Amicus Committee
American Immigration Lawyers Association
1331 G Street, NW, Suite 300
Washington, D.C. 20005

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

In the Matter of:	
Jose Lorenzo Mendoza-Quinones	File No.: A088-134-413
In removal proceedings	

SUPPLEMENTAL AMICUS BRIEF
AMERICAN IMMIGRATION LAWYERS ASSOCIATION

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Immigration and Nationality Act

State Statutes

Decisions of the U.S. Supreme Court

Decisions of the U.S. Court of Appeals

Decisions of the Board of Immigration Appeals

State Court Decisions

Model Jury Instructions

Federal Regulations

III. STATEMENT OF INTEREST OF AMICUS

The American Immigration Lawyers Association (AILA) is a national association with more than 13,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and United States Supreme Court.

IV. STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

Mr. Mendoza Quinones is a Mexican national who has resided in the U.S. for over 18 years. Immigration Judge Decision (IJ Dec'n) at 2. In 2000, he pled guilty to third degree assault, in violation of C.R.S. § 18-3-204. IJ Dec'n at 2-3. The statute of convictions reads as follows:

> (1) A person commits the crime of assault in the third degree if:
>
> (a) The person knowingly or recklessly causes bodily injury to another person or with criminal negligence the person causes bodily injury to another person by means of a deadly weapon.

C.R.S. § 18-3-204(1)(a).

The Department of Homeland Security charged Mr. Mendoza Quinones with removability as a noncitizen present in the U.S. without being admitted or paroled and the Immigration Judge sustained that charge. IJ Dec'n at 1-2. As a defense to deportation, Mr. Mendoza Quinones applied for cancellation of removal under INA § 240A(b)(1). IJ Dec'n at 2. Under that provision, the Immigration Judge had the discretionary authority to cancel removal if Mr. Mendoza Quinones first met four threshold criteria, among them proof that he had not been convicted of an offense under INA §§ 212(a)(2), 237(a)(2), or 237(a)(3). IJ Dec'n at 3; INA § 240A(b)(1)(C).

The Immigration Judge found that Mr. Mendoza Quinones failed to carry his burden of proving that he had not been convicted of a disqualifying offense and therefore pretermitted the cancellation application, declining to address the other statutory criteria or engaging in a discretionary review. IJ Dec'n at 10. More specifically, the Immigration Judge, relying on the Board's decision in *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012), held that Colorado third-degree assault was a divisible statute since it penalized some conduct that would meet the definition of a crime involving moral turpitude, while other conduct encompassed within C.R.S. § 18-3-204 would not be considered morally turpitudinous. IJ Dec'n at 5; *see also Lanferman*, 25 I&N Dec. at 727 (holding that a statute is divisible whenever its elements "could be satisfied either by removable or non-removable conduct") (quoting *Lanferman v. BIA*, 576 F.3d 84, 90 (2nd Cir. 2009)). The dividing line, in the Immigration Judge's analysis, lay between a 'knowing' and 'reckless' state of mind: a 'knowing' assault was morally turpitudinous, but a 'reckless' or 'negligent' assault was not. IJ Dec'n at 5-6. Because he found the assault statute divisible with respect to the *mentes reae*, the Immigration Judge found that use of the modified categorical approach was warranted for determining which criminal state of mind—knowingly, recklessly, or negligently—was at issue in Mr. Mendoza Quinones' criminal proceedings. IJ Dec'n at 9-10.

Mr. Mendoza Quinones could not prove that he hadn't been convicted of a 'knowing' assault, as opposed to a 'reckless' or 'negligent' assault. IJ Dec'n at 2-3, 9. The certified judgment he obtained from the county of conviction only showed that he pled guilty to C.R.S. § 18-3-204 with no additional clarification about which *mens rea*—if any—was specified in his plea agreement. IJ Dec'n at 9; Transcript of Proceedings (Tr.) at 94-95. Mr. Mendoza Quinones sought additional documents from his criminal record, such as a sentencing memorandum, sentencing minutes, or plea colloquy, but those additional materials had been destroyed by the state court. Tr. at 94-95.

Operating under the assumption that Mr. Mendoza Quinones had been required to plead to one of the three alternate *mentes reae*, and noting that the available records did not show which of the three he pled guilty to, the Immigration Judge held that Mr. Mendoza Quinones failed to satisfy his burden of establishing statutory eligibility for cancellation. IJ Dec'n at 10 (citing *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009) (holding that an inconclusive record of

conviction for Colorado third degree assault which fails to identify the applicable *mens rea* is insufficient to satisfy a cancellation applicant's burden of proof)).

In his briefing before the Board Mr. Mendoza Quinones argued primarily that third degree assault in Colorado is categorically not a crime involving moral turpitude, since even a conviction under the most culpable *mens rea*—knowingly—would still encompass acts that do not rise to the level of moral turpitude under existing Board precedent.[1] Respondent's Brief on Appeal (Resp. Br.) at 4-19. In the alternative, Mr. Mendoza Quinones argued that even if the assault statute was divisible, the Immigration Judge, faced with an inconclusive record of conviction, should have considered his testimony as evidence of whether or not his crime involved moral turpitude, under the third step of *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). Resp. Br. at 20-25. Finally, Mr. Mendoza Quinones urged the Board to find that his presentation of an inconclusive record of conviction was sufficient to meet his burden of proof under 8 C.F.R. § 1240.8(d), asking it to distinguish or overturn controlling circuit court precedent. Resp. Br. at 25-27 (noting, and attempting to distinguish, *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009)).

---

[1] Mr. Mendoza Quinones relied on *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007) for this argument. In *Solon*, the Board explained its rubric for assessing moral turpitude in assault crimes, reasoning that such an evaluation "involves an assessment of both the state of mind and the level of harm required to complete the offense." *Solon*, 24 I&N Dec. at 242. According to the Board, "intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous." *Id.* But as the applicable *mens rea* descends downward, from intentional conduct to reckless, "more serious resulting harm is required in order to find that the crime involves moral turpitude." *Id.* Using this framework, the Board found that third degree assault under N.Y. Penal Law § 120.00(1) was a crime involving moral turpitude because it required a specific intent to cause physical injury, where physical injury was defined in New York so as to exclude mere "pain," but only included "substantial pain" or the "impairment of physical condition." *Id.* at 243-44 (quoting N.Y. Penal Law § 10.00(9)). By contrast, third degree assault in Colorado, committed knowingly, is a general intent crime. Unlike New York, Colorado law does not require the defendant charged with third degree assault to have the conscious objective of causing bodily injury. *Compare* C.R.S. § 18-1-501(6) (defining "knowingly") *with* C.R.S. § 18-1-501(5) (defining "intentionally"). Furthermore, the "bodily injury" element of Colorado third degree assault can be satisfied with "some physical pain, illness or physical or mental impairment, *however slight*." *People v. Wood*, 743 P.2d 422, 431 (Colo. 1987) (emphasis added) (quoting *People v. Hines*, 572 P.2d 467, 470 (Colo. 1977)). Accordingly, the Amicus Committee agrees with Mr. Mendoza Quinones that third degree assault is categorically not a crime involving moral turpitude. However, that issue is not the focus of this brief, which instead addresses the issue raised by the Board in its request for supplemental briefing and which assumes, for the sake of argument, that a violation of C.R.S. § 18-3-204(1)(a), committed knowingly, does meet the *Solon* test for moral turpitude.

Mr. Mendoza Quinones submitted his opening brief to the Board on July 16, 2012; the Department submitted its brief in opposition on August 6, 2012. The appeal remains pending, but while it has awaited adjudication the Supreme Court announced a new decision that has impacted the manner in which the Board and Immigration Courts determine when use of the modified categorical approach is warranted.

