U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: R[redacted]-L[redacted], D[redacted] R[redacted] **A[redacted]054**

Date of this notice: 1/19/2018

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Liebowitz, Ellen C
Creppy, Michael J.
Malphrus, Garry D.

Userteam: Docket

File: [redacted] 054 – Los Angeles, CA Date: JAN 19 2018

In re: D[redacted] R[redacted] R[redacted] L[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Joseph J. Huprich, Esquire

APPLICATION: Cancellation of removal

The respondent appeals the Immigration Judge's September 9, 2014, decision denying his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The Department of Homeland Security has not filed a response. The appeal will be sustained, and the record will be remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge pretermitted the respondent's application for cancellation of removal, holding that the respondent's 2012 conviction under Cal. Penal Code § 273a(b) ("§ 273a(b)") was a "crime of child abuse, child neglect, or child abandonment," under section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i), which rendered him ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act (IJ at 2-4). In so holding, the Immigration Judge concluded that while § 273a(b) is not categorically a crime of child abuse, it is a divisible statute that warrants application of the modified categorical approach (IJ at 2). Applying the modified categorical approach to the instant case, the Immigration Judge concluded that the conviction records reveal that the respondent's conviction constitutes an offense under section 237(a)(2)(E)(i) of the Act (IJ at 2-4). The respondent now appeals.

On appeal, the respondent argues that his conviction is not a crime of child abuse as the statutory language of § 273a(b) punishes a broader range of conduct than that encompassed by the generic definition of a "crime of child abuse" under section 237(a)(2)(E)(i) of the Act, and therefore, he is not statutorily ineligible for cancellation of removal (Respondent's Br. at 3-5). In his supplemental appeal brief, the respondent further argues that we are bound by our decision in *Matter of Mendoza Osorio*, 26 I&N Dec. 703 (BIA 2016) to conclude that § 273a(b) is not a crime of child abuse (Respondent's Supplemental Br. at 2). We will reexamine whether the respondent's conviction renders him ineligible for cancellation of removal, in light of relevant intervening case law from the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit, and the Board since the Immigration Judge's September 9, 2014, decision in this case.

To determine whether a state criminal conviction is a crime of child abuse, we must follow the "categorical approach." *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). Under the categorical approach, we compare the state statute of conviction, which in this case is the respondent's conviction under Cal. Penal Code § 273a(b), with the generic offense – here, a "crime of child abuse" – to determine whether the state offense is a categorical match to the generic offense, such that every violation of that statute qualifies as a crime of child abuse. *See id.*; *see also Diego v. Sessions*, 857 F.3d 1005, 1009 (9th Cir. 2017).

In 2012, the respondent was convicted of violating Cal. Penal Code § 273a(b). California Penal Code § 273a(b) provides:

> Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.

In applying the categorical approach, we must first determine the definition of the generic offense. We have previously defined a "crime of child abuse" to mean an offense "involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being." *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512 (BIA 2008). The term is not limited to offenses that require proof of actual harm or injury, as the phrase "act or omission that constitutes maltreatment of a child" encompasses some crimes of child endangerment. *See Matter of Soram*, 25 I&N Dec. 378, 383 (BIA 2010); *see also Matter of Mendoza Osorio*, 26 I&N Dec. at 704. As states use a variety of terms to describe the degree of threat required under endangerment-type offenses, "a [s]tate-by-[s]tate analysis is appropriate to determine whether the risk of harm required by the endangerment-type language in any given [s]tate statute is sufficient to bring an offense within the definition of 'child abuse' under the Act." *Matter of Soram*, 25 I&N Dec. at 383. In *Matter of Mendoza Osorio*, we held that the elements of N.Y. Penal Code § 260.10(1), the child endangerment statute at issue in that case, which punished a knowing mental state coupled with an act or acts creating a likelihood of harm to a child, fit within the generic definition of a crime of child abuse. *Matter of Mendoza Osorio*, 26 I&N Dec. at 706.

