03-40267-ag

To Be Argued By:
DOUGLAS P. MORABITO

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-40267-ag

ANTONIO JOAO CONCEICAO SANTOS,
Petitioner,

-vs-

JOHN ASHCROFT, United States Attorney General,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR JOHN ASHCROFT ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review an order of the Board of Immigration Appeals removing an alien who commits an "aggravated felony," *see* 8 U.S.C. § 1252(a)(2)(C), which is defined to include "sexual abuse of a minor," *see* 8 U.S.C. § 1101(a)(43)(A). Nevertheless, this Court retains jurisdiction to consider the limited question of whether the jurisdictional bar applies -- that is, whether petitioner has in fact been convicted of an aggravated felony under § 1101(a)(43)(A).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether petitioner's conviction for risk of injury to a minor under Conn. Gen. Stat. § 53-21(a)(2) is a removable offense because it constitutes "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A) and thus qualifies as an aggravated felony.

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BRIEF FOR JOHN ASHCROFT
Attorney General of the United States

Preliminary Statement

Antonio Santos, a native and citizen of Cape Verde, petitions this Court for review of a decision of the Board of Immigration Appeals ("BIA") summarily affirming a removal order based on his conviction for risk of injury to a minor under Conn. Gen. Stat. § 53-21(a)(2). The immigration authorities found that this conviction constituted "sexual abuse of a minor" which was therefore

an aggravated felony warranting removal under 8 U.S.C. § 1101(a)(43)(A).

Petitioner claims that his conviction for risk of injury to a minor does not constitute "sexual abuse of a minor" under § 1101(a)(43)(A) because that term should be limited to situations where there is a "sexual act" or specific "sexual contact." He contends that the BIA's adoption of the definition in 18 U.S.C. § 3509 -- which provides procedural protections for children who are victims or witnesses in sexual abuse cases -- as an interpretive guide is over broad and inappropriate because he characterizes § 3509 as a "social welfare definition."

These contentions are meritless. This Court has already held that the BIA's interpretation of the phrase "sexual abuse of a minor" deserves deference, and that Congress intended to sweep broadly in defining "sexual abuse of a minor" for purposes of immigration law. Because the elements for conviction under the Connecticut statute fit within the BIA's reasonable construction of the term "sexual abuse of a minor," petitioner is properly removable as an aggravated felon. Accordingly, this Court lacks jurisdiction to review petitioner's removal order.

Statement of the Case

Petitioner was placed into removal proceedings on August 11, 2000. Joint Appendix ("JA") 195. On March 19, 2003, an immigration judge concluded that petitioner's conviction under Conn. Gen. Stat. § 53-21(a)(2) constituted "sexual abuse of a minor" and ordered him

removed to Cape Verde. JA 28-33. On March 23, 2003, petitioner filed a timely notice of appeal with the BIA. JA 117-120. On July 9, 2003, the BIA summarily affirmed the immigration judge's decision. JA 1-2. On July 30, 2003, petitioner filed a timely petition for review with this Court.

The petitioner remains in detention pending resolution of this appeal and his removal from the country.

Statement of Facts

A. Petitioner's Entry into the United States and Aggravated Felony Conviction.

Petitioner is a native and citizen of Cape Verde. JA8. He was admitted to the United States at Boston, Massachusetts on or about January 22, 1991, as an immigrant. JA 195. On February 11, 1999, petitioner was convicted by guilty plea in the Superior Court at Bridgeport, Connecticut, of fourth-degree sexual assault, in violation of Conn. Gen. Stat. § 53a-73a.[1] JA 195. He was sentenced to one year of imprisonment. *Id.*

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[1] **Conn. Gen. Stat. § 53a-73a**. Sexual assault in the fourth degree: Class A misdemeanor.

(a) A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age . . . .

(b) Sexual assault in the fourth degree is a class A misdemeanor or, if the victim of the offense is under sixteen years of age, a class D felony.

Thereafter, petitioner filed a motion to withdraw his guilty plea, which was granted by the state judge. JA 149-50. Subsequently, on August 15, 2001, petitioner was convicted by guilty plea in the Superior Court at Bridgeport, Connecticut, of risk of injury to a minor, in violation of Conn. Gen. Stat. § 53-21(a)(2).[2] JA145. He was sentenced to one year in jail, execution suspended, and six months of probation. JA 145.