On June 2013, the Supreme Court announced *Descamps v. U.S.*, 133 S. Ct. 2276 (2013), clarifying and reaffirming its understanding of the proper use of the modified categorical approach. *Descamps* involved the Armed Career Criminal Act (ACCA), a statute which increases the sentences of certain criminal defendants with three prior violent felony convictions, including burglary. *Descamps*, 133 S. Ct. at 2281. In determining whether a particular state conviction meets the generic definition of "burglary," the Court noted that the categorical approach was to be used. *Id.* Under the categorical approach a court will "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the "generic" crime—*i.e.,* the offense as commonly understood." *Id.* A prior conviction will qualify as a violent felony under the ACCA "only if the statute's elements are the same as, or narrower than, those of the generic offense." *Id.*

The Court then noted that a variant of this method, called the modified categorical approach, is used only when a criminal statute is divisible. *Id.* According to the Court, a divisible statute "sets out one or more elements of the offense in the alternative." *Id.* Where one alternative matches an element in the generic crime, but another alternative doesn't, the modified categorical approach allows a court "to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Id.* On the other hand, however, the Court cautioned that a court "may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." *Id.* at 2282. In such a scenario, where an indivisible statute "sweeps more broadly than the generic crime, a conviction under that law cannot count" as a disqualifying offense, "even if the defendant actually committed the offense in its generic form." *Id.* at 2283. "The key," the Court emphasized, "is elements, not facts." *Id.* at 2283.

Understood this way, the modified categorical approach is seen merely as a way of helping to implement the categorical approach when a defendant was convicted of violating a

divisible statute." *Id.* at 2285. The modified categorical approach adds a "mechanism for making [a] comparison [between a criminal statute and a generic offense] when [the] statute lists multiple, alternative elements, and so effectively creates "several different . . . crimes." *Id.* at 2285 (quoting *Nijhawan v. Holder*, 557 U. S. 29, 41 (2009)); *see also id.* at 2288 (reasoning that the "modified categorical approach merely assists the sentencing court in identifying the defendant's crime of conviction"). Only in a situation where "a statute defines" an offense "alternatively, with one statutory phrase corresponding to the generic crime and another not" may "a court may look to the additional documents to determine which of the statutory offenses (generic or non-generic) formed the basis of the defendant's conviction." *Id.* at 2286.

The Court took great pains to clarify that any alternatively expressed "statutory phrases" must correspond to a statute's actual elements—in other words, those "facts the court can be sure the jury so found, . . . as distinct from amplifying but legally extraneous circumstances." *Id.* at 2288; *see also id.* at 1290 (noting that "only divisible statutes enable a sentencing court to conclude that a jury (or a judge at a plea hearing) has convicted the defendant of every element of the generic crime"). The Court's concern with "elements" over "legally extraneous circumstances" stems from its long-standing ""demanding requirement that . . . a prior conviction '*necessarily' involve[]*" a jury finding on each element of the generic offense." *Id.* at 2286 n.3 (quoting *Shepard v. U.S.*, 544 U.S. 13, 24 (2005) (plurality opinion)). According to the Court, a factfinder cannot be said to have "necessarily found" a non-element. *Id.* at 2286 n.3. Due to the focus on statutory elements, the Court has only recognized a "narrow range of cases" that are truly divisible with respect to alternate elements expressed disjunctively, where use of the modified categorical approach is permitted. *Taylor v. U.S.*, 495 U.S. 575, 602 (1990).

In light of *Descamps*, and other potentially relevant decisions interpreting that case, the Board requested supplemental briefing in Mr. Mendoza Quinones' case. That request was issued on October 1, 2014. Given the significance of the issue in Colorado, where an inconclusive record of a third degree assault conviction is a frequent impediment for cancellation applicants, the AILA Amicus Committee requested that it be allowed to address the legal question posed by the Board.[2]

[2] In light of AILA's interests, it intervenes only to address the purely legal questions raised by this case. It takes no position on the ultimate issue of whether or not Mr. Mendoza Quinones merits a favorable

V. STATEMENT OF ISSUE RAISED BY THE BOARD IN ITS REQUEST FOR SUPPLEMENTAL BRIEFING

The Board requested supplemental briefing from the parties on the issue of Mr. Mendoza Quinones' ability to establish eligibility for cancellation of removal under INA § 240A(b) despite his conviction for third degree assault under C.R.S. § 18-3-204. The parties were asked to discuss *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009), *Descamps v. United States*, 133 S.Ct. 2276 (2013), and any other relevant case law.

VI. STANDARD OF REVIEW

The Board reviews factual findings by the immigration judge for clear error. 8 C.F.R. § 1000.3(d)(3). Questions of law, discretion, judgment, and all other appellate issues are reviewed *de novo*. *Id.*

VII. SUMMARY OF THE ARGUMENT

The Immigration Judge found Mr. Mendoza Quinones ineligible for cancellation of removal under INA § 240A(b) based on the conclusion that he could not meet his burden of proving that he did not have a conviction for a disqualifying offense. The relevant portion of the conviction at issue, Colorado third degree assault, involved "knowingly or recklessly" causing bodily injury to another person. The Immigration Judge found that while a conviction for "recklessly" causing bodily injury would not be a disqualifying offense, a conviction for "knowingly" causing bodily injury precluded Mr. Mendoza Quinones from cancellation of removal. The Immigration Judge therefore found the statute to be divisible and employed the modified categorical approach. Because the record of conviction produced by Mr. Mendoza Quinones provided no indication about which *mens rea* he might have pleaded to, the Immigration Judge ruled that he could not meet his burden to show that he was eligible for relief from removal.

---

exercise of discretion should his assault conviction be found not to statutorily bar him from cancellation of removal.

During the pendency of Mr. Mendoza Quinones' appeal, the Supreme Court's decision in *Descamps* and the Board's interpretation of that decision in *Chairez-Castrejon* made clear that a statute can only be considered divisible if there are alternative sets of elements sufficient for conviction where one set would trigger removability and the other would not. Under *Chairez-Castrejon*, a statutory phrase is only an element if jurors would have to agree upon it unanimously. If no such agreement is required for conviction, the alternative phrases within the statute are considered alternative means rather than alternative elements. Where there are simply alternative means of committing a unified crime, the offense is not divisible and the least culpable conduct must be presumed under the Supreme Court's decision in *Moncrieffe*.

The Board should employ the analysis from *Chairez-Castrejon* notwithstanding the Tenth Circuit's divisibility analysis in *U.S. v. Trent*. The Tenth Circuit in *Trent* did not definitively divert from the traditional definition of element consistent with *Chairez-Castrejon*. Rather, it offered an alternative "shorthand" analysis while still proceeding to provide a full analysis of the statute using the traditional definition of element. Moreover, the *Trent* case did not involve alternative *mentes reae*. The Board in *Chairez-Castrejon*, a case which *did* involve a statute with *mentes reae* expressed disjunctively, indicated that in order to apply a circuit court's interpretation of divisibility post-*Descamps*, it would prefer to have a precedential decision in the *mens rea* context. Finally, *Trent* applied its shorthand approach to a statute where the prosecutor was clearly required to provide the applicable alternative phrase or term in the charging document. To apply the shorthand analysis from *Trent* to a statute where the prosecutor could elect whether to provide the applicable statutory phrase—in this case one of two possiblee *mentes reae*—would lead to the absurd result of the same statute being considered divisible for some defendants and indivisible for others depending on how the prosecutor handled the case.

