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DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

IN THE MATTER OF:	§	
Miguel Angel XXXXXXXXXXX	§	FILE NO: AXXXXX
IN REMOVAL PROCEEDINGS	§	

RESPONDENT'S BRIEF ON APPEAL

The respondent, Miguel Angel XXXXXXXXXX, through counsel, submits this brief in support of his appeal from the decision, dated August 22, 2016,[1] of Immigration Judge XXXXXX, sitting at the Immigration Court in Pearsall, Texas. Mr. XXXXXXX requests that the Board overturn the removal order and terminate proceedings because he is not removable as charged.

Issue:

whether Mr. XXXXXXX is removable under INA § 237(a)(2)(A)(iii) as an alien convicted of a "sexual abuse of a minor" aggravated felony under INA § 101(a)(43)(A).

The Facts:

On January 19, 2016, the Department of Homeland Security ("DHS") filed a Form I-862, Notice to Appear ("NTA"), with the Immigration Court at the South Texas Detention Center in Pearsall, Texas. DHS charged Mr. XXXXXXX with being removable under INA § 237(a)(2)(A)(iii) as an alien convicted of an aggravated felony as defined in INA § 101(a)(43)(A) for "Murder, Rape OR Sexual Abuse of a Minor" on account of a June 2, 2015, Texas conviction for "Indecency with a Child by Contact." See Record of Proceedings ("ROP"), Exh. 1 (Notice to Appear). On the same date, DHS filed records relating to a March 27, 2015 conviction in Cause No. XXXXXXXX-II, out of a court in Travis County, Texas,

[1] Hereinafter "IJ Decision" or "IJ Dec."

for "Indecency W/A Child By Contact, Felony – Level 2". ROP, Exh. 2 (conviction records), pgs. 2 – 6.

Mr. XXXXXXX, through family, hired attorney Orlando S. M_____ to represent him before the immigration court. On or about March 23, 2016, Mr. M_____ filed his Form EOIR 28, Notice of Entry of Appearance, on behalf of Mr. XXXXXXX, with the immigration court. See ROP, Exh. 3. On April 6, 2016, the IJ took pleadings. Mr. M_____ admitted all factual allegations and conceded that his client was removable as charged. See ROP Transcipt (hereinafter "Transcript" or "Tr."), pg. 3, lines 11 – 23. On the basis of that concession, the IJ upheld removability. See id. As stated in her written decision:

> On April 6, 2016, respondent appeared before the court with his counsel, Mr. Orlando S. M_____. See Exhibit 3.
> ….
> The respondent through counsel … entered pleadings, admitting to all of the factual allegations and conceding the charge of removability. Based upon the evidentiary record consisting of respondent's admission to all factual allegations contained in the NTA and the respondent's concession to the single charge contained in the NTA and the conviction records contained in Exhibit 2, the Court sustains the charge of removability and finds that factual allegations numbers 1-5 áre true by clear and convincing evidence. The Court further finds as a matter of law that the Government has proven by clear and convincing evidence that the respondent is removable as charged.

IJ Dec., pg. 3. Here the IJ makes clear that she found removability not only on the basis of Mr. M_____'s concession but also based upon her own independent review of the record of conviction and her own legal analysis into removability. The IJ then asked Mr. M_____ "what forms of relief, if any" did he client

seek? Mr. M_____ said, "We were going to file an I-212, you honor." Tr., pg. 4, lines 6 – 10. Without asking Mr. M_____ how a Form I-212 was relevant to his client's case,[2] the IJ asked Mr. M_____ whether he had the application ready. Mr. M_____ did not so he requested additional time, which request was granted. See id., pg. 4, lines 11 – 24. The trial attorney said nothing as well and the case was adjourned for five weeks. See id., pg. 5, lines 1 – 22.