We agree with the respondent that Cal. Penal Code § 273a(b) punishes a broader range of conduct than the generic definition of "crime of child abuse." In its decision in *Fregozo v. Holder*, the Ninth Circuit held that the "full range of conduct" punished under § 273a(b) is broader than our definition of "crime of child abuse." *Fregozo v. Holder*, 576 F.3d 1030, 1037 (9th Cir. 2009).[1] In so holding, the court stated that the fourth prong of § 273a(b), which involves willfully causing or permitting a child – in one's care or custody – to be placed in a situation where his or her person

[1] We note that *Fregozo v. Holder* was decided prior to our decisions in *Matter of Soram*, 25 I&N Dec. at 378, and *Matter of Mendoza Osorio*, 26 I&N Dec. at 703.

or health may be endangered, "makes criminal conduct that creates only the bare potential for nonserious harm to a child. . . " *Id.* at 1038.

As we noted in *Matter of Mendoza Osorio*, in concluding that § 273a(b) is broader than our definition of "crime of child abuse," the *Fregozo* court cited a California state case that upheld a conviction under § 273a(b) where a defendant "plac[ed] an unattended infant in the middle of a tall bed without a railing, even though the child was never injured." *Fregozo v. Holder*, 576 F.3d at 1037; *see also Matter of Mendoza Osorio*, 26 I&N Dec. at 711; *People v. Little*, 9 Cal. Rptr. 3d 446, 449-50 (Cal. Ct. App. 2004) (defendant was convicted under § 273a(b) for placing a child in a bed without railings or restraints, where she *could have been injured* from falling) (emphasis added). We agree that the facts in *People v. Little*, as construed by the *Fregozo* court, do not define a crime of child abuse.

In light of the foregoing discussion, we agree with the respondent that as the fourth prong of Cal. Penal Code § 273a(b) punishes allowing a child in one's care or custody to be placed in a situation where he or she *may* be endangered, the statute punishes a broader range of conduct than the generic definition of "crime of child abuse." *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) ("to find that a state statute creates a crime outside the generic definition . . . requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime."); *see also Fregozo v. Holder*, 576 F.3d at 1037-38; *People v. Little*, 9 Cal. Rptr. 3d at 449-50. As we agree that § 273a(b) criminalizes more conduct than the elements of the generic offense of "child abuse," the respondent is correct that § 273a(b) is overbroad and thus is not categorically a "crime of child abuse," within the meaning of section 237(a)(2)(E)(i) of the Act.

Turning to the issue of divisibility, although the Immigration Judge concluded that § 273a(b) is divisible and applied the modified categorical approach to the respondent's record of conviction when she analyzed the statute in 2014 (IJ at 2-4), we must now examine whether § 273a(b) is divisible under current case law from the Supreme Court, the Ninth Circuit, and the Board.

When a statute is overbroad and thus not a categorical match to the generic offense, we next determine whether the state statute of conviction is "divisible" or "indivisible." *See Diego v. Sessions*, 857 F.3d at 1009; *see also Descamps v. United States*, 133 S. Ct. 2276, 2281, 2283 (2013). To determine whether a statute is divisible, we ask whether a statute contains alternative "elements" defining multiple crimes or alternative "means" by which a defendant might commit the same crime. *See Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016). If the statute of conviction has an indivisible set of elements, it is "indivisible" and the modified categorical approach cannot be applied. *See Descamps v. United States*, 133 S. Ct. at 2282; *see also Matter of Chairez-Castrejon*, 26 I&N Dec. 819, 819-20 (BIA 2016) (holding that the divisibility analysis outlined in *Descamps* and *Mathis* "applies in immigration proceedings nationwide to the same extent that it applies in criminal sentencing proceedings").

To determine whether § 273a(b) is divisible, we first look to the text of the statute itself. The first part of the statutory text of § 273a(b) requires that the conduct be done "under circumstances or conditions other than those likely to produce great bodily harm or death." The second part of the statute outlines four prongs, phrased disjunctively, that present alternative ways in which a

defendant can injure or endanger a child. Although the statute is phrased disjunctively, that does not automatically render the statute divisible. *See Mathis v. United States*, 136 S. Ct. at 2249. It is not clear on the face of the statute whether these four prongs outline alternative means of committing the offense or if they are alternative elements punishing different offenses.