In Colorado, a conviction for third degree assault does not require jurors to agree on the *mens rea*. The statute is therefore not divisible and the categorical approach dictates that Mr. Mendoza Quinones was only "necessarily" convicted of the least culpable conduct. The least culpable conduct here is the "reckless" causation of bodily harm, which the Immigration Judge already recognized would not disqualify Mr. Mendoza Quinones from cancellation of removal.

Even if the Board were to find Colorado third degree assault to be divisible, Mr. Mendoza Quinones met his statutory burden of proof to demonstrate that he has not necessarily

been convicted of a disqualifying crime. Mr. Mendoza Quinones met that burden by producing the available record of conviction. The record of conviction did not establish whether Mr. Mendoza Quinones had been convicted under the knowing or reckless language of the statute. Under the Supreme Court's decision in *Moncrieffe*, where the record of conviction does not resolve ambiguity on whether a ground of deportability has been triggered, the proper conclusion is that the conviction did not necessarily involve facts that correspond to the generic offense. *Moncrieffe* clearly stated that its application of the categorical and modified categorical approach is identical in the context of removability and applications for relief. The Tenth Circuit's contrary holding from *Garcia v. Holder* has been abrogated by *Moncrieffe*. Because Mr. Mendoza Quinones produced the available record of conviction for the immigration court's use in the modified categorical approach, and because those documents do not establish that he was necessarily convicted of a disqualifying crime, Mr. Mendoza has met his burden of proof even if the Board were to determine that the statute at issue here is divisible.

VIII. ARGUMENT

A. Third Degree Assault is not a Divisible Statute with Respect to the *Mentes Reae* 'Knowingly' or 'Recklessly.'

Mr. Mendoza Quinones may (or may not) have knowingly caused bodily injury to another, and so committed a crime involving moral turpitude. But C.R.S. § 18-3-204(1)(a)—the crime of which he was convicted—does not require the factfinder (whether jury or judge) to make that determination, as long as he was at least found to have acted recklessly. *See Descamps*, 133 S. Ct. at 2293. Because 'knowingly or recklessly' are not alternative elements of C.R.S. § 18-3-204(1)(a), but simply alternative means of committing a unified crime, a conviction under that statute is never for morally turpitudinous assault. *See id.* Absent a divisible statute, the Immigration Judge must rely on strict application of the categorical approach, which focuses on "the minimum conduct that has a realistic probability of being prosecuted" under the Colorado third degree assault statute. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013). Because the minimum conduct prosecuted under C.R.S. § 18-3-204(1)(a)—'reckless' or 'negligent' assault—does not rise to the level of moral turpitude (IJ Dec'n at 5-6), the offense is categorically not a crime involving moral turpitude. *Descamps*, 133 S. Ct. at 2293.

1. *'Knowingly' or 'Recklessly' are Alternative Means of Committing Third Degree Assault under the Board's Divisibility Framework in* Chairez-Castrejon.

The Court in *Descamps* "resolved a circuit split regarding whether the modified categorical approach is appropriate when the indivisible elements of a statute target a broader swath of conduct than a corresponding generic offense." *Coronado v. Holder*, 759 F.3d 977, 983 (9th Cir. 2014) (citing *Descamps*, 133 S. Ct. at 2283). The Court clarified that use of the modified categorical approach is only appropriate as an aid to the categorical approach when considering "a divisible statute, listing *potential offense elements in the alternative*, [which] renders opaque *which element* played a part in the defendant's conviction." *Descamps*, 133 S. Ct. at 2283 (emphasis added).

Left unresolved in the Court's analysis was any definitive rubric for assessing when a statute's disjunctively expressed terms or phrases might rise to the level of discrete elements. The Court was not squarely faced with that issue in *Descamps*, since that case dealt with "an indivisible, overbroad statute that lack[ed] an element contained in the corresponding generic federal offense." *Coronado*, 759 F.3d at 984.

The majority opinion recognized that there was a fundamental difference between the elements of a crime—"the only facts" a subsequent court can be sure a jury found to be proved beyond a reasonable doubt—and "superfluous facts." *Descamps* at 2288, 2290. However, as the dissent noted, distinguishing between the two can often be difficult. *Id.* at 2301 (Alito, J., dissenting). The dissent agreed with the majority opinion that an element is generally understood "to mean something on which a jury must agree by the vote required to convict under the law of the applicable jurisdiction." *Id.* at 2296 (Alito, J., dissenting). However, it then noted that many statutes are written in the disjunctive, not as a way of separating discrete elements, but merely to distinguish between alternate means of committing a crime. *Id.* at 2298 (citing *Schad* v. *Arizona*, 501 U. S. 624, 636 (1991) (plurality)). The distinguishing feature of a true element "is the need for juror agreement." *Id.* at 2298 (Alito, J., dissenting) (citing *Richardson* v. *United States*, 526 U. S. 813, 817 (1999)).

According to the dissent, when considering statutory phrases or terms expressed disjunctively, the only way to determine whether the different items are truly distinct elements,

or merely different means, might be by finding "cases concerning the correctness of jury instructions that treat the items one way or the other." *Id.* at 2301-02 (Alito, J., dissenting). The majority opinion recognized the dissent's concerns, but imagined the task would be far simpler. *Id.* at 2290. Rather than researching case law on the appropriateness of specific jury instructions (which the dissent correctly noted may be sparse, *id.* at 2302, Alito, J. dissenting), the majority believed that one could usually find the answer in how a typical case is charged, and how it is typically presented to a jury. *Id.* at 2290. It noted that where a statute is truly divisible "[a] prosecutor charging a violation . . . must generally select the relevant element from its list of alternatives." *Id.* at 2290 (noting *The Confiscation Cases*, 87 U.S. 92 (1874) ("[A]n indictment or a criminal information which charges the person accused, in the disjunctive, with being guilty of one or of another of several offences, would be destitute of the necessary certainty, and would be wholly insufficient")); *see also id.* at 2284 (recognizing that "[i]n a typical case brought under [a divisible] statute, the prosecutor charges one of those two alternatives, and the judge instructs the jury accordingly"). The majority also noted that consideration of jury instructions would "make clear" whether a particular phrase or term must be found "unanimously and beyond a reasonable doubt." *Id.* at 2290. Despite all of the musings about the different ways one might distinguish between elements and means for the purpose of deciding whether or not to employ the modified categorical approach, the Court did not have to resolve the issue definitively, since *Descamps* did not involve a statute with alternatively expressed terms or phrases. *Descamps*, 133 S. Ct. at 2282. And even though the Court acknowledged its prior understanding of what an "element" is, from *Richardson* and *Schad*, the fact remains that "no Supreme Court opinion addressing the modified categorical approach has ever found it appropriate to examine whether an alternative statutory phrase is an "element" in the sense of the word" used in those cases. *U.S. v. Trent*, 767 F.3d 1046, 1061 (10th Cir. 2014).

The Board then put the Supreme Court's *dicta* to action in *Matter of Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014). In *Chairez-Castrejon* the Board applied the *Descamps* understanding of divisibility to the immigration context, holding that "a criminal statute is divisible, so as to warrant a modified categorical inquiry, only if (1) it lists multiple discrete offenses as enumerated alternatives 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." *Id.* at 353 (citing *Descamps,* 133 S.Ct. at 2281). Regarding its understanding of what constitutes an "element," the Board adopted the reasoning of the dissent in *Descamps*, concluding "that for purposes of the modified categorical approach, an offense's "elements" are those facts about the crime which "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find . . . unanimously and beyond a reasonable doubt."" *Id.* at 353 (quoting *Descamps*, 133 S.Ct. at 2288 (citing *Richardson*, 526 U.S. at 817 (1999))).