B. INS Removal Proceedings

Based on petitioner's initial conviction for fourth-degree sexual assault, the Immigration and Naturalization Service ("INS")[3] initiated proceedings to remove petitioner from the United States. JA 195. In this regard,

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[2] **Conn. Gen. Stat. § 53-21**. Injury or risk of injury to, or impairing morals of, children. Sale of children.

(a) Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child, . . . shall be guilty of . . . a class B felony for a violation of subdivision (2) of this subsection.

[3] The INS was abolished effective March 1, 2003, and its functions transferred to three bureaus within the Department of Homeland Security pursuant to the Homeland Security Act of 2002. *See* Pub. L. No. 107-296, 116 Stat. 2135, 2178. The enforcement functions of the INS were transferred to the Bureau of Immigration and Customs Enforcement ("ICE"). *Id.* For convenience, respondent-appellee is referred to herein as the INS.

petitioner was served with a Notice to Appear on October 5, 2000, which specifically charged, among other things, that petitioner was "not a citizen or national of the United States" but "a native . . . and a citizen of Cape Verde," and that he was subject to removal from the United States as an aggravated felon, under 8 U.S.C. § 1227(a)(2)(A)(iii), specifically that his sexual assault conviction was a crime of violence under 8 U.S.C. § 1101(a)(43)(F). JA 195-96. On November 7, 2000, the INS further charged that petitioner's sexual assault conviction constituted sexual abuse of a minor, which provided an additional basis for considering him an aggravated felon under 8 U.S.C. § 1101(a)(43)(A). JA 172.

On May 7, 2001, an Immigration Judge ("IJ") ordered petitioner removed to Cape Verde. JA 124-27. Specifically, the IJ concluded that petitioner was subject to removal based on his fourth-degree sexual assault conviction because it constituted a crime of violence under 8 U.S.C. § 1101(a)(43)(F). JA 124-27. The IJ, however, concluded that petitioner's fourth-degree sexual assault conviction did not constitute sexual abuse of a minor under 8 U.S.C. § 1101(a)(43)(A). JA 124-27.

On May 7, 2001, petitioner filed a timely appeal of the removal order with the BIA. JA 117-120. In his BIA appeal, petitioner challenged the finding by the IJ that he was removable as an aggravated felon. JA 118. On April 16, 2002, the BIA remanded petitioner's appeal to the IJ to determine his status because petitioner's motion to withdraw his guilty plea as to his fourth-degree sexual assault conviction had been granted in the interim by the state court. JA 99. Thus, it was not clear to the BIA

whether petitioner still had a conviction subjecting him to removal from the United States.

On remand, on February 25, 2003, the INS ascertained that petitioner had subsequently entered a guilty plea to a substitute information charging him with risk of injury to a minor under Conn. Gen. Stat. § 53-21(a)(2). Based on this new conviction, the INS charged that petitioner was subject to removal from the United States as an aggravated felon, under 8 U.S.C. § 1227(a)(2)(A)(iii), specifically that his risk of injury conviction constituted sexual abuse of a minor under 8 U.S.C. § 1101(a)(43)(A). JA 146. On March 19, 2003, an IJ ordered petitioner removed to Cape Verde because he concluded that petitioner's risk of injury conviction constituted sexual abuse of a minor and thus qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(A). JA 26-33.

On March 27, 2003, petitioner filed a timely appeal of the removal order with the BIA. JA 18-22. In his BIA appeal, petitioner challenged the finding by the IJ that he was removable as an aggravated felon. JA 118. On July 9, 2003, the BIA affirmed, without opinion, the decision of the IJ under 8 C.F.R. § 3.1(e)(4) (2002).[4] JA 1-2. This petition for review followed.[5]

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[4] That section has since been redesignated as 8 C.F.R. § 1003.1(e)(4). *See* 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003).

[5] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d (continued...)