Five weeks later, on May 16, 2016, Mr. M_____ submitted an I-212 to the IJ. See Tr., pg. 6, line 16 to pg. 7, line 10. Neither the IJ nor the trial attorney inquired of Mr. M_____ as to why he was filing I-212 or what relevance it had to the proceeding. See id. Then Mr. M_____ sought another continuance (of two weeks) to file another unidentified application. See Tr., pg. 7, lines 11 – 24. When asked whether he knew at that time what kind of application he would be filing, Mr. M_____ claimed that he was going to be "filing adjustment of status and maybe a waiver also." Tr., pg. 8, line 16. The trial attorney then interjected and asked whether there was a pending I-130. See Tr., pg. 9, lines 1 – 2. Mr. M_____ claimed there was. See Tr., pg. 9, line 4. Notably, Mr. M_____ did not explain how it was that the pending I-130 made his client eligible to adjust status. See id. At the next hearing, on June 6, 2016, after another

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[2] Such an application would have relevance in an attempt to reimmigrate from abroad via the consular process, after being deported, see 8 C.F.R. §§ 212.2 and 103.7(b)(1)(i)(R), but would have no relevance to Mr. XXXXXXXX's removal proceedings.

request for a continuance by Mr. M_____, it finally came out that "there was an issue with the pending I-130," as the IJ put it, see Tr., pg. 11, line 18, namely that it was Mr. XXXXXXX's wife who had filed the I-130, that she was not a U.S. citizen, and that she was in the process of naturalization but had already failed the examination at least once. See id., pg. 12, lines 6 – 12. The IJ granted a continuance to July 11, 2016 to allow Mr. XXXXXXX's wife to attempt to complete the process of naturalization. See Tr., pgs. 14 – 15. On July 11, 2016, it was continued for the same purpose again to July 25, 2016. See Tr., pgs. 16 – 20.

On July 24, 2016, Mr. M_____ went to visit Mr. XXXXXXX at the detention center.

Mr. XXXXXXX describes that exchange as follows:

> The night before the July 25, 2016 hearing I was notified that I had an appointment with an attorney. When I arrived to the visitation room I saw that it was Orlando M_____. He told me that tomorrow we had our final hearing and said we would see how it went for us because he could not do anything else to help me because I was going to be ordered deported because my wife's application to become a citizen had been denied and that it was basically her fault. He went on to say I was being deported because my wife was struggling to pass her civics exam. He told me that being ordered deported was no big deal and not to worry because even after I was deported to Mexico I could still obtain legal status through a waiver via consular processing, even while I was away in Mexico. He told me that the whole situation could be resolved this way and that I would be back in the U.S. very soon, in two to three weeks. I was skeptical of this and told him that I had heard on a radio program hosted by an immigration attorney that the average time of the consular processing case lasted anywhere from two to three years. He said this was not true.

> **I made it clear to him that I really wanted to try appealing a deportation order**. He told me he was not going to help me with the appeal process. **I told him that my family members had consulted with another law firm and had hired another attorney to help me with my case, beginning with the handling of my last hearing**. He said that the other attorney did not know what they were doing and could not do anything to help me. I told him that my family was helping me by consulting with other attorneys and that I was not going to turn down any help or support that they were giving me, especially since he had been telling me that my case was basically hopeless. **I told him that if he could not do anything that he should not bother appearing at the hearing because a new attorney had been hired to represent me.** He told me he was still going to appear at the hearing because the immigration judge could punish him if he did not show up.

See Tab D, pgs. ____ (XXXXXXX 2nd Aff., ¶¶ 3 – 4) (emphasis added). During that in-jail visit, Mr. XXXXXXX made two things clear to Mr. M_____: he made clear that he was discharging Mr. M_____ from further service on his behalf and that he desired and intended to assert his rights to appeal any removal order.