The Board then applied that understanding of divisibility and elements to a Utah statute that bears striking similarities to the assault provision at issue in Mr. Mendoza Quinones' case. The Utah provision in *Chairez-Castrejon* defined a crime with three alternate mental states—intentionally, knowingly and recklessly. *Id.* at 354. Despite being expressed disjunctively, the Board found that the alternate *mentes reae* were not discrete elements because there was no evidence that unanimous juror agreement on a defendant's *mens rea* was required for conviction. *Id.* at 355.

The Board found support in a decision by the Utah Supreme Court decision analyzing a statute with three alternative *mentes reae* holding that conviction did not require unanimity on the *mens rea*. *Id.* (citing *State v. Russell*, 733 P.2d 162, 164–68 (Utah 1987) (holding that a Utah jury need not be unanimous in deciding under which of three statutory sections the defendant was found guilty as long as the jurors were unanimous that one or another form of second-degree murder was committed)). Because there was no evidence of any requirement for juror unanimity on the *mens rea*, the Board found that the three possible states of mind constituted alternative means of committing a single crime rather than alternative elements setting forth three different crimes.

The Board noted that it was bound to apply divisibility consistently with the individual circuits' interpretation of divisibility under *Descamps* and recognized that at the time of its decision the Tenth Circuit Court of Appeals, the jurisdiction where *Chairez-Castrejon* arose, had not issued a precedential decision on divisibility under *Descamps*, "particularly in the *mens rea* context." *Id.* at 354. In the absence of any directly contrary circuit precedent, the Board held that it would apply its own understanding of how to assess divisibility consistently with the principles articulated in *Descamps*. *Id.* Following *Descamps* and *Chairez-Castrejon*, the Board has relied

on "generally applicable jury instructions" to assess a statute's divisibility. *Matter of L-G-H-*, 26 I&N Dec. 365, 372 (BIA 2014).

Given the considerable structural overlap between the Utah statute at issue in *Chairez-Castrejon* and the Colorado assault statute at play in Mr. Mendoza Quinones' case, the *Chairez-Castrejon* decision provides the perfect template for assessing the divisibility of C.R.S. § 18-3-204(1)(a). That analytical model clearly shows that Colorado third degree assault is not divisible with respect to the *mentes reae* "knowingly or recklessly".[3] Like the Utah statute, the Colorado assault statute employs different criminal states of mind. As in *Chairez-Castrejon*, there does not appear to a state Supreme Court decision directly on point, holding that there must be jury unanimity on the question of 'knowing' versus 'reckless' causation of bodily injury in order to support a conviction. Nevertheless, as in *Chairez-Castrejon*, there are several pieces of highly suggestive evidence supporting the contention that jury unanimity is not required.

The first piece of evidence comes from the Colorado model jury instructions for criminal cases. Those model instructions clarify that "[w]here a culpable mental state for an offense is specified by statute, the Committee has segregated it as a separate element." Colorado Jury Instructions—Criminal (COLJI-Crim) (2014), Chap. A—General Instructions Culpable Mental States. The model instructions for assault in the third degree are broken into two separate instructions, one applicable to "knowingly or recklessly" assault, and the other applicable to assault committed negligently with a deadly weapon. *Compare* COLJI-Crim, § 3-2:20 Assault in the Third Degree (Knowingly or Recklessly) *with* COLJI-Crim, § 3-2:21 Assault in the Third Degree (Negligence and Deadly Weapon).

The jury instructions for "knowingly or recklessly" assault list five items, identified as elements. "Knowingly or recklessly" are listed together as the third item or element,[4] as shown below:

---

[3] In claiming non-divisibility, the committee recognizes that negligent causation of bodily injury with a deadly weapon is structurally distinct from the "knowingly or recklessly" prong of the statute. The negligent/deadly weapon phrase is likely a separate, formal element under the *Chairez-Castrejon* rubric. Nevertheless, assuming "knowingly or recklessly" are viewed as alternate 'means' rather than 'elements,' the statute can't be divisible between "knowingly and recklessly" and "negligently/deadly weapon" because the minimum conduct proscribed on either side of that divide would not be morally turpitudinous.

[4] *See also People v. Suazo*, 867 P.2d 161 (Colo. App. 1993), in which the court noted that "'knowingly or recklessly" *is a lesser degree* of mental culpability than "with intent."" (emphasis added). The

3-2:20 ASSAULT IN THE THIRD DEGREE
(KNOWINGLY OR RECKLESSLY)

The elements of the crime of assault in the third degree (knowingly or recklessly) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly or recklessly,

4. caused bodily injury to another person.

5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the third degree (knowingly or recklessly).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the third degree (knowingly or recklessly).

COLJI-Crim (2014), § 3-2:20. The terms "knowingly or recklessly" are not contained in brackets. Regarding the use of brackets, the Committee noted:

> The Committee has used brackets sparingly to identify alternative language within instructions, interrogatories, and verdict forms. For example, where a single statutory subsection defines more than one way to commit an offense, the Committee has not enclosed the alternatives within brackets unless the Committee perceived a clear disjunctive separation point that warranted distinct numbering of the alternative element(s).

---

construction of the phrase is interesting, as the court did not say that knowingly or recklessly *are lesser degrees* of mental culpability, instead treating "knowingly or recklessly" as a unified concept. In noting this construction, the committee recognizes that 'knowingly' and 'recklessly' are distinct mental states with different definitions. Nevertheless, their common usage in different Colorado criminal statutes, and case law interpreting those statutes, is as a single term.

Colorado Jury Instructions—Criminal (COLJI-Crim) (2014), Chap. A—General Instructions—Bracketed Material.

As mentioned, "knowingly or recklessly" assault is a separate instruction from assault committed with negligence and a deadly weapon—that instruction is contained in COLIJ-Crim (2014), § 3-2:21. The fact that negligent/deadly weapon assault has its own, separate instruction suggests that Colorado treats that type of third degree assault as a "different . . . crime[]." *Descamps*, 133 S. Ct. at 2285 (quoting *Nijhawan*, 557 U. S. at 41). The converse is also true—the fact that "knowingly or recklessly" are not separated into separate jury instructions, but included on the same instruction, with the two *mentes reae* included together in a single, enumerated item is highly suggestive that Colorado views "knowingly and recklessly" as simply two different "way[s] to commit [the] offense," rather than "alternative element(s)." Colorado Jury Instructions—Criminal (COLJI-Crim) (2014), Chap. A—General Instructions—Bracketed Material.

One can readily find examples of other jury instructions in which alternative elements are bracketed and given separate entries, all with the same element number, clearly indicating that a person would be charged under one of the listed alternatives. One such example is First Degree Burglary. The jury instruction for that offense reads as follows:

4-2:01 FIRST DEGREE BURGLARY

The elements of the crime of first degree burglary are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. entered unlawfully, or remained unlawfully after a lawful or unlawful entry,

5. in a building or occupied structure,

6. with intent,

7. to commit therein the crime[s] of [insert name(s) of offense(s)], and

8. in effecting entry or while in the building or occupied structure or in immediate flight from the building or occupied structure,

[9. the defendant or another participant in the crime committed the crime of assault or the crime of menacing against any person.]

[9. the defendant or another participant in the crime was armed with explosives.]

[9. the defendant or another participant in the crime used a deadly weapon or possessed and threatened the use of a deadly weapon.]

[10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree burglary.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree burglary.

COLJI-Crim (2014), § 4-2:01. As can be seen, the instructions contain three alternate versions of item/element number nine, suggesting that only one choice, per charge, is presented to a jury.