We next look at "authoritative sources of state law" to determine whether the statute is divisible. *See Mathis v. United States*, 136 S. Ct. at 2256. To begin, we note that § 273a is divided into subsections (a) and (b). Subsection (a) is a felony and punishes four alternative scenarios that occur "under circumstances or conditions likely to produce great bodily harm or death." As noted above, subsection (b) is a misdemeanor and punishes four alternative scenarios that occur "under circumstances or conditions *other than those* likely to produce great bodily harm or death" (emphasis added).[2] The language detailing the four alternative scenarios in both subsections (a) and (b) is identically worded. Due to the identical language of the relevant portions of both subsections, although this case only involves looking at subsection (b), in analyzing state case law to determine whether § 273a(b) is divisible, we also look to case law involving subsection (a).

California case law has determined that there are two distinct ways that an individual can violate the statute. First, an individual can violate the statute by "direct infliction," namely, by inflicting unjustifiable physical pain or mental suffering on a child. *See In re L.K.*, 132 Cal. Rptr. 3d 342, 346-47 (Cal. Ct. App. 2011) (analyzing subsection (a) of section 273a). The statute can also be violated by "indirect infliction," namely, by willfully causing or permitting any child to suffer; willfully causing or permitting the person or health of a child – in one's care or custody – to be injured; or willfully causing or permitting a child – in one's care or custody – to be placed in a situation where his or her person or health may be endangered.[3] *Id.* Of the three "indirect infliction" prongs of the statute, only the final prong, which punishes willfully causing or permitting a child – in one's care or custody – to be placed in a situation where his or her person or health may be endangered, falls outside of our definition of a crime of child abuse. Therefore, to determine whether the statute is divisible vis-à-vis our definition of "crime of child abuse," we must determine whether this final prong is merely an alternative means of violating the statute or

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[2] Subsections (a) and (b) qualify as distinct elements of the offense rather than as "brute facts," or mere means of commission as they contain different sentencing provisions affecting the degree of punishment. *See Matter of Chairez-Castrejon*, 26 I&N Dec. at 823; *see also Mathis v. United States*, 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, then under *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000),] they must be elements.").

[3] The California Supreme Court has determined that a violation of the "direct infliction" prong requires the state to prove general criminal intent, whereas a violation of the "indirect infliction" prongs only requires the state to prove criminal negligence. *See People v. Valdez*, 42 P.3d 511, 518-19 (Cal. 2002). Our definition of "crime of child abuse" encompasses both a mens rea of general intent (i.e., willfulness) and a mens rea of criminal negligence. *Matter of Velasquez-Herrera*, 24 I&N Dec. at 512 (our definition of a crime of child abuse requires "an intentional, knowing, reckless, or criminally negligent act or omission.").

whether it is an element of the offense that requires jury unanimity in order for a conviction. *Mathis v. United States*, 136 S. Ct. at 2248.

In *Ramirez v. Lynch*, the Ninth Circuit examined whether a conviction under Cal. Penal Code § 273a(a) is categorically an aggravated felony crime of violence. *Ramirez v. Lynch*, 810 F.3d at 1127. In concluding that § 273a(a) is overbroad and indivisible, the court held that the four prongs of the statute were alternative means of committing a single offense, rather than alternative elements requiring jury unanimity. *See id.* at 1138. Although *Ramirez* dealt with a different inquiry than the one in the instant case, the court relied on two California Courts of Appeal cases that aid us in our analysis of the instant case.

In *People v. Vargas*, the California Court of Appeal held that where a case involves a continuous course of conduct,[4] "it is permissible for members of the jury to determine that the underlying facts establish a violation of the statute under different legal theories such as direct infliction of abuse or permitting the child's health or safety to be endangered." *People v. Vargas*, 251 Cal. Rptr. 904, 909 (Cal. Ct. App. 1988). In other words, the jury did not need to agree as to whether the defendant violated the prong of the statute punishing the direct infliction of physical pain or the prong of the statute punishing the indirect infliction of injury by willfully permitting her child to be injured, so long as the jury unanimously agreed that the defendant violated § 273a(a). *Id.*