SUMMARY OF ARGUMENT

Because the elements of petitioner's risk of injury to a minor conviction under Conn. Gen. Stat. § 53-21(a)(2) fall within the BIA's broad categorical definition of "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A), petitioner is subject to removal from the United States as an aggravated felon under 8 U.S.C. § 1227(a)(2)(A)(iii). This Court has already held that the BIA's adoption of 18 U.S.C. § 3509(a) as a general interpretive guide to the statutory phrase "sexual abuse of a minor" is reasonable and worthy of deference. Accordingly, the defendant's contention that the definition of "sexual abuse of a minor" should be limited to acts which are subject to prosecution under federal criminal law is squarely foreclosed by this Court's precedent. Because the Connecticut statute at issue prohibits (1) intentional contact with a child, (2) involving designated body parts, (3) with a specified abusive or other intent, it clearly falls within the category of "sexual abuse of a minor" for purposes of federal immigration law.

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[5] (...continued)
542, 549 (3d Cir. 2001), courts properly review an IJ's decision where, as here (JA 1-2), the BIA adopts that decision. *See* 8 C.F.R. § 3.1(a)(7) (2004); *Secaida-Rosales*, 331 F.3d 297, 305 (2d Cir. 2003); *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). Accordingly, this brief treats the IJ's decision as the relevant administrative decision.

ARGUMENT

I. The Immigration Judge Correctly Concluded That Petitioner's Conviction for Risk of Injury to a Minor Constituted Sexual Abuse of a Minor and Thus Subjected Him to Removal From the United States as an Aggravated Felon.

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

Section 242 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252, governs judicial review of final orders of removal. Judicial review may proceed by way of direct petition for review in the court of appeals, *see* § 1252(a)(1) (authorizing judicial review), § 1252(b)(2) (establishing venue for (a)(1) petitions in courts of appeals) or, in certain circumstances where such review is not available under § 1252(a)(1), via habeas petition filed in the district court. *Calcano-Martinez v. INS*, 533 U.S. 348, 351-52 (2001); *INS v. St. Cyr*, 533 U.S. 289, 313-14 (2001). Under 8 U.S.C. § 1252(a)(2)(C), the courts of appeals lack jurisdiction to review a final order of removal entered against an alien who is removable as an aggravated felon. *Durant v. INS*, 393 F.3d 113, 115 (2d Cir. 2004); *Brissett v. Ashcroft*, 363 F.3d 130, 133 (2d Cir. 2004); *Bell v. Reno*, 218 F.3d 86, 89 (2d Cir. 2000).

Nonetheless, the Court retains jurisdiction to decide whether this jurisdictional bar applies. *See Durant*, 393 F.3d at 115. Accordingly, this Court has reviewed claims in petitions for review by aliens who contend they have not been convicted of "aggravated felonies." *See id.*

The INA authorizes the removal of aliens who have been convicted of "aggravated felony" offenses. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (commission of "aggravated felony" constitutes basis for removal proceeding). The term "aggravated felony" in turn extends to a broad variety of offenses, including in pertinent part any crime involving "sexual abuse of a minor." 8 U.S.C. § 1101(a)(43)(A).

Although the phrase "sexual abuse of a minor" is not defined by the INA or by reference to other provisions of the United States Code, this Court definitively addressed its meaning in *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001). In *Mugalli*, the Court determined that the BIA had reasonably construed "sexual abuse of a minor" broadly, drawing guidance primarily from the definition found in 18 U.S.C. § 3509(a), which provides procedural protections to children who are victims or witnesses in sexual abuse cases. *See* 258 F.3d at 58-60 (concluding that standard adopted by BIA in *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (B.I.A. 1999), deserves deference under *Chevron, U.S.A., Inc. v. Natural*

Resources Def. Council, Inc., 467 U.S. 837 (1984)).[6] Section 3509(a)(8) provides that:

> the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, *sexually explicit conduct* or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children . . . .

(Emphasis added). Section 3509(a)(9) goes on to define "sexually explicit conduct" as follows:

> (9) the term "*sexually explicit conduct*" means actual or simulated --
>
> > (A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; *sexual contact means the intentional touching, either directly or through clothing, of the*

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[6] In *Rodriguez-Rodriguez*, the BIA held that indecent exposure to a child constitutes "sexual abuse of a minor" and thus an aggravated felony under 8 U.S.C. § 1101(a)(43)(A). In *Mugalli*, this Court had no occasion to decide whether that particular application of § 3509(a)'s definition was correct. 258 F.3d at 58 n.5. What is pertinent here is that the Court nevertheless endorsed the BIA's use of § 3509(a) as an interpretive guide to § 1101(a)(43)(A).