Another example of this treatment of different elements can be seen in the instructions for First Degree Criminal Trespass, which contains two alternate instructions for item/element number five. Presumably, for each charge, a jury would be instructed either as to entry into a dwelling or entry into a vehicle, but not both.

4-5:03 FIRST DEGREE CRIMINAL TRESPASS

The elements of first degree criminal trespass are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly, and

4. unlawfully,

[5. entered or remained in a dwelling of another.]

[5. entered any motor vehicle,

6. with intent to commit the crime of [insert name of offense] therein.]

[_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree criminal trespass.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree criminal trespass.

COLJI-Crim (2014), § 4-5:03.

Another piece of suggestive evidence comes from Colorado case law concerning jury unanimity—when it is required, and when it is not. While "the Colorado Constitution does not explicitly guarantee the right to a unanimous jury verdict," there is a *statutory* right to a unanimous jury verdict. *People v. Hall*, 60 P.3d 728, 734 (Colo. App. 2002) (citing C.R.S. § 16-10-108 and C.R.S. § 18-1-406(1), as well as Colo. Crim. P. 23(a)(8)). However, the statutory right to jury unanimity has been interpreted to mean that a jury must only unanimously agree on all the elements of a crime, and not on the theory or evidence by which a particular element is established. *People v. Palmer*, 87 P.3d 137, 140 (Colo. App. 2003); *People v. Rivas*, 77 P.3d 882, 887 (Colo. App. 2003). In the latter case, the Colorado Court of Appeals held that the defendant was not deprived of the right to jury unanimity where the assault instructions described four alternate theories of culpability, yet the verdict form did not require agreement on which theory applied. *Rivas*, 77 P.3d at 887; *see also People v. Dunlap*, 124 P.3d 780, 815 (Colo. App. 2004) (holding that jury instructions not requiring agreement on the means by which theft was committed (by "threat and deception," or "without authorization") did not deprive defendant of right to unanimous verdict). Applying the well-settled authority that juror unanimity is not required for the theory by which an element of a crime is established, one can say of Mr. Mendoza Quinones' crime that the m*ens rea* element was "knowingly or recklessly," while each

separate state of mind constituted a separate theory by which that uniform *mens rea* element could be established.

Working in tandem with Colorado case law on jury unanimity is another line of authority holding that "the law does not require that sufficient evidence support each alternative theory of liability present in the jury instruction . . . . Rather, as long as the evidence supports one of the theories of liability beyond a reasonable doubt, [a] trial [is] not fundamentally unfair." *People v. Dunaway*, 88 P.3d 619, 624 (Colo. 2004) (en banc). In that case, the defendant was convicted for child abuse resulting in serious bodily injury. *Id.* at 623. The trial court instructed the jury on two alternate theories of culpability and provided it with a general verdict form, not requiring a selection of one theory over the other. *Id.* On appeal, the Colorado Supreme Court agreed with the defendant that one of the two theories of culpability was not supported by sufficient evidence. *Id.* at 627. Despite this flaw, the court held "that when a jury instruction includes two alternative factual theories of the same charged offense and the jury returns a general verdict of guilt, due process does not require reversal of that conviction merely because the evidence only supports one of the theories beyond a reasonable doubt." *Id.* at 622, 631 (citing *Griffin v. United States*, 502 U.S. 46 (1991)).The court recognized the fundamental principle that "the prosecution must prove every *element* of a charged crime beyond a reasonable doubt." *Id.* at 627 (emphasis added) (citing *People v. Snyder*, 874 P.2d 1076, 1080 (Colo. 1994)). But it clarified that where each element is proven beyond a reasonable doubt, "due process is not offended if one of the alternative bases of liability contained within an element is not also supported by sufficient evidence." *Id.* at 629 (citing *Griffin*, 502 U.S. at 59-60).

The Colorado Supreme Court's distinction between "elements" and "alternative bases of liability contained within an element" is structurally analogous to the Supreme Court's discussion of "elements" versus "means" in *Descamps*. The former must be proven "unanimously and beyond a reasonable doubt," *Descamps*, 133 S. Ct. at 2290, while the latter do not, *id.* at 2288. As a matter of simple logic, in any third degree assault prosecution in which "knowingly" and "recklessly" are both charged in a single count, they must *always* constitute "alternative bases of liability contained within" the *mens rea* element. This is because a "reckless" state of mind is necessarily established by a finding of a "knowing" state of mind. The former is a lesser *mens rea* included within the latter. C.R.S. § 18-1-503(3) ("If recklessness

suffices to establish an element, that element also is established if a person acts knowingly or intentionally."); *see also People v. Low*, 732 P.2d 622, 626 (Colo. 1987) ("The mental states required for third-degree assault—knowingly, recklessly or "with criminal negligence"—are all established if the prosecution proves intentional conduct."). As a practical consequence, then, if a defendant is charged with "knowingly or recklessly" causing bodily injury, and the jury is not required to pick one *mens rea* over the other, there will be jury unanimity even if some of the jurors believed the defendant acted knowingly, while others thought he only acted recklessly. The jurors who believed the defendant acted knowingly necessarily also found, as a matter of law, that he acted recklessly. Therefore, because jury unanimity on "knowingly" cannot be required, that term must be construed as an "alternative basis of liability contained within" the *mens rea* element.

The third piece of suggestive evidence comes from actual charges and plea agreements. How is the phrase "knowingly or recklessly" used in the "real world?" *Descamps*, 133 S. Ct. at 2285 n.2. Despite the evidence above, indicating that "knowingly or recklessly" are treated as alternate means of fulfilling the *mens rea* requirement, rather than true elements describing discrete crimes, how is the phrase actually charged and pled to? Do prosecutors treat the different mental states as actual elements, by charging one over the other? Are defendants required to plead to only one of the two mental states? The answer from Colorado case law is 'no' to both questions. For example, in *People v. Malczewskie*, 744 P.2d 62 (Colo. 1987), the defendant was charged in a two count information. Count two of that information "alleged that the defendant on that same occasion *knowingly or recklessly* caused bodily injury to" the victim." *Id.* at 63. And in *Sanchez-Martinez v. People*, 250 P.3d 1248 (Colo. 2011), one can see an example of a plea colloquy for a defendant charged with third degree assault. The magistrate queried the defendant in the following manner:

> Magistrate Bowen: Okay, Then, as to assault in the third degree, if you were to enter a plea of guilty to that charge, *you would be acknowledging that you did*, within the State of Colorado, on or about the twelfth day of January 2001--excuse me--2008, *knowingly or recklessly cause bodily injury* to another person without affirmative defense or legal justification. Sir, is that your understanding?
>
> Sanchez-Martinez: Yes.
>
> Magistrate Bowen: So, as to 18-3-204, assault, and 18-6-801, domestic violence, sir, how do you plead, guilty or not guilty?

Sanchez-Martinez: Guilty.

Id. at 1251-52 (emphasis added).The existence of other cases in which the prosecutor *did* choose one mental state over the other does not undercut the argument. *See, e.g., People v. Martinez*, 74 P.3d 316, 321 (Colo. 2003), and *People v. Weinreich*,119 P.3d 1073, 1075 (Colo. 2005) (cases in which the defendant was charged with, or the jury was instructed on, one *mens rea* over another in a child abuse statute). The fact remains that because "knowingly or recklessly" can be charged, and pled to, as a single, unified term means that the two terms are not true "elements" as that concept is understood in *Descamps* and *Chairez-Castrejon*. Despite being expressed disjunctively, 'knowingly' and 'recklessly' are not discrete elements because there is no evidence that jury unanimity is required for conviction. Therefore, in Mr. Mendoza Quinones' case resort to the modified categorical approach was erroneous. His conviction should have been assessed under the categorical approach only, and under that framework the minimum conduct necessary for a conviction fell short of a crime involving moral turpitude.

