 2; Exh. 1). The Immigration Judge found that the respondent was removable as charged and, based on his aggravated felony conviction, pretermitted and denied his application for cancellation of removal pursuant to section 240A(a)(3) of the Act, 8 U.S.C. § 1229b(a)(3) (IJ at 8-9; Tr. at 58-60). At his merits hearing, the respondent withdrew all of his other applications for relief and requested an appeal from the Immigration Judge's decision to challenge the Immigration Judge's decision on removability (Tr. at 58-60). Whether the respondent's conviction renders him removable as charged is a question of law we review de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

II. ANALYSIS

A. Sexual Abuse of a Minor

The Act defines the term aggravated felony as, among other things, "sexual abuse of a minor." Section 101(a)(43)(A) of the Act. "To determine whether a conviction under [the respondent's State statute of conviction] qualifies as sexual abuse of a minor, we apply the categorical approach, looking to the statute of conviction and comparing the elements to those of the generic federal offense." *Shroff v. Sessions*, 890 F.3d 542, 544 (5th Cir. 2018) (citing *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013)). An "element" of a statute is a "fact[]" that must be "'necessarily' involved" in an offense such that the prosecution must prove it and a jury must find it unanimously beyond a reasonable doubt to sustain a conviction. *Moncrieffe v. Holder*, 569 U.S. at 190 (citation omitted); *see also Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

"The generic definition of sexual abuse of a minor . . . requires that conduct (1) involve a child, (2) be sexual in nature, (3) and be abusive." *Shroff v. Sessions*, 890 F.3d at 544 (citation omitted). The Supreme Court has clarified that "[w]here sexual intercourse is abusive solely because of the ages of the participants, the [child] victim must be younger than 16." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017). However, the Court observed that "the generic crime of sexual abuse of a minor may include a different age of consent where the perpetrator and [child] victim *are in a significant relationship of trust*." *Id.* (emphasis added).

The record reflects that the respondent was originally charged in 2015 with "AGGRAVATED CRIME AGAINST NATURE" in violation of section 14:89.1(A)(2)(a) (IJ at 2-6; Exh. 2 at Tab E, 13, Tab F, 16).[4] In 2017, a jury returned a responsive verdict, finding the respondent guilty of

[4] At all relevant times, section 14:89.1(A)(2)(a) proscribed "engaging in any prohibited act enumerated [including, among other acts, carnal knowledge and sexual intercourse] with a person who is under eighteen years of age and who is known to the offender to be related to the offender as any of the following biological, step, or adoptive relatives: child, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew, or niece."

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attempted crime against nature pursuant to sections 14:27[5] and 14:89 of the Louisiana Revised Statutes (IJ at 2; Exh. 2 at Tab F, 16; Exh. 3 at 157). According to State law, "[a]ll of the elements of crime against nature are included in aggravated crime against nature, and therefore crime against nature is a lesser included offense and a responsive verdict to a charge of aggravated crime against nature." *State v. McCoy*, 337 So. 2d 192, 196 (La. 1976).

At the time of the respondent's offense, section 14:89 provided, in relevant part, that

> A. Crime against nature is either of the following:
>
> (1) The unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal, ... Emission is not necessary; and, when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.
>
> (2) The marriage to, or sexual intercourse with, any ascendant or descendant, brother or sister, uncle or niece, aunt or nephew, with knowledge of their relationship . . . .[6]
>
> B. (1) Whoever commits the offense of crime against nature as defined by Paragraph (A)(1) of this Section shall be fined not more than two thousand dollars, imprisoned, with or without hard labor, for not more than five years, or both.
>
> (2) Whoever commits the offense of crime against nature as defined by Paragraph (A)(l) of this Section with a person under the age of eighteen years shall be fined not more than fifty thousand dollars, imprisoned at hard labor for not less than fifteen years nor more than fifty years, or both.
>
> (3) Whoever commits the offense of crime against nature as defined by Paragraph (A)(l) of this Section with a person under the age of fourteen years shall be fined not

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[5] Section 101(a)(43)(U) of the Act defines an aggravated felony as "any attempt or conspiracy to commit [another aggravated felony] described in" section 101(a)(43) of the Act. At all relevant times, section 14:27 of the Louisiana Statutes provided the definition of "attempt" to commit an intended offense. The respondent does not meaningfully challenge the Immigration Judge's conclusion that the definition of "attempt" under section 14:27 categorically falls within the Federal generic definition of "attempt" set forth in section 101(a)(43)(U) of the Act (IJ at 6-7; Respondent's Br. at 6). We consider any arguments in this regard to be waived. *See Matter of P-B-B-*, 28 I&N Dec. 43, 44 n.1 (BIA 2020).