> *genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person*;

(Emphasis added).

"In deciding whether a crime of conviction fits within the definitions of aggravated felony outlined in § 1101(a)(43), this court has adopted a categorical approach, focusing on the elements of the offense of conviction without regard to the factual circumstances of the crime." *Kamagate v. Ashcroft*, 385 F.3d 144, 152 (2d Cir. 2004); *see also Sui v. INS*, 250 F.3d 105, 116 (2d Cir. 2001) (endorsing BIA's categorical approach in determining whether conviction for possession of counterfeit securities fit definition of "attempt or conspiracy to commit" crime); *Michel v. INS*, 206 F.3d 253, 263 (2d Cir. 2000) (employing categorical approach to determine whether conviction at issue was crime involving moral turpitude)*; cf. Taylor v. United States*, 495 U.S. 575 (1990) (adopting categorical approach for purposes of criminal sentencing enhancements). Thus, in determining whether petitioner's conviction constitutes "sexual abuse of a minor," the Court should look at the elements of the offense of his risk of injury conviction.

As this Court explained in *Mugalli*, the BIA's construction of the term "sexual abuse of a minor" deserves substantial deference because the BIA is charged with administering the immigration laws. By contrast, the Court reviews *de novo* the BIA's interpretation of state criminal statutes, as well as its decision that petitioner's

conviction under Connecticut law for risk of injury to a minor falls within the BIA's interpretation of what constitutes "sexual abuse of a minor." *See Sutherland v. Reno*, 228 F.3d 171, 174 (2d Cir. 2000) (holding that courts owe "no deference to an agency's interpretations of state or federal criminal laws, because the agency is not charged with the administration of such laws") (quoting *Michel*, 206 F.3d at 262 (opinion of Sotomayor, J.)); *Sui*, 250 F.3d at 112-13.

C. Discussion

In this case, the IJ correctly concluded that petitioner was subject to removal because his conviction for risk of injury to a minor constitutes "sexual abuse of a minor" for federal immigration purposes. That is, because a conviction under Conn. Gen. Stat. § 53-21(a)(2) involves contact with a child, involving designated body parts, in a sexual and indecent manner, it clearly falls within the broad definition of "sexual abuse of a minor" for purposes of 8 U.S.C. § 1101(a)(43)(A).

As noted above, this Court in *Mugalli* approved the BIA's broad construction of "sexual abuse of a minor" by reference to 18 U.S.C. § 3509(a). In doing so, the Court endorsed the BIA's analysis in *Rodriguez-Rodriguez* that § 3509(a) provided "'a useful identification of the forms of sexual abuse.'" *Mugalli*, 258 F.3d at 57 (quoting *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 993-95). In that case, the BIA concluded that 18 U.S.C. §§ 2242, 2243, and 2246, sections criminalizing certain sexual acts with children, were "too restrictive to encompass the numerous state crimes that can be viewed as sexual abuse and the

diverse types of conduct that would fit within the term as it commonly is used." 22 I.& N. Dec. at 996. The BIA further explained that limiting itself to those definitions would be "[in]consistent with Congress' intent to remove aliens who are sexually abusive toward children and to bar them from any relief." *Id.* The BIA explained, however, that it was "not adopting [§ 3509(a)] as a definitive standard or definition but invoke it as a guide in identifying the types of crimes [it] would consider to be sexual abuse of a minor." *Id.*; *see Emile v. INS*, 244 F.3d 183, 185-86 (1st Cir. 2001) (not unreasonable for BIA to look to 18 U.S.C. § 2244, which prohibits "abusive sexual contact," in determining the meaning of the phrase "sexual abuse of a minor"). This Court agreed, noting that a broad interpretation of "sexual abuse of a minor" was consonant with the "generally understood broad meaning of the term 'sexual abuse'" as reflected in *Black's Law Dictionary* 10 (7th Ed. 1999) (defining "sexual abuse" as "An illegal sex act, esp. one performed against a minor"). *Mugalli*, 258 F.3d at 58-59.