2. *The Tenth Circuit's Divisibility Analysis from* Trent *did not Abrogate* Chairez-Castrejon *for Purposes of Analyzing a Statute with Alternative Mentes Reae*

Not long after the Board's decision in *Chairez-Castrejon*, the Tenth Circuit Court of Appeals issued a published decision on divisibility. *U.S. v. Trent*, 767 F.3d 1046 (10th Cir. 2014). While the Tenth Circuit proposed an alternative, "shortcut" method for assessing divisibility that would at first appear to be at odds with *Chairez-Castrejon*, the Board's reasoned analysis should continue to govern divisibility analyses for immigration cases arising in the Tenth Circuit for three reasons, as explained below. First, the Tenth Circuit in *Trent* did not definitively choose a method that diverges from *Chairez-Castrejon*'s use of the traditional definition of element. Second, the statute in *Trent* did not implicate alternative *mentes reae*. The Board in *Chairez-Castrejon*, a case which *did* involve a statute with *mentes reae* expressed disjunctively, indicated that in order to apply a circuit court's interpretation of divisibility post-*Descamps*, it would prefer to have a precedential decision in the *mens rea* context. *Chairez-Castrejon*, 26 I&N Dec. at 354. Third and finally, *Trent* applied its new shorthand method to a statute where it was clearly established that the state's prosecutors were required to explicitly

state the applicable alternative in the charging document. Applying the new *Trent* analysis to a statute where a prosecutor is *not* required to select the applicable alternative in the charging document—but could if he or she so chose—would lead to absurd results, where the same state statute could be divisible in some cases and indivisible in others.

The issue in *Trent* was whether the modified categorical approach could be employed to determine whether a prior felony was a "serious drug offense" under the Armed Career Criminal Act. *Id.* at 1048. The prior felony in question was under an Oklahoma conspiracy statute which required a defendant to conspire with another "[t]o commit any crime" in order to support a conviction. *Id.* at 1052. The information to which Mr. Trent pled specified the relevant underlying crime as the manufacture of methamphetamine. *Id.* The *Trent* court wrestled with whether the conspiracy statute was divisible, by cross referencing the entire Oklahoma Criminal Code with its requirement for "any crime," so as to allow that criminal information to be considered under a modified categorical approach. *Id.*

While the statute requiring that a defendant conspire with another "to commit any crime" is not drafted in the disjunctive and does not list potential underlying crimes, the *Trent* court found that it effectively cross-referenced all Oklahoma criminal offenses and that in so doing, "the general conspiracy statute lays out multiple, alternative versions of the crime of conspiracy, according to what underlying crime provides the conspiracy's object." *Id.* at 1057.

The court next needed to decide whether the alternative versions of the crime of conspiracy—based on the underlying crime constituting the conspiracy's object—were "elements" as contemplated by *Descamps*. *Id.* at 1058. A finding that the object of the conspiracy was an element would allow the court to use the modified categorical approach to review the record of conviction and find that the conviction was a serious drug offense for purposes of the ACCA. *Id.* On the other hand, if the specific object of the conspiracy is not an element of the crime, then Mr. Trent could not be considered to have committed a serious drug offense "no matter how clear it is that the object of his conspiracy was the manufacture of methamphetamine." *Id.*

The court recognized that ""[c]alling a particular kind of fact an 'element' carries certain legal consequences. [For example,] a jury . . . cannot convict unless it unanimously finds that the

Government has proved each element."" *Id.* (quoting *Richardson v. United States*, 526 U.S. 813, 817 (1999) (citation omitted)). It also acknowledged

> [t]he fact that a criminal statute lists alternatives does not necessarily mean that the alternatives are alternative elements in that sense. If several alternatives are presented to the jury, the jurors may not need to agree on which alternative act was committed by the defendant. The alternatives may be simply alternative "means" of committing the offense; and the jurors could disagree on the means but still properly convict."

Id. 1058-59.

Despite recognizing this traditional understanding of "element" from *Schad* and *Richardson,* the Tenth Circuit nevertheless indicated that some "alternative statutory phrases may not be 'elements' in the full sense of the term," but still may be considered sufficiently close for purposes of deciding whether or not to use the modified categorical approach, with any "'shortcoming' . . . generally irrelevant." *Trent*, 767 F.3d at 1060. The court stated that in view of the policy rationale underlying the discussion of divisibility in *Descamps* "there is no need to worry about" any formal distinction "between elements and means." *Id.* With this shorthand understanding of 'element' in mind, the Tenth Circuit concluded that when faced with a statute containing alternate statutory phrases or terms, expressed disjunctively, one need look no further than a charging document or plea agreement to see how the statute is treated in the "real world." *Id.* (quoting *Descamps*, 133 S. Ct. at 2285 n.2).

The divisibility analysis becomes quite circular in that scheme—one looks to those documents only permitted under the modified categorical approach because a statute is divisible (*i.e.*, the particular case's indictment, jury instructions, plea colloquy, and plea agreement) in order to determine if a statute is divisible and therefore warrants use of the modified categorical approach. In this "shorthand" scheme the divisibility analysis is individualized—the same statute might be divisible for one person but not another—with the difference depending on how the state handled the particular prosecution. *Id.*

The Tenth Circuit acknowledged that its "close enough to an element" approach to divisibility may simply be wrong and then proceeded to provide an alternate analysis under the traditional definition of element—an approach that squares with the Board's approach in *Chairez-Castrejon*. *Id.* at 1061 ("Must the jury agree unanimously on what crime the conspirators agreed to commit?"), *compare to Chairez-Castrejon*, 26 I&N Dec. at 353 ("for

purposes of the modified categorical approach, an offense's "elements" are those facts about the crime which "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find . . . unanimously and beyond a reasonable doubt'"") (quoting *Descamps*, 133 S. Ct. at 2288) (citing *Richardson*, 526 U.S. at 817). For the general conspiracy statute at issue in *Trent*, this meant an analysis of whether a jury must agree unanimously on the crime that the defendants agreed to commit.

Continuing its application of the traditional approach, the court acknowledged that in some jurisdictions a jury need only be unanimous in deciding that crime, in general, was the object of the conspiracy, even if some of the jurors were not in agreement on what *specific* crime might have been planned. *Id.* at 1061 (citing *People v. Vargas*, 110 Cal. Rptr. 2d 210, 247 (2001)). However, the court found that in Oklahoma jury unanimity *is* required with respect to the specific crime underlying a conspiracy charge. *Id.* In reaching this conclusion, it admitted that it could not find "an opinion by an Oklahoma court explicitly stating that the jury must unanimously agree beyond a reasonable doubt on the object of the agreement that constitutes the conspiracy." *Id.* However it relied upon other persuasive evidence, including: (1) case law stating that a "formal charge of conspiracy in Oklahoma must allege the object of the conspiracy," *id.* (citing *Williams v. State*, 182 P. 718, 724 (Okla. Crim. App. 1919)); and (2) the "Oklahoma Uniform Jury Instructions," which provided relevant information on "how [the state's] courts generally instruct juries with respect" to a particular offense," *id.* (quoting *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013) (using jury instructions to determine whether an assault statute contained alternate elements)). Using that persuasive authority, the court concluded under the traditional approach that "it appears that an Oklahoma jury must agree unanimously on the crime the defendant has conspired to commit." *Id.* Because the court found that the object of the conspiracy in the Oklahoma statute met the traditional definition of element, it found that the statute would be divisible under the traditional approach. *Id.*

The traditional approach to the definition of an element from *Schad* and *Richardson*, applied in *Trent*'s alternative analysis section, is fully consistent with the Board's approach in *Chairez-Castrejon*. *Id.* at 1061 (identifying the relevant question, if "element" is understood in the traditional sense, as whether the jury must agree unanimously on what crime the conspirators agreed to commit); *Chairez-Castrejon*, 26 I&N Dec. at 354 ("If Utah does not require such jury

unanimity, then it follows that intent, knowledge, and recklessness are merely alternative "means" by which a defendant can discharge a firearm, not alternative "elements" of the discharge offense.").