Furthermore, in *In re L.K.*, the California Court of Appeal upheld the lower court's judgment, but on a different prong of § 273a(a). *In re L.K.*, 132 Cal. Rptr. 3d at 347. The trial court found that the defendant violated the "direct infliction" portion of the statute, but in so doing, applied the incorrect mental state of criminal negligence (as opposed to general intent). *Id.* at 346. The appellate court agreed with the defendant that the trial court had erred in concluding that her actions violated the "direct infliction" portion of the statute. *Id.* However, the appellate court still upheld the lower court's judgment, concluding that the defendant had violated the first prong of the statute, by willfully permitting her brother to suffer unjustifiable physical pain and mental suffering. *Id.* at 347. Thus, even though the trial court erred in finding that the defendant violated the "direct infliction" portion of the statute, the appellate court upheld the conviction under § 273a(a), concluding that the evidence supported a conviction under a different prong. *Id.*

These cases reveal that in order to sustain a conviction under § 273a(b), the state of California need not prove that a defendant violated a particular prong of the statute, so long as the jury agrees

[4] Under California law, a jury verdict must be unanimous, and the jury must unanimously agree that a defendant is guilty of a specific crime. *People v. Russo*, 25 P.3d 641, 645 (Cal. 2001). An exception to the juror unanimity requirement exists for certain offenses, including § 273a, when the state alleges a pattern of abuse, or a "continuous course of conduct." *People v. Ewing*, 140 Cal. Rptr. 299, 300-01 (Cal. Ct. App. 1977). When a prosecutor alleges a "continuous course of conduct," the jury is required to unanimously decide whether the defendant was guilty of that course of conduct, as distinguished from whether the defendant committed a specific act on a specific date. *Id.*

that the defendant violated one of the four prongs necessary for a conviction. *See generally In re L.K.*, 132 Cal. Rptr. 3d at 342; *People v. Vargas*, 251 Cal. Rptr. at 904. As such, the four prongs of § 273a(b) are merely alternative means of violating the statute that do not require jury unanimity, as opposed to separate elements. Therefore, after examining the authoritative sources of state law, we conclude that § 273a(b) is not divisible. As § 273a(b) is not a divisible statute, our analysis stops here, and we cannot apply the modified categorical approach to the instant case.

In sum, we conclude that § 273a(b) is broader than the generic offense of a "crime of child abuse," and is not divisible; therefore, it is not a crime of child abuse under section 237(a)(2)(E)(i) of the Act. As such, the respondent is not precluded from applying for cancellation of removal, as he has not been convicted of a disqualifying offense under section 240A(b)(1)(C) of the Act.[5] In light of our conclusion, we will remand the record to the Immigration Judge to further determine whether the respondent is eligible for cancellation of removal. Due to the passage of time since the Immigration Judge's decision in this case, the parties should be allowed to update the record with new evidence or arguments on remand. Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

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

FOR THE BOARD

[5] Although the respondent is not precluded from seeking cancellation of removal, the Immigration Judge may consider the respondent's criminal history as part of a discretionary analysis. *See Matter of C-V-T-*, 22 I&N Dec. 7, 11-12 (BIA 1998) (discussing exercise of discretion for lawful permanent residents seeking cancellation of removal).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CA

IN THE MATTER OF: §

D[redacted] R[redacted] R[redacted]-L[redacted] § CASE NO. [redacted] 054

§

IN REMOVAL PROCEEDINGS

CHARGE(S): 212(a)(6)(A)(i) Alien Present In The United States Without Having Been Admitted or Paroled By An Immigration Official
APPLICATION: Respondent's Eligibility for Cancellation of Removal

ON BEHALF OF THE RESPONDENT:
Joseph J. Huprich, Esq.

ON BEHALF OF THE DHS:
District Counsel's Office

ORDER AND DECISION OF THE IMMIGRATION JUDGE

Respondent has applied for relief under Cancellation of Removal for Non- Permanent Residence under §240(A)(b) if the Immigration and Nationality Act. DHS has argued that the respondent is ineligible for this form of relief because he has been convicted for a crime of "child abuse" as enacted under §237(a)(2)(E(i). DHS argues that *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) applies, therefore, respondent is ineligible for this form of relief. Respondent has argued, that despite the Board's decision in *Matter of Soram,supra,* the Ninth Circuit has not deffed to the Board's decision in that case and DHS is ignoring the Supreme Court's decisions in Moncrieffe v. Holder, 133 S.Ct. 1678(2013) and Descamps v. US, 133 S.Ct. 2276(2013).