As such, § 3509(a) establishes a useful guide for determining the categorical elements of "sexual abuse of a minor." Section 3509(a)(8) provides: "the term "sexual abuse" includes "the . . . use, . . . of a child to engage in . . . sexually explicit conduct . . . ." "Sexually explicit conduct" is, in turn, defined to include "sexual contact," which encompasses "intentional touching, either directly or through clothing of the genitalia, anus, groin, breast, inner thigh, or buttocks of a person with the intent to abuse, humiliate, harass, degrade or arouse or gratify sexual desire of any person." 18 U.S.C. § 3509(a)(9). Hence, an offense should be considered "sexual abuse of

a minor," if it involves (1) contact with a child, (2) involving designated body parts, (3) with a specified abusive or other intent. *See* §§ 3509(a)(8) and 3509(a)(9).[7]

Petitioner was convicted under Conn. Gen. Stat. § 53-21(a)(2), which penalizes

> [a]ny person who . . . has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child

"Intimate parts" are defined by Conn. Gen. Stat. § 53a-65(8) as the "genital area, groin, anus, inner thighs, buttocks or breasts." Thus, an offense under Conn. Gen. Stat. § 53-21(a)(2) must involve (1) contact with a person under sixteen years of age, (2) involving designated body parts, (3) in a sexual and indecent manner likely to impair the health or morals of a child.

A conviction under Conn. Gen. Stat. § 53-21(a)(2) falls within the BIA's broad interpretation of the phrase "sexual abuse of a minor" because each element of the Connecticut law is embodied in the BIA's interpretation of what constitutes "sexual abuse of a minor." That is, each

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[7] As noted above, and consistent with the holdings of this Court in *Mugalli* nor the BIA in *Rodriguez-Rodriguez*, the term "sexual abuse of a minor" is not limited to conduct which falls within the definitional sections of § 3509(a).

requires contact with a child, involving designated body parts (i.e., genital area, groin, anus, inner thighs, buttocks or breasts), for some improper sexual gratification. Consequently, the elements of a conviction under Conn. Gen. Stat. § 53-21(a)(2) fall categorically within the BIA's reasonable interpretation of what constitutes "sexual abuse of a minor" under the INA.[8]

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[8] To the extent petitioner's brief might be construed to argue that the BIA's interpretation of the phrase "sexual abuse of a minor" is limited to sexual contact "in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact," as delineated in the first sentence of § 3509(a)(9)(A), such a conclusion is not supported by the full language of the statute, and would run contrary to Congress' intent to remove aliens who commit sexual crimes against children.

First, the use of the word "including" to preface the four enumerated manners of contact § 3509(a)(9)(A) indicates that the list is illustrative rather than exclusive. *See Federal Land Bank of St. Paul v. Bismarck Lumber Co.,* 314 U.S. 95, 100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."); *United States v. Angelilli*, 660 F.2d 23, 31 (2d Cir. 1981) ("The use of the word 'includes,' rather than a more restrictive term such as 'means,' 'indicates that the list is not exhaustive but merely illustrative.' (quoting *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979))).

Moreover, a contrary reading would render the remaining language of § 3509(a)(9)(A) superfluous. *See*,

(continued...)

This result comports with Congress' intent that the phrase "sexual abuse of a minor" be construed to broadly incorporate all acts that fall within the "ordinary, contemporary, and common meaning of the words." *See Espinoza-Franco v. Ashcroft*, 394 F.3d 461 (7th Cir. Jan. 3, 2005) (per curiam) (holding that a conviction for "fondling any part of [a child's] body with lewd intent" under Illinois law constituted "sexual abuse of a minor" under § 1101(a)(43)(A)); *Chuang v. U.S. Attorney General*, 382 F.3d 1299, 1301 (11th Cir. 2004) (same, with respect to conviction under Florida law that, *inter alia*, punishes anyone who "[h]andles, fondles, or assaults any child under the age of 16 years in a lewd, lascivious, or indecent manner); *United States v. Baron-Medina*, 187 F.3d 1144, 1146-47 (9th Cir. 1999) (same, with respect to conviction under California law for "(a) the touching of an underage child's body (b) with a sexual intent"); *see also United States v. Zaval-Sustaita*, 214 F.3d 601, 604-05 (5th

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[8] (...continued)
e.g., *Connecticut Nat. Bank v. Germain*, 503 U.S. 239, 243 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous"). This is so because the next sentence in § 3509(a)(9)(A) defines sexual contact as the intentional touching of certain body parts -- the "groin, breast, inner thigh, or buttocks of a person" -- that would not fall within the preceding category of genital-genital, oral-genital, anal-genital, or oral-anal contacts. In short, the full text of § 3509(a)(9)(A) makes clear that the statutory definition of "sexually explicit conduct" sweeps far more broadly than sexual intercourse.

