UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
OMAHA, NEBRASKA

File #: A [redacted]243

Date: JUL 3 0 2018

In the Matter of:

[redacted]

Respondent.

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(E)(i) of the Immigration and Nationality Act ("INA" or "Act")—alien convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment;

APPLICATION: Motion to Reconsider

ON BEHALF OF THE RESPONDENT:
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Omaha, NE 68105

ON BEHALF OF THE GOVERNMENT:
Anna L. Speas, Assistant Chief Counsel
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DECISION OF THE IMMIGRATION JUDGE

I. Background and Procedural History

Respondent is a native of Iraq who: was admitted to the United States in Detroit, Michigan on 1 July 1993 as a refugee; adjusted status to that of a lawful permanent resident on 1 July 1993 pursuant to sections 209(a), (b) of the Act; was convicted on 22 August 2002 of Third Degree Assault in violation of NEB. REV. STAT. § 28-310(1), and that offense was committed against his wife, Samantha Alrekabi. *See* Exh. 1. On 15 October 2002, the Department of Homeland Security ("DHS" or "the government") initiated removal proceedings against Respondent by filing a Notice to Appear ("NTA") with the Court. *See id.* The NTA charged Respondent with removability pursuant to the above-captioned section of the Act. *Id.*

On 22 March 2004, Respondent filed a Form EOIR 42-A, Application for Cancellation of Removal for Certain Permanent Residents. *See* Exh. 2. Respondent subsequently filed a Form I-589, Application for Asylum and for Withholding of Removal. *See* Exh. 3. Respondent, through former counsel, admitted the allegations and conceded the charge of removability.[1] Respondent declined to designate his country of removal and Iraq was designated. On 1 February 2006, the Immigration Judge ("IJ") issued a written decision denying Respondent's applications for relief and ordering his removal to Iraq. *See* Decision and Order of the IJ (1 Feb. 2006).

On 26 February 2018, Respondent, through new counsel, moved the Court to reopen his proceedings. *See* Motion to Reopen and Terminate, and Emergency Motion for Stay of Removal (26 Feb. 2018) ("Motion to Reopen"). DHS timely opposed the motion. *See* DHS Opposition to the Respondent's Untimely Motion to Reopen (8 Mar. 2018) ("DHS Opposition"). The Court granted Respondent's motion. *See* Decision and Order of the IJ (10 Apr. 2018).

On 18 April 2018, Respondent moved the Court to terminate his removal proceedings. *See* Respondent's Motion to Withdraw Plea and Terminate (18 Apr. 2018) ("Motion to Terminate"). The government filed a brief in opposition. *See* DHS Opposition to the Respondent's Motion to Terminate (30 Apr. 2018) ("DHS Opposition to Termination"). Respondent then filed a reply brief. *See* Reply to DHS's Opposition to Respondent's Motion to Terminate (3 May 2018) ("Respondent's Reply"). The Court granted Respondent's motion and terminated his proceedings. *See* Decision and Order of the IJ (1 Jun. 2018).

On 25 June 2018, the government timely moved the Court to reconsider its 1 June 2018 decision terminating Respondent's proceedings. *See* DHS Motion to Reconsider (25 Jun. 2018). Respondent filed a reply brief. *See* Reply to DHS's Motion to Reconsider (2 Jul. 2018). For the following reasons, the Court will deny the government's motion.