As explained above, the statute at issue in Mr. Mendoza Quinones' case, Colorado third degree assault, does not require juror unanimity on whether the defendant committed the act knowingly or recklessly in order to support a conviction. Under the Board's analysis in *Chairez-Castrejon* and *Trent's* alternative analysis, the separate *mentes reae* in Colorado's third degree assault statute are not alternative elements but rather alternative means of committing a unitary crime.

That traditional approach should continue to govern divisibility analyses by the Board in cases arising in the Tenth Circuit, despite the Tenth's discussion of a "shortcut" method, for three reasons. First, while the Tenth Circuit did lay out a new method whereby an "almost element" might suffice for purposes of rendering a statute divisible, it then proceeded to analyze the statute in question under its new method *and* under the traditional method. *Trent*, 767 F.3d at 1058-63. The *Trent* court admittedly showed a preference for its new "shorthand" method of determining whether a statutory phrase is an element, but frankly conceded that such preference "may be wrong" before delving into a full traditional analysis consistent with *Chairez-Castrejon*. *Id.* at 1060-61. Given *Trent's* use of two alternative analyses, with the admission that its preferred analysis may be wrong, the Board should not find that it is not yet bound by the "close enough to an element" analysis in *Trent* in analyzing Colorado third degree assault. Unless and until the Tenth Circuit definitively decides on a divisibility rubric, *Chairez-Castrejon* should continue to govern.

Second, to the extent that *Trent* may have overruled *Chairez-Castrejon*, its scope should be limited to divisibility analyses concerning different *actus rei*. *Chairez-Castrejon*, like Mr. Mendoza Quinones' case, concerned alternate mental states, and analyzing divisibility in that context may present unique issues not applicable to other divisibility assessments. In fact, the Board noted its preference for a published decision from the Tenth Circuit addressing divisibility post-*Descamps* in the specific *mens rea* context when deciding whether it could apply its own interpretation to the Utah statute. Only after concluding that the Tenth Circuit had not yet "applied divisibility under *Descamps* in a precedential decision, particularly in the mens rea

context," did the Board decide that its understanding of divisibility would control. *Chairez-Castrejon*, 26 I&N Dec. at 354. What the Board noted in *Chairez-Castrejon* still applies, even after *Trent*. The Tenth Circuit still has yet to issue a published decision analyzing divisibility after *Descamps* in the *mens rea* context.

Finally, *Trent* is limited in yet another way. Its shorthand method for finding divisibility should be cabined to those statutes where the law is clear in its requirement that a prosecutor *must* select one alternative from a list expressed disjunctively. The shortcomings of the Tenth Circuit's "close enough to an element" approach are minimized in those situations where a prosecutor is *required* to select from different alternatives when charging a criminal defendant. That was the case in *Trent*, where a charge under the conspiracy statute at issue required the prosecutor to allege the specific object of the conspiracy from a disjunctive list comprised of the entire Oklahoma criminal code. *Trent*, 767 F.3d at 1062. The court acknowledged that "a formal charge of conspiracy in Oklahoma must allege the object of the conspiracy." *Id.* (citing *Williams v. State*, 182 P. 718, 724 (Okla. Crim. App. 1919)). In those situations, it is guaranteed that alternative terms will be treated *as if* they were elements, even if (rarely) a traditional *Schad/Richardson* analysis might lead to different results. Every case properly charged will reveal one, and only one, alternative term selected by the prosecution. One can find examples of these types of statutes in the Colorado criminal code. One example, among many, is Contributing to the Delinquency of a Minor, C.R.S. § 18-6-701. The model jury instructions for that offense provide:

> 6-7:01 CONTRIBUTING TO THE DELINQUENCY OF A MINOR
>
> The elements of the crime of contributing to the delinquency of a minor are:
>
> 1. That the defendant,
>
> 2. in the State of Colorado, at or about the date and place charged,
>
> 3. knowingly induced, aided, or encouraged another to violate [*insert a reference to the federal or state law, municipal or county ordinance, or court order*], and
>
> 4. the person who was induced, aided, or encouraged by the defendant was under the age of eighteen years.

> [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]
>
> After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of contributing to the delinquency of a minor.
>
> After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of contributing to the delinquency of a minor.

COLJI-Crim, § 6-7:01. As can be seen, item/element number three requires a prosecutor to "insert a reference to the federal or state law, municipal or county ordinance, or court order." This is analogous to the Oklahoma conspiracy statute in *Trent*, where the prosecutor was required to specify the criminal object of the conspiracy.

The *Trent*ian shortcut would not be nearly as applicable, however, to those statutes with disjunctive terms in which a prosecutor has the *option* of selecting one alternate over another, but is not required to do so. That is the situation presented by Mr. Mendoza Quinones' case, in which a prosecutor *could* have charged him with only knowing assault, or only reckless assault, but also (and more likely) could have charged him with 'knowing or reckless' assault in a single count. *See, e.g., Malczewski*, 744 P.2d at 63 (example of defendant charged with "knowingly or recklessly" causing bodily injury in a single count); *Sanchez-Martinez*, 250 P.3d at 1251-52 (example of a plea colloquy in which a defendant admitted that he "knowingly or recklessly" caused bodily injury to another). Applying the *Trent* shortcut to those statutes would lead to absurd and inconsistent results, where the same statute might be found divisible in one case, but indivisible in another, depending on whether or not the prosecutor exercised his option to select one alternate, or simply charge in the disjunctive. Such disparate results would lead to the very unfairness that the categorical approach was designed to avoid. *Moncrieffe*, 133 S. Ct. at 1690 (citing *Taylor v. U.S.*, 495 U.S. 575, 601 (1990)).

For the foregoing reasons, *Trent* does not govern Mr. Mendoza Quinones' case; the Board's sensible approach in *Chairez-Castrejon* should continue as the default guide for divisibility in the Tenth Circuit, if not for all situations then at least for those statutes involving

disjunctive *mentes reae* where the prosecution is not required to select one particular state of mind.

B. Even if Third Degree Assault Might be a Divisible Statute with Respect to the *Mentes Reae*, Mr. Mendoza Quinones Met his Burden of Proof with an Inconclusive Record that Showed he was not Necessarily Convicted of a Knowing Assault

In spite of the concerns with the Tenth Circuit's approach expressed above, it is possible that the Board will find that *Trent* governs divisibility analysis in the Tenth Circuit. As the Board cautioned, it is "bound to apply divisibility consistently with the individual circuits' interpretation of divisibility under *Descamps*." *Chairz-Castrejon,* 26 I&N Dec. at 354. And if *Trent* is understood to mean that *all* questions of divisibility can be *only* be resolved by a review of certain documents particular to the case under review—as opposed to a review of generally applicable materials (*i.e.*, uniform jury instructions, case law on jury unanimity, general verdict forms, etc.)—then the question becomes how to handle those cases in which those documents are inconclusive or unavailable.