Cir. 2000) (holding that § 1101(a)(43)(A) is satisfied by Texas law that prohibits a person from "(1) exposing himself to a minor, (2) knowing that the minor is present, (3) with the intent to arouse or gratify anyone's sexual desire," even absent physical contact). Contrary to petitioner's argument that the definition of "sexual abuse of a minor" should only include sexual intercourse or a situation where there is some specific "sexual act" with a child, neither the risk of injury to a minor statute nor the BIA's broad definition requires such conduct for the offense to constitute "sexual abuse of a minor." The statutory language in § 3509(a)(8) and (9), which pertains to the rights of child witnesses and children who have been the victims of crimes, subsumes and incorporates the language contained in 18 U.S.C. §§ 2241-2246, sections of federal law criminalizing sexual acts and abusive sexual contact with children. Section 3509 is a statutory mechanism meant to protect the rights of children who have been victimized by the broad range of conduct prescribed by all of these federal laws. Notably, the definition of "sexual contact" in § 3509 is identical to the definition of "sexual contact" in § 2246(3) as it applies to § 2244 (criminalizing abusive sexual contact).[9] Common sense thus dictates that illegal "sexual contact" by an adult

[9] At one point in his brief, petitioner appears to ask this Court to limit the scope of § 1101(a)(43)(A) to conduct covered by §§ 2241-2246. He apparently overlooks the fact that § 2244 and § 2246(3) expressly incorporate language regarding abusive sexual contact that is identical to the language of § 3509(a), which as explained above corresponds to the elements of petitioner's state conviction.

against a minor falls within the BIA's broad definition of removable offenses involving "sexual abuse of a minor."

Finally, petitioner also asserts that his conduct does not constitute sexual abuse of a minor under the reasoning of *In re Crammond*, 23 I. & N. Dec. 9 (B.I.A. 2001). However, the BIA subsequently vacated *Crammond* for lack of subject matter jurisdiction. *See In re Crammond*, 23 I. & N. Dec. 179 (B.I.A. 2001). Moreover, petitioner's reliance on *Crammond* is misplaced because he has been convicted of a felony, whereas the principal issue in *Crammond* was whether a misdemeanor offense of sexual abuse of a minor constitutes an aggravated felony under § 1101(a)(43)(A). In any event, in *In re Small*, 23 I. & N. Dec. 448 (B.I.A. 2002), the BIA held that a misdemeanor offense of sexual abuse of a minor constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)(A). This Court has similarly concluded that a crime designated as a misdemeanor under state law may neverthless constitute an "aggravated felony" for purposes of§ 1101(a)(43). *See United States v. Pacheco,* 225 F.3d 148 (2d Cir. 2000). Thus, even if *Crammond* dealt with an issue that was relevant to the case at bar, it would carry no precedential weight even within the BIA because the decision was vacated by the BIA, and in any event its holding has been rejected by both *Small* and this Court.

Accordingly, the IJ correctly concluded that petitioner's conviction of risk of injury to a minor pursuant to Conn. Gen. Stat. § 53-21(a)(2) comes within the BIA's broad definition of "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A) and thus subjects him to removal from the United States as an aggravated felon.

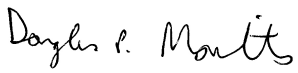
CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for review for lack of jurisdiction.

Dated: February 18, 2005

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY



DOUGLAS P. MORABITO
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
ASSISTANT U.S. ATTORNEY (OF COUNSEL)

Addendum

Conn. Gen. Stat. § 53-21

Injury or risk of injury to, or impairing morals of, children. Sale of children

(a) Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child, or (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child, or (3) permanently transfers the legal or physical custody of a child under the age of sixteen years to another person for money or other valuable consideration or acquires or receives the legal or physical custody of a child under the age of sixteen years from another person upon payment of money or other valuable consideration to such other person or a third person, except in connection with an adoption proceeding that complies with the provisions of chapter 803, shall be guilty of a class C felony for a violation of subdivision (1) or (3) of this subsection and a class B felony for a violation of subdivision (2) of this subsection.