The categorical approach, which requires a focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, is employed to determine whether the respondent's conviction is for a crime of child abuse under the Immigration and Nationality Act.. *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Matter of Chairez*, 26 I&N Dec. 349(BIA 2014) followed.

Under Decamps v. US, 133 S.Ct. 2276 (2013) the Supreme Court determined that the categorical approached requires a focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction. The Supreme Court explained that a criminal statute is divisible, so as to warrant a modified categorical inquiry, only if (1) it lists multiple discrete offenses as enumerated alternative or defines a single offense by reference to disjunctive sets of "elements" more than one combination of which could support a conviction; and (2) at least one, but not all of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard.

Respondent was convicted in violation of §273a(b) of the California Penal Code which states:

Penal Code § 273a.

(b) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.

This criminal statute is divisible because it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements of more than one combination of which could support a conviction . *See Decamps v. US*, supra. Therefore, the modified categorical approach must be applied to determine if at least one, but not all of those listed offenses or combination of disjunctive elements is a match to the relevant generic standard. *See Decamps v. US*, supra.

Under Count 1 of Respondent's felony complaint it states that respondent "...on or about January 7, 2012 in the City of Long Beach, County of Los Angeles, State of California, a misdemeanor was committed by said defendant(s) who did then and there did willfully and unlawfully, under circumstances of conditions other than those likely to produce great bodily harm or death, cause and permit Moeses R., a child of the age of TEN years to suffer unjustifiable physical pain or mental suffering or did willfully use or permit said child(s) to be injured or placed in a situation where his or her person or health was endangered in violation of Section 273a(b) of the Penal Code of the State of California."

This complaint is also divisible and allows for different alternative means of committing the crime. There are no other judicially noticeable documents other the minute order which does not further explain said document. Under, *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012) (en banc) (holding in the cancellation of removal context that an inconclusive record is insufficient to satisfy the alien's burden of proof). It is the respondent's burden of proof to establish eligibility for Cancellation of Removal with an inconclusive record of conviction. Respondent has failed to do so in this case. This court has no idea whether respondent was convicted for "... willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered." Respondent just argues in his brief that it was for endangerment. None of the judicially noticeable documents support this assertion.

Currently, *Matter of Soram, supra*, is the standard sets forth the standard for a child abuse conviction under Colorado law for immigration purposes. In the BIA's decision it held that:

"The respondent was convicted of "knowingly or recklessly" permitting a child to be unreasonably placed in a situation that posed a threat of injury to the life or health of the child under section 18-6-40 l(7)(b)(I) of the Colorado Revised Statutes. This "knowingly or

recklessly" mens rea is consistent with our definition of a crime of child abuse, which requires an "intentional, knowing, reckless, or criminally negligent act or omission." Matter of Velazquez-Herrera, 24 I&N Dec. at 512. Colorado courts have held that the term "knowingly" in the statute "refers to the actor's general awareness of the abusive nature of his conduct in relation to the child or his awareness of the circumstances in which he commits an act against the well-being of the child." People v. Noble, 635 P.2d 203, 210 (Colo. 1981). Furthermore, "a person acts 'recklessly' when he consciously disregards a substantial and unjustifiable risk that, in light of the child's circumstances, a particular act or omission will place the child in a situation which poses a threat of injury to the child's life or health." Lybarger v. People, 807 P.2d at 575...."

"In addition, the culpability of those who permit a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health is quite high. In this regard, we observe that, prior to 1980, section 18-6-401(l)(a) of the Colorado Revised Statutes used the phrase "may endanger [a child's] life or health." People v. Weinreich, 119 P.3d 1073, 1077 (Colo. 2005). The Supreme Court of Colorado has recognized that the use of the phrase "may endanger" introduced a "broad and unconstitutionally vague spectrum of speculative causal possibilities," noting that "'virtually any conduct directed toward a child has the possibility, however slim, of endangering the child's life or health."' Id. at 1078 (quoting People v. Hoehl, 568 P.2d 484, 486 (1977)). Accordingly, to render the statute constitutional, the court interpreted the phrase "may endanger" to mean that "there is a reasonable probability that the child's life or health will be endangered from the situation in which the child is placed." People v. Hoehl, 568 P.2d at 486 (emphasis added)..."