The next day, on July 25, 2016, the IJ held another master hearing. After pointing out that there was "no application for relief pending before the court," Tr., pg. 21, lines 1 – 2, she ordered Mr. XXXXXXX removed. See id., pg. 21, lines 6 – 9. In her written decision issued four weeks later, the IJ wrote that, at that "July 25, 2016 [master hearing], "[Mr. XXXXXXX] through counsel concede[d] that [Mr. M_____] does not qualify for relief from removal as [he] does not have a qualifying relative to support the Application for Permission to Reapply for

Admission Into the United States After Deportation or Removal [i.e., the I-212 waiver form].[3] As such, there are no applications for relief pending before the Court." IJ Dec., pg. 4. Despite being discharged and despite being specifically advised by Mr. XXXXXXX that he wished to reserve appeal, Mr. M_____, on behalf of Mr. XXXXXXX, attempted to waive appeal of the IJ's removal order. See Tr., pg. 21, lines 12 – 15. When asked by the IJ, "Does your client wish to reserve appeal, sir?," Mr. M_____ told the IJ: "No, your honor." Id. Thus, not only did Mr. M_____ knowingly violate Mr. XXXXXXX's wishes to reserve appeal in an active attempt to undermine his client's legal interests but he did so by means of a false representation to the Court.[4] Mr. XXXXXXX, fortunately, was familiar enough with Mr. M_____ to know that he was being wronged and he immediately interjected himself into the proceeding to advise the IJ that, contrary to what "his" lawyer had just said, he did indeed wish to appraise himself of an appeal. See Tr., pg. 21, line 22 – pg. 22, line 6. If Mr. XXXXXXX had not been so assertive on that day in the face of Mr.

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[3] It is unclear why the Court was addressing the I-212 or any supposed requirement of a qualifying relative. As stated in the preceding footnote, an I-212 waiver had no relevance to Mr. XXXXXXXX's proceedings. In any case, even if it were relevant, there is no requirement of a qualifying relative for such a waiver. See 8 C.F.R. § 212.2. Furthermore, even if there were a requirement of a qualifying relative for such a waiver, Mr. XXXXXXXX's wife is a resident alien. See IJ Dec., pgs. 3 – 4. In short, nothing about that portion of the IJ's decision makes any sense.

[4] This egregious conduct is the subject of an additional bar complaint. See Index, Tab C, pgs. ____.

M_____'s misconduct, Mr. M_____ would have successfully stripped Mr. XXXXXXX of his right to an appeal. See 8 C.F.R. § 1003.39.

Later, the IJ scheduled a further hearing on August 22, 2016 to address the exhibits in the record. As described above, several weeks prior to that final master hearing, Mr. XXXXXXX, through family, had contracted with the undersigned to take over representation of the case. The family believed that a removal order had been entered against him already. The office of the undersigned contacted Mr. M_____ immediately (by means of a letter sent as a facsimile) and requested the file. Mr. M_____ responded to the letter by sending a facsimile with certain documents from the file. Nowhere within the documents provided by Mr. M_____ was any notice pertaining to any future hearing in the removal case. Mr. XXXXXXX's new counsel would later discover that the immigration court had scheduled an August 22, 2016 hearing, that Mr. M_____ had received notice of that hearing, and that Mr. M_____ had failed to inform new counsel that that hearing had been scheduled in time for that new counsel to attend. The day after the August 22, 2016 hearing, undersigned counsel again reached out to Mr. M_____ to obtain a copy of the order so that a proper Notice of Appeal could be submitted to this Board. Mr. M_____ refused to produce a copy of the removal order despite being discharged by his client. Undersigned counsel then filed a complaint with the Texas State Bar on account of that refusal,

see Tab A, pgs. ____,[5] and that complaint remains pending.

Undersigned counsel ultimately obtained the relevant records by means of a FOIA request to EOIR. Those records revealed to the undersigned for the first time that Mr. M_____ had conceded removability in the case, thereby committing ineffective assistance of counsel because, as explained below in full, there is a fundamental difference in essential elements between the Board's definition of "sexual abuse of a minor" and the Texas Penal Code provision at issue. The Texas statute is missing an essential element of the Board's definition and, therefore, does not qualify as sexual abuse of a minor within the meaning of the INA. Undersigned counsel gave notice to Mr. M_____ of his intent to file a bar complaint pursuant to Matter of Lozada, 19 I. & N. Dec. 637 (B.I.A. 1988), on account of his concession of removability. See Tab __. Mr. M_____ has acknowledged receipt of this complaint. See Tab ____.[6] After giving notice, the undersigned filed that bar complaint on behalf of Mr. XXXXXXX, see Tab ___, and it remains pending.