(b) The act of a parent or agent leaving an infant thirty days or younger with a designated employee pursuant to section 17a-58 shall not constitute a violation of this section.

Conn. Gen. Stat. § 53a-73a

Sexual assault in the fourth degree:
Class A misdemeanor or class D felony

(a) A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age, or (B) mentally defective or mentally incapacitated to the extent that such other person is unable to consent to such sexual contact, or (C) physically helpless, or (D) less than eighteen years old and the actor is such other person's guardian or otherwise responsible for the general supervision of such other person's welfare, or (E) in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over such other person; or (2) such person subjects another person to sexual contact without such other person's consent; or (3) such person engages in sexual contact with an animal or dead body; or (4) such person is a psychotherapist and subjects another person to sexual contact who is (A) a patient of the actor and the sexual contact occurs during the psychotherapy session, or (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual contact occurs by means of therapeutic deception; or (5) such person subjects another person to sexual contact and accomplishes the sexual contact by means of false representation that the sexual contact is for a bona fide medical purpose by a health care professional; or (6) such person is a school employee and subjects another person to sexual contact who is a student enrolled in a school in which the actor works or a school under the

jurisdiction of the local or regional board of education which employs the actor; or (7) such person is a coach in an athletic activity or a person who provides intensive, ongoing instruction and subjects another person to sexual contact who is a recipient of coaching or instruction from the actor and (A) is a secondary school student and receives such coaching or instruction in a secondary school setting, or (B) is under eighteen years of age; or (8) such person subjects another person to sexual contact and (A) the actor is twenty years of age or older and stands in a position of power, authority or supervision over such other person by virtue of the actor's professional, legal, occupational or volunteer status and such other person's participation in a program or activity, and (B) such other person is under eighteen years of age.

(b) Sexual assault in the fourth degree is a class A misdemeanor or, if the victim of the offense is under sixteen years of age, a class D felony.

8 U.S.C. § 1101(a)(43)(A)

(43) The term "aggravated felony" means--

(A) murder, rape, or sexual abuse of a minor;

. . .

8 U.S.C. § 1227(a)(2)(A)(iii)

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

. . .

(2) Criminal offenses

(A) General crimes

. . .

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

18 U.S.C. § 2241
Aggravated sexual abuse

(a) By force or threat.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act--

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so,

shall be fined under this title, imprisoned for any term of years or life, or both.

(b) By other means.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly--

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby--

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) With children.--Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than

the person so engaging), or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) State of mind proof requirement.--In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

18 U.S.C. § 2242
Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly--

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is--

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 2243
Sexual abuse of a minor or ward

(a) Of a minor.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who--

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) Of a ward.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who is--

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than one year, or both.

(c) Defenses.--

(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexualact were at that time married to each other.

(d) State of mind proof requirement.--In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew--

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

18 U.S.C. § 2244
Abusive sexual contact

(a) Sexual conduct in circumstances where sexual acts are punished by this chapter.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in or causes

sexual contact with or by another person, if so to do would violate--

(1) section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than six months, or both.

(b) In other circumstances.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than six months, or both.

(c) Offenses involving young children.--If the sexual contact that violates this section is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.

18 U.S.C. § 2245
Sexual abuse resulting in death

A person who, in the course of an offense under this chapter, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.

18 U.S.C. § 2246
Definitions for chapter

As used in this chapter--

(2) the term "sexual act" means--

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to

abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

. . . .

18 U.S.C. § 3509
Child victims' and child witnesses' rights

(a) Definitions.-- For purposes of this section--

. . . .

(2) the term "child" means a person who is under the age of 18, who is or is alleged to be--

(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or

(B) a witness to a crime committed against another person;

. . . .

(6) the term "exploitation" means child pornography or child prostitution;

. . . .

(8) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(9) the term "sexually explicit conduct" means actual or simulated--

(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

(B) bestiality;

(C) masturbation;

(D) lascivious exhibition of the genitals or pubic area of a person or animal; or

(E) sadistic or masochistic abuse;

(10) the term "sex crime" means an act of sexual abuse that is a criminal act;

. . .