*"In sum, the Colorado child abuse law requires a knowing or reckless act, and the juvenile status of the victim is an element of the offense. Furthermore, we find that the full range of conduct proscribed by *386 section 18-6-401(l)(a) of the Colorado Revised Statutes falls squarely within the definition of a "crime of child abuse." See Matter of Velazquez-Herrera, 24 I&N Dec. at 512. We therefore conclude that the respondent's offense categorically qualifies as a "crime of child abuse" under section 237(a)(2)(E)(i) of the Act. Id; see also Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991, 996 (BIA 1999). Accordingly, the respondent's appeal will be dismissed."*

The Colorado Statute§186-401(7)(b)(1) states:

"(b) Where no death or injury results, the following shall apply:
(I) An act of child abuse when a person acts knowingly or recklessly is a class 2 misdemeanor; except that, if the underlying factual basis of the child abuse, which would constitute a misdemeanor, has been found by the trier of fact to include one of the acts described in paragraph (e) of this subsection (7), subsequent to a prior conviction under this section, then it is a class 5 felony."

Paragraph (a) states:

(a) Where death or injury results, the following shall apply:
(I) When a person acts knowingly or recklessly and the child abuse results in death to the child, it is a class 2 felony except as provided in paragraph (c) of this subsection (7).
(II) When a person acts with criminal negligence and the child abuse results in death to the child, it is a class 3 felony.
(III) When a person acts knowingly or recklessly and the child abuse results in serious bodily injury to the child, it is a class 3 felony.
(IV) When a person acts with criminal negligence and the child abuse results in serious bodily injury to the child, it is a class 4 felony.
(V) When a person acts knowingly or recklessly and the child abuse results in any injury other than serious bodily injury, it is a class 1 misdemeanor; except that, if the underlying factual basis of the child abuse, which would constitute a misdemeanor, has been found by the trier of fact to include one of the acts described in paragraph (e) of this subsection (7), subsequent to a prior conviction under this section, then it is a class 5 felony.
(VI) When a person acts with criminal negligence and the child abuse results in any injury other than serious bodily injury to the child, it is a class 2 misdemeanor; except that, if the underlying factual basis of the child

abuse, which would constitute a misdemeanor. has been found by the trier of fact to include one of the acts described in paragraph (e) of this subsection (7), subsequent to a prior conviction under this section, then it is a class 5 felony.

The Colorado statute and the BIA decision encompass a statue that is by far much broader in nature than the California statute. Respondent's California convictions falls within the language of the Colorado statutory definition and the BIA's decision in *Matter of Soram, supra*, which used the modified categorical approach in deciding this case, is the controlling decision and applies *on point* to respondent's case. Respondent's arguments that *Moncrieffe v. Holder, supra* and *Decamps, supra* override *Matter of Soram*, has no merit. *Matter of Soram* is currently applicable law and again is controlling in this case.

Although respondent argues that the BIA overreached it authority in expanding the definition "to include and defining endangerment type offenses", this Court has no jurisdiction nor authority to address these constitutional arguments.

Matter of Soram, supra, is controlling in Respondent's case and his conviction is a conviction of child abuse. Respondent has failed to present judicially noticiable evidence otherwise under *Young v. Holder, supra.* Therefore, respondent is statutorily barred from Cancellation of Removal for Non Permanent Residence and his 42B application is DENIED AND PRETERMITTED.

9/9/14 at 11:40a.m.
Date and Time

D. D. Sitgraves
Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO:( ) ALIEN ( ) ALIEN c/o Custodial Officer ( ) Alien's ATT/REP ( ) INS
DATE: 9/11/14 BY: COURT STAFF Tina Attachments:( )
EOIR-33 ( ) EOIR-28 ( ) Legal Services List ( ) Other