Summary of the Argument:

Mr. XXXXXXX was represented by Mr. M_____ in proceedings. Mr.

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[5] For the sake of economy, the copy of the bar complaint attached does not include the full index sent to the state bar.

[6] Mr. M_____'s entire response was: "You need to learn your case. I really should not be responding to your email. It is just ignorant. You just want to justify your billing to Mr. XXXXXXXX and his wife." Index, Tab B, pg. ___.

M_____ committed ineffective assistance of counsel in conceding removability. Mr. XXXXXXX, as a matter of law, is not removable as charged. There is a fundamental difference in essential elements between the Board's definition of "sexual abuse of a minor" and the Texas statute at issue. The Texas statute is missing an essential element of the Board's definition and, therefore, does not qualify as sexual abuse of a minor within the meaning of the INA. This Board should terminate proceedings.

Argument:

I. **Mr. XXXXXXX is not removable as charged because the Texas statute at issue is missing an essential element of the Board's definition of sexual abuse of a minor. This Board should overturn the finding of removability and terminate proceedings**.

A. **The IJ conducted her own analysis into removability based upon her own review of the conviction record and erroneously found Mr. XXXXXXX to be removable. This Board has jurisdiction to review that erroneous finding of removability.**

Mr. XXXXXXX did not dispute any factual issues before the IJ and he does not dispute any factual issues now before the Board, including the existence of the charged conviction. The IJ made clear that, despite Mr. M_____'s concession of removability, she reviewed the convicted records and independently determined Mr. XXXXXXX to be removable. See IJ Dec., pg. 3 ("Based upon the evidentiary record consisting of respondent's admission to all factual allegations … and the respondent's concession to the single charge [of removability] and the

conviction records … in Exhibit 2, the Court sustains the charge of removability…. The Court further finds as a matter of law that the Government has proven by clear and convincing evidence that the respondent is removable as charged."). This means that, regardless of Mr. M_____'s ineffective assistance of counsel in conceding removability, see argument below, this Board may properly review the legal issue of whether Mr. XXXXXXX is removable as charged. See 8 C.F.R. 1003.1(d)(3)(ii) ("The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo"). Because Mr. XXXXXXX is not removable as charged, as explained below, this Board should overturn the finding of removability and terminate proceedings.

B. **Mr. XXXXXXX is not removable as charged because the Texas statute at issue is missing an essential element of the Board's definition of sexual abuse of a minor**

A conviction under Texas Penal Code § 22.11(a)(1) does not render an alien removable under § 237(a)(2)(A)(iii), which is the only ground of removability alleged by the DHS, because the Texas statute does not have as an element the necessary age differential between the accused and the complainant.

The categorical approach applies in this context. See Matter of Esquivel-Quintana, 26 I&N Dec. 469 (BIA 2015). Under the categorical approach, only the "fact of conviction and the statutory definition of the prior offense" can be examined. Taylor v. United States, 495 U.S. 575, 602 (1990); see also Mathis v.

United States, 136 S. Ct. 2243, 2248 (2016) (holding that the focus of the categorical approach is on "whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case").

In Esquivel-Quintana, the Board held that the offense of unlawful intercourse with a minor in violation of section 261.5(c) of the California Penal Code was categorically a "sexual abuse of a minor" aggravated felony under INA § 101(a)(43)(A) because, inter alia, it required, **as an element of the statute**, that the minor victim be "more than three years younger" than the perpetrator:

> We recognize that there should be a distinction between sexual offenses involving older adolescents and those involving younger children when assessing whether consensual intercourse between peers is "abusive," and thus whether it would constitute "sexual abuse of a minor." See United States v. Medina-Villa, 567 F.3d 507, 514 (9th Cir. 2009). **The statute must prohibit conduct that constitutes "sexual abuse" as that term is commonly used.** See Matter of Rodriguez-Rodriguez, 22 I&N Dec. at 996. **In this regard, we do not view an offense under a statute that may involve a 16- or 17-year-old victim, and that presumes a lack of consent, as categorically constituting sexual "abuse" without requiring an age differential.** See United States v. Osborne, 551 F.3d 718, 720 (7th Cir. 2009) (noting that it is difficult to classify as "abusive" certain conduct prohibited by a State statute that imposes no age differential requirement but that makes it a crime for one teenager to engage in sexual contact with another, without committing a sexual act). **In our view, an age differential is the key consideration in determining whether sexual intercourse with a 16- or 17-year-old is properly viewed as categorically "abusive."** See id. at 720–21 (differentiating between sexual acts that are "abusive," because there is a significant age differential between the perpetrator and victim, and sexual acts that are not "abusive" because they occur between high school peers

> who are separated in age by, for example, only 2 years).
> ….
> As discussed above, for a statutory rape offense involving a 16- or 17-year-old victim to be categorically "sexual abuse of a minor" under section 101(a)(43)(A) of the Act, the statute must require a meaningful age
> difference between the victim and the perpetrator.

26 I&N Dec. at pgs. 475, 477 (emphasis added).

By contrast, the Texas statute makes the age differential not an element of the statue – which by definition is something that the state must prove – but rather an affirmative defense – which is something that by definition the defendant must prove.[7] The relevant Texas statute reads:

> Sec. 21.11. INDECENCY WITH A CHILD.
> (a) A person commits an offense if, with a child younger than 17 years of age, whether the child is of the same or opposite sex, the person:
> > (1) engages in sexual contact with the child or causes the child to engage in sexual contact; or
>
> ….
> (b) **It is an affirmative defense to prosecution under this section that the actor:**
> > **(1) was not more than three years older than the victim and of the opposite sex**;

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[7] Texas Penal Code § 2.04, entitled, "Affirmative Defense" reads:

> (a) An affirmative defense in this code is so labeled by the phrase: "It is an affirmative defense to prosecution ... ."
> (b) The prosecuting attorney is not required to negate the existence of an affirmative defense in the accusation charging commission of the offense.
> (c) The issue of the existence of an affirmative defense is not submitted to the jury unless evidence is admitted supporting the defense.
> (d) If the issue of the existence of an affirmative defense is submitted to the jury, the court shall charge that the defendant must prove the affirmative defense by a preponderance of evidence.

> (2) did not use duress, force, or a threat against the victim at the time of the offense; and
> (3) at the time of the offense:
>
> (A) was not required under Chapter 62, Code of Criminal Procedure, to register for life as a sex offender; or
>
> (B) was not a person who under Chapter 62 had a reportable conviction or adjudication for an offense under this section.

This is not a meaningless distinction. Rather it connotes a difference in essential elements between the Board's definition of "sexual abuse of a minor" and the Texas penal code provision. The Texas penal code provision lacks an essential element of the Board's definition of "sexual abuse of a minor."

Consider the Fifth Circuit decision in Sarmientos v. Holder, 742 F.3d 624 (5th Cir. 2014), which applied the categorical approach to a Florida drug statute that differed from the federal drug trafficking offense in so far as the Florida statute converted knowledge of the illicit nature of the substance from an element (as it existed under federal law) into an affirmative defense. The Court, applying the minimum conduct analysis, ruled that this distinction made the Florida statute overbroad and not categorically an aggravated felony:

> The Government nonetheless contends that the Florida offense is a categorical match to the federal offense even though "knowledge of the illicit nature of the substance" is an affirmative defense under Florida law but an element of the crime the prosecution must prove beyond a reasonable doubt under federal law. According to the Government, because a defendant can raise the affirmative defense if he actually lacks knowledge of the illegal nature of the substance, the affirmative defense ensures that the defendant is "convicted based on

> knowledge of the substance's illicit nature just as he or she would have been under federal law."
>
> This argument misses the mark. A defendant can be convicted under the Florida law at issue without a finding beyond a reasonable doubt or an admission in a plea agreement that the defendant knew of the substance's illicit nature if the defendant either fails to raise the affirmative defense or fails to meet his burden of persuasion. Because we cannot say that "the least of the acts criminalized" by the Florida statute is encompassed by the federal offense, the Florida crime of delivery of cocaine does not, as a matter of law, constitute an aggravated felony.