[6] The term "unnatural carnal copulation" in section 14:89(A)(1) only reaches "sodomy (anal-genital intercourse of a specified nature, . . .) and oral-genital activity (whereby the mouth of one of the participants is joined with the sexual organ of the other participant)"; by contrast, the term "sexual intercourse" in section 14:89(A)(2) reaches oral, anal, and vaginal activity. *State v. Smith*, 766 So. 2d 501, 504-05, 513 (La. 2000) (citation omitted).

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> more than seventy-five thousand dollars, imprisoned at hard labor for not less than twenty-five years nor more than fifty years, or both.
>
> (4) Whoever commits the offense of crime against nature as defined by Paragraph (A)(2) of this Section, where the crime is between an ascendant and descendant, or between brother and sister, shall be imprisoned at hard labor for not more than fifteen years.
>
> (5) Whoever commits the offense of crime against nature as defined by Paragraph (A)(2) of this Section, where the crime is between uncle and niece, or aunt and nephew, shall be fined not more than one thousand dollars, imprisoned, with or without hard labor, for not more than five years, or both.

La. Stat. Ann. § 14:89(A)-(B) (2017).[7]

On its face, section 14:89 proscribes two distinct crimes—(1) unnatural carnal copulation under certain circumstances and (2) incest under certain circumstances. *See* La. Stat. Ann. § 14:89(D) (providing that section 14:89 "incorporate[s] the elements of the crime[] of incest (R.S. 14:78) . . . , as they existed prior to . . . repeal"). Because section 14:89 metes out different punishments depending on whether a person is convicted of unnatural carnal copulation or incest, these statutory alternatives "must be elements." *Mathis v. United States*, 136 S. Ct. at 2256; *see also Matter of P-B-B-*, 28 I&N Dec. at 47. We may therefore examine the respondent's record of conviction under a modified categorical analysis to determine whether his offense involved unnatural carnal copulation or incest and what elements he was convicted of. *See Matter of P-B-B-*, 28 I&N Dec. at 46, 49.

The charging document in the record reflects that the respondent was charged with aggravated crime against nature "committed under one of following circumstances: the victim is *under the age of 18*, who is known to the offender to be *related to the offender as a biological relative, a daughter*" (IJ at 6; Exh. 2 at Tab E, 13 (emphases added)). However, although the respondent was *charged* with this offense, a jury ultimately *convicted* him by responsive verdict of a lesser included offense—namely, attempted crime against nature (IJ at 6; Exh. 3 at 157).

As noted, a responsive verdict was appropriate in the respondent's criminal case because the elements of a crime against nature are "included in [the original charge of] aggravated crime against nature" under section 14:89.1(A)(2)(a). *State v. McCoy*, 337 So. 2d at 196. To establish a conviction for aggravated crime against nature under this provision, the State must prove the

[7] To the extent section 14:89 proscribes oral and anal sex between two consenting adults, that portion of the statute is unconstitutional. *See Louisiana Electorate of Gays & Lesbians, Inc. v. Connick*, 902 So. 2d 1090, 1093 (La. Ct. App.) (severing these unconstitutional aspects of the statute from the proscription against carnal copulation with animals in light of *Lawrence v. Texas*, 539 U.S. 558 (2003), which held that a State statute forbidding two adult males from engaging in a consensual act of sodomy in the privacy of their home was unconstitutional), *writ denied*, 916 So. 2d 1062 (La. 2005).

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following elements: (1) the victim was under 18 years of age; (2) the offender knew that the victim was related to him; and (3) the offender has engaged in one of the prohibited acts with the victim. *State v. Flores*, 669 So. 2d 646, 650 (La. Ct. App. 1996) (outlining the elements for aggravated incest under former section 14:78.1); *see also* La. Stat. Ann. § 14:89.1(E) (stating that section 14:89.1 "incorporate[s] the elements of . . . aggravated incest (R.S. 14:78.1), as they existed prior to . . . repeal"). In light of the elements of section 14:89.1(A)(2)(a) as well as the contents of the respondent's charging document, the respondent could have only been convicted of one of two lesser included offenses under section 14:89: unnatural carnal copulation with "with a person under the age of eighteen years" under sections 14:89(A)(1) and (B)(2), *or* incest "between an ascendant and descendant" under sections 14:89(A)(2) and (B)(4).[8] The jury's responsive verdict does not specify under what section of 14:89 the respondent was convicted (IJ at 6 n.3; Exhs. 2-3).