II. Statement of Law

Motion to Reconsider

An IJ may, upon his or her own motion at any time, or upon motion of the government or the respondent, reconsider any case in which he or she has made a decision, unless jurisdiction has vested with the Board of Immigration Appeals ("BIA" or "Board"). *See* 8 C.F.R. § 1003.23(b)(1). A motion to reconsider is a request that the IJ reexamine his or her decision in light of additional legal arguments, a change in the law, or an argument or aspect of the case that was previously overlooked. *See* 8 C.F.R. § 1003.23(b)(2); *Matter of O-S-G-*, 24 I&N Dec. 56, 57 (BIA 2006); *Matter of Cerna*, 20 I&N Dec. 399, 402–03 (BIA 1991). The motion must specify the errors of fact or law in the IJ's prior decision and must be supported by pertinent authority. *See* INA § 240(c)(6)(C); 8 C.F.R. § 1003.23(b)(2); *O-S-G-*, 24 I&N Dec. at 56–57; *Cerna*, 20 I&N Dec. at 402–03. Unlike a motion to reopen, which seeks a new hearing based on new or previously unavailable evidence, a motion to reconsider contests the correctness of the original decision based on the previous factual record. *See O-S-G-*, 24 I&N Dec. at 57–58. A

[1] Respondent was previously represented by three different attorneys (William E. Pfeiffer, Brett McArthur, and James Benzoni), all of whom filed motions to withdraw for various reasons. The Court granted each motion and Respondent thereafter proceeded *pro se*.

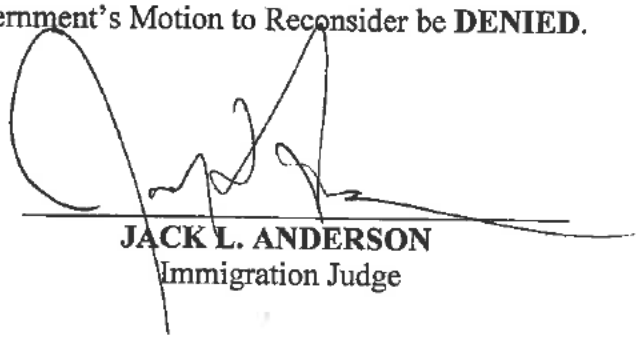
(citing *United States v. Garcia-Longoria*, 819 F.3d 1063, 1065 (8th Cir. 2016)). That is wrong. A statute is divisible when it contains crimes as defined by distinct elements but it is not divisible when it contains a single crime that can be completed by different statutory means. *Mathis*, 136 S. Ct. at 2243. "'Elements' are the 'constituent parts' of a crime's legal definition—the things the prosecution must prove to sustain a conviction [. . .] they are what the jury must find beyond a reasonable doubt." *Id.* at 2248 (citation omitted). While "means" are alternative methods of committing one offense. *Id.* at 2256. Crucial to the distinction between elements and means, "a jury need not find (or a defendant admit) any particular [means]." *Id.* at 2251. Nebraska case law establishes that Neb. Rev. Stat. § 28-310(1) does not require a specific finding that the defendant acted intentionally, for example, just that a defendant acted either "[i]ntentionally, knowingly, *or* recklessly"—meaning that any one of the three can satisfy the *mens rea* element. *See State v. Pribil*, 395 N.W.2d 543, 546 (Neb. 1986) (emphasis in original). Hence, as previously explained, the listed mental states in Neb. Rev. Stat. § 28-310(1) are means. *See* Decision and Order of the IJ (1 Jun. 2018).

Finally, the government argues the Court erred by finding that recklessness was an insufficient *mens rea* to fit the crime of violence definition set forth in 18 U.S.C. § 16(a). *See* DHS Motion to Reconsider at 6 (citing *Voisine v. United States*, 136 S. Ct. 2272 (2016)). However, *Voisine* did not involve 18 U.S.C. § 16 and the Supreme Court explicitly declined to extend its holding to that provision. *See* 136 S. Ct. at 2280 n.4 (stating "[o]ur decision today [. . .] does not resolve weather § 16 includes reckless behavior."). The government's argument on this point is therefore unsupported. Thus, the Court finds no error, and the government's motion will be denied. *See O-S-G-*, 24 I&N Dec. at 57–58.

Accordingly, the following order will be entered:

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that the government's Motion to Reconsider be **DENIED**.



JACK L. ANDERSON
Immigration Judge