742 F.3d at 631 (emphasis added).

Applying Sarmientos and Esquivel-Quintana to the removability analysis at issue here results in the inescapable conclusion that the Texas offense is not categorically a "sexual abuse of a minor" aggravated felony under INA § 101(a)(43)(A) because it is missing an essential element relating to the age differential. This means that Mr. XXXXXXX is not removable under § 237(a)(2)(A)(iii) on account of any conviction for an aggravated felony and this Board should terminate proceedings.

C. **Mr. M_____ committed ineffective assistance of counsel in conceding removability on behalf of Mr. XXXXXXX and Mr. XXXXXXX was clearly prejudiced thereby.**

As previously argued, the IJ made clear that, despite Mr. M_____'s concession of removability, she reviewed the conviction records and independently determined Mr. XXXXXXX to be removable, meaning this Board may review the legal question of whether Mr. XXXXXXX is removable as charged despite Mr.

M_____'s concession. But to the extent that Mr. M_____'s concession of removability appears to this Board to be an obstacle to that review, then Mr. M_____ clearly committed ineffective assistance of counsel when he conceded removability and Mr. XXXXXXX should not be held to that concession.[8]

While it is a judicial principal that "[a]bsent egregious circumstances, a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his professional capacity binds his client as a judicial admission," nevertheless, certain "egregious circumstances" may justify relieving an alien from being bound by his counsel's admissions, such as when "admissions and the concession of deportability … were the result of unreasonable professional judgment or were so unfair that they have produced an unjust result." Matter of Velasquez, 19 I. & N. Dec. 377, 382 – 83 (BIA 1986). Mr. M_____'s concession was the clear result of unreasonable professional judgment and his concession would clearly produce an unjust result because Mr. XXXXXXX is not removable as charged, as argued above. Mr. M_____ failed to do the basic analysis involved in determining whether any ground of removability applies – a comparison of the elements between the criminal statute and the ground of

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[8] In regard to that, Mr. XXXXXXXX has complied with Matter of Lozada, 19 I&N Dec. 637 (BIA 1988) aff'd 857 F.2d 10 (1st Cir. 1988). Mr. XXXXXXXX's affidavit explaining his agreement with Mr. M_____ is at Tab D, pg. ___. Undersigned counsel gave notice to Mr. M_____ of the allegation that he committed ineffective assistance in conceding removability, see Tab B, pg. _, and subsequently filed a bar complaint against him. See Tab B, pg. ___.

removability. As noted by the IJ in her decision, because of M_____'s concession, his client had no relief so there was no possible tactical reason for Mr. M_____ to concede removability. We know that Mr. M_____ submitted a Form I-212 to the IJ[9] – which form had no relevance whatsoever to Mr. XXXXXXX's proceedings – and then, contrary to his client's stated wishes, attempted to undermine his client's legal interests by waiving appeal. This suggests that Mr. M_____'s concession as to removability related either to his desire to undermine his client's interests or his simple ignorance what relief would be available to his client thereafter. Mr. M_____'s actions clearly reflect a lack of any meaningful knowledge of either his professional responsibilities to his client or to immigration law and that his judgment was facially unreasonable.

Conclusion

For the foregoing reasons, Mr. XXXXXXX requests that this Board overturn the IJ's decision and terminate proceedings.

Respectfully submitted,

_____
David Antón Armendáriz

De Mott, McChesney, Curtright,

[9] See IJ Dec., pgs. 5 – 6.

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CERTIFICATE OF SERVICE

I hereby certify that on the understated date, a copy of the attached RESPONDENT'S BRIEF ON APPEAL and accompanying attachments was sent by regular first class mail to:

U.S. Immigration & Customs Enforcement
Office of the Chief Counsel
8940 Fourwinds Drive, 5th Floor
San Antonio, Texas 78239

_____
David Antón Armendáriz

Dated: October 20, 2016