If the former, the respondent's offense does not constitute sexual abuse of a minor because sections 14:89(A)(1) and (B)(2) do not require the abuse of a child under the age of 16, nor do they require that a defendant be in a "significant relationship of trust" with the victim. *Esquivel-Quintana v. Sessions*, 137 S. Ct. at 1572. If the latter, the respondent's offense does not constitute sexual abuse of a minor because sections 14:89(A)(2) and (B)(4) do not require proof that a "descendant" be a minor at the time of the offense. *Compare* La. Stat. Ann. § 14:89.1(A)(2)(a) (2017) (incorporating the elements of former section 14:78.1 and criminalizing certain acts against a relative "who is under eighteen years of age"); La. Stat. Ann. § 14:78.1 (2014) (criminalizing aggravated incest against a minor relative), *with* La. Stat. Ann. §§ 14:89(A)(2), (B)(4) (2017) (incorporating the elements of incest under former section 14:78 and not specifying the age of the victim relative); La. Stat. Ann. § 14:78 (2014) (criminalizing incest and not specifying the victim's age). In either case, the respondent was not convicted of a crime that necessarily involved sexual abuse of a minor under section 101(a)(43)(A) of the Act.

As a consequence, the respondent's conviction for attempted crime against nature under Louisiana law is not a conviction for attempted sexual abuse of a minor under sections 101(a)(43)(A) and (U) of the Act. The Immigration Judge therefore erred when he sustained the charge of removability under section 237(a)(2)(A)(iii) of the Act (IJ at 4-7).

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[8] Contrary to the respondent's contentions, his sentence to 7 years in prison does not necessarily establish that he was convicted under sections 14:89(A)(1) and (B)(1) (Respondent's Br. at 4). Nor does it preclude him from being convicted under sections 14:89(A)(1), (2), (B)(2), and (B)(4). First, the conviction record establishes that his victim was human, not animal, and, to the extent sections 14:89(A)(1) and (B)(1) proscribe consensual conduct between adult humans, these provisions have been deemed unconstitutional. *See Louisiana Electorate of Gays & Lesbians, Inc. v. Connick*, 902 So. 2d at 1093. Second, although sections 14:89(B)(2) and (4) set forth mandatory minimum sentences exceeding 7 years, there are a number of reasons why a State sentencing judge may choose to depart downward from a mandatory minimum sentence in a criminal statute. *See State v. Johnson*, 709 So. 2d 672, 676 (La. 1998) (providing that a sentencing court may depart from mandatory minimum penalties upon a showing by the defendant that he "is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case" (citation omitted)).

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B. Crime of Child Abuse

The Immigration Judge likewise erred in sustaining the charge of removability under section 237(a)(2)(E)(i) of the Act, which renders removable any alien who, at any time after admission, is convicted of "a crime of child abuse, child neglect, or child endangerment" (IJ at 7-8). We have held that the term "crime of child abuse" in section 237(a)(2)(E)(i) of the Act should be interpreted "broadly to mean any . . . sexual abuse or exploitation" of a child. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512 (BIA 2008); *see also Garcia v. Barr*, No. 19-60097, 2020 WL 4458772, at *3 (5th Cir. Aug. 4, 2020) (deferring to our holding in *Velazquez-Herrera*). For purposes of this definition, a "child" is anyone under the age of 18 years old. *Matter of Velazquez-Herrera*, 24 I&N Dec. at 512. Finally, the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, uses the categorical approach to discern whether a State offense is a crime of child abuse under the Act. *See Garcia v. Barr*, No. 19-60097, 2020 WL 4458772, at *4.

As set forth above, the respondent's record of conviction does not conclusively resolve whether he was convicted of an offense involving a minor. He could have been convicted of one of two possible crimes: (1) engaging in sexual activity with "a person under the age of eighteen years" pursuant to sections 14:89(A)(1) and (B)(2)—which would necessarily qualify as a crime of child abuse; or (2) incest with a "descendant" of an unspecified age under sections 14:89(A)(2) and (B)(4)—which would not (IJ at 6; Exhs. 2-3). Since the record of conviction in this case does not conclusively show that the respondent was convicted under sections 14:89(A)(1) and (B)(2)—rather than sections 14:89(A)(2) and (B)(4)—we are unable "to satisfy '*Taylor*'s demand for certainty' when determining whether [the respondent] was *convicted of*" a crime of child abuse. *Mathis v. United States*, 136 S. Ct. at 2257 (emphasis added) (citing *Shepard v. United States*, 544 U.S. 13, 21 (2005)). Without this certainty, our inquiry must end, "even if the defendant *actually committed the offense in its generic form*." *Descamps v. United States*, 570 U.S. 254, 261 (2013) (emphasis added); *cf. Le v. Lynch*, 819 F.3d 98, 109 (5th Cir. 2016) (holding that an alien could not establish his eligibility for relief based on "an inconclusive record of conviction").

III. CONCLUSION

The categorical approach is a highly formalistic framework which focuses solely on "what crime, *with what elements*, [an alien] was convicted of." *Mathis v. United States*, 136 S. Ct. at 2249 (emphasis added) (citing, inter alia, *Taylor v. United States*, 495 U.S. 575, 602 (1990)). "The key [under the categorical approach] is *elements*, not facts." *Descamps v. United States*, 570 U.S. at 261; *see also id.* at 270 (holding that we may not rely on "a non-elemental fact" under this approach). As a consequence, this "formalistic framework may result in some counterintuitive and hard-to-justify outcome[s]," as it does in this case. *Cabeda v. Att'y Gen. of U.S.*, No. 19-1835, 2020 WL 4778223, at *1 (3d Cir. Aug. 18, 2020).

The record plainly indicates that the respondent engaged in sexual conduct with his minor daughter (IJ at 6; Exhs. 2-3). But, under the categorical approach, his actual conduct is irrelevant. He was necessarily convicted of one of two different crimes set forth in the State statute of conviction. Each of these crimes satisfy some, but not all, of the elements of sexual abuse of a minor. And since it is uncertain what specific crime under the statute the respondent was convicted of, we cannot say for certain that he was convicted of a crime of child abuse. Because the DHS

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cannot sustain the charges of removability under sections 237(a)(2)(A)(iii) and (E)(i) of the Act, these proceedings must be terminated. *See Matter of J.J. Rodriguez*, 27 I&N Dec. 762, 763 (BIA 2020) (holding that proceedings must be terminated when "the charges of removability against a respondent have not been sustained" (citation omitted)). Accordingly, the following order will be entered.

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

FOR THE BOARD

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File: A077-898-496 – Oakdale, LA Date: AUG 20 2020

In re: Santiago GONZALEZ ALONSO

CONCURRING OPINION: Blair O'Connor

I concur with the result because precedent requires me to. I write separately to emphasize the absurdity of this outcome as indicated in the majority opinion's concluding paragraphs. It is beyond dispute factually that the respondent forcibly engaged in sexual intercourse with his daughter over a three-year period, beginning when she was just 13 years old. We know this from the Louisiana Court of Appeals decision in the respondent's case (Exh. 2, Tab F). But because of the ridiculous limitations the categorical approach imposes on immigration adjudicators making criminal law determinations, we must close our eyes as to what actually happened and "instead proceed with eyes shut" as to what could have happened, even though we know it did not. *United States v. Chapman*, 866 F.3d 129, 138 (Jordan, J., concurring). In the process, the respondent "escapes the consequences that Congress intended for [his] conduct." *United States v. Valdivia-Flores*, 876 F.3d 1201, 1211 (O'Scannlain, J., specially concurring). I grow tired of writing these concurrences, but I continue to do so in hopes that one day someone in Congress will open their eyes to this mess and take action to fix it. *See United States v. Fish*, 758 F.3d 1, 17-18 (1st Cir. 2014) (collecting cases that call on Congress to "'rescue the federal courts from the mire into which [application of the categorical approach] have pushed [them]'") (quoting *Chambers v. United States*, 555 U.S. 122, 131-32) (Alito, J., concurring)); *Mathis v. United States*, 136 S. Ct. at 2258 (Kennedy, J., concurring) (noting the "continued congressional inaction in the face of a system that each year proves more unworkable").

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