Mr. Mendoza Quinones tried to obtain his sentencing memorandum, sentencing minutes, or plea colloquy, hoping that those materials would show which state (or states) of mind he pled guilty to; however, the state court had destroyed them, preserving only the non-specific judgment of conviction. Tr. at 94-95. Under a *Trent* analysis, it can't be shown whether his case was treated like a divisible statute (in which the prosecutor charged only one *mens rea*) or a divisible one (where the prosecutor charged multiple *mentes reae* in a single count). Despite the unavailability of those materials, and the concomitant inability of Mr. Mendoza Quinones to prove that the third degree assault statute, as applied to him, was handled in his criminal proceedings like a non-divisible statute, he is nevertheless still able to meet his burden of proof under 8 C.F.R. § 1240.8(d). To the extent that the burden issue conflicts with *Garcia*, 584 F.3d at 1289-90 (holding that an inconclusive record of conviction for Colorado third degree assault which fails to identify the applicable *mens rea* is insufficient to satisfy a cancellation applicant's burden of proof), the Supreme Court's decision in *Moncrieffe* has vitiated that holding.

In *Moncrieffe*, the Supreme Court held that "[b]ecause we examine what the state conviction *necessarily* involved, not the facts underlying the case, we must presume that the

conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, and then determine whether even those acts are encompassed by the generic federal offense."*Moncrieffe*, 133 S. Ct. at 1684 (emphasis added) (quoting *Johnson v. U.S.*, 559 U.S. 133, 137 (2010)). The Court emphasized this point elsewhere, stressing that to in order to "qualify as an aggravated felony, a conviction for the predicate offense *must necessarily establish*" that it meets all the elements of the generic offense. *Moncrieffe*, 133 S. Ct. at 1687 (emphasis added). With those principals in mind, the Court applied the modified categorical approach to determine whether or not Mr. Moncrieffe's conviction satisfied all of the elements of a drug trafficking aggravated felony. *Id.* at 1685 (considering Mr. Moncrieffe's plea agreement to determine which of ten different alternate acts, expressed disjunctively, he was found guilty of committing). Even with a consideration of the documents allowed by the modified categorical approach, however, the Court could not determine whether Mr. Moncrieffe's conviction met all of the elements required for a drug trafficking aggravated felony—the records were ambiguous, or inconclusive, on that point. *Id.* at 1686-87.

Confronted with an ambiguous record, the Court did *not* conclude that Mr. Moncrieffe failed to meet his burden of establishing that his prior conviction was not an aggravated felony. *Id.* at 1687. Instead, the Court held that "[a]mbiguity on this point means that the conviction did not "necessarily" involve facts that correspond to" a drug trafficking aggravated felony. *Id.* The Court's reasoning trumps the contrary position taken by the Tenth Circuit in *Garcia*, where it held that an inconclusive record of conviction was insufficient to meet a cancellation applicants' burden of proving statutory eligibility—specifically, the burden to show that he "has not been convicted" of a disqualifying offense. *Garcia*, 584 F.3d at 1289-90.

Garcia cannot be squared with *Moncrieffe* simply because the former concerned an application for relief for removal (in which the burden was on the applicant to establish eligibility for the benefit sought) and the latter concerned deportability (where the burden was on the government). *Compare* INA § 240(c)(3) ("the Service has the burden of establishing by clear and convincing evidence that . . . the alien is deportable") *with* INA § 240(c)(4) ("An alien applying for relief . . . from removal has the burden of proof to establish that [he] satisfies the applicable eligibility requirements") *and* 8 C.F.R. § 1240.8(d) (same). The Supreme Court said it

did not make a difference, holding that the "analysis is the same" for both removability and relief from removal. *Moncrieffe*, 133 S. Ct. at 1685 n.4.

That is not to say that *Moncrieffe* overrode the statutory allocations of burden of proof in the two settings. The burdens remain the same. When the issue is removability, the government bears the burden of producing the record of conviction—that record will then either "necessarily" establish the existence of a removable offense or it will not. The opposite is true for a respondent—when applying for a relief from removal for which certain convictions will bar statutory eligibility, he bears the burden of providing the record of conviction. *See also* INA § 240(c)(4)(B) (relief applicant must provide supporting documents). The record provided by the respondent will then "necessarily" establish that his conviction bars him from relief, or it won't "necessarily" prove the existence of a disqualifying crime. In other words, a respondent can still be held to his evidentiary burden even if not required to prove the nonexistence of a certain category of conviction. *Moncrieffe*, 133 S. Ct at 1690.

The Court in *Moncrieffe* recognized that its strict reading would lead to "underinclusiveness." *Id.* at 1693. In the removability context, some criminal aliens would have their removal proceedings terminated because the government could not establish, with an inconclusive record, that they were "necessarily" convicted of deportable offenses. *Id.* The Court justified this potential error rate based on its long-standing belief that "ambiguity in criminal statutes referenced by the [Immigration and Nationality Act] must be construed in the noncitizen's favor." *Id.* at 1693. Any concerns about "underinclusiveness" are lessened in the relief context, where a noncitizen who establishes that he wasn't "necessarily" convicted of a disqualifying crime would still need to prove that he meets any other criteria for relief, and in many cases that he merits the relief in the exercise of discretion. *Moncrieffe*, 133 S. Ct at 1692.

Mr. Mendoza Quinones' situation is a good example of this principle. In remanded proceedings, should the Immigration Judge correctly recognize that his inconclusive record of conviction does not "necessarily" show that he is disqualified for cancellation due to a conviction for "knowing" third degree assault, Mr. Mendoza Quinones would still needed to establish that he meets all of the other criteria for a cancellation grant. He would need to establish, among other factors, that his assault conviction (and any imprisonment tied to it and other offenses) did not prevent him from proving that he was of good moral character, INA § 101(f), or that he

merited a favorable exercise of discretion, INA § 240A(b)(1) ("The Attorney General *may* cancel removal") (emphasis added).

Accordingly, if the Board finds the Colorado third degree assault statute to be a divisible offense within the understanding of *Descamps*, then under the strictures of *Moncrieffe* it must find that a cancellation applicant who provides an inconclusive record of conviction has met his statutory burden of proof, because he has established that he was not "necessarily" convicted of a knowing assault. *See also Almanza-Arenas v. Holder*, 2014 U.S. App. LEXIS 21372, *16-22 (9th Cir. 2014) (panel decision holding that *Moncrieffe* abrogated that portion of the *en banc* decision, *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012), which had held that a cancellation applicant cannot demonstrate the absence of a disqualifying crime with an inconclusive record).

IX. CONCLUSION

For the foregoing reasons, the Board should find Colorado third degree assault is indivisible because the disjunctive *mentes reae* are properly understood as alternative means of committing one crime. Even if the Board were to find that the statute is divisible, however, it should find that Mr. Mendoza Quinones met his burden of proof of showing that his conviction did not disqualify him from relief from removal where he produced the available record of conviction and such record did not establish that he had necessarily been convicted of a crime involving moral turpitude.

Dated: November 20, 2014

Respectfully submitted:

Aaron C. Hall
12203 E. 2nd Ave.
Aurora, CO 80011
PH: (303) 297-9171
aaron@immigrationissues.com

Mark R. Barr
1601 Vine Street
Denver, CO 80206
PH: (303) 554-8400
mbarr@lichterimmigration.com

Attorneys for *Amicus Curiae*

X. PROOF OF SERVICE

On November 20, 2014 I, Aaron Hall, served a copy of the foregoing Amicus Brief and attached Request to Appear as Amicus Curiae to the Office of the Chief Counsel at the following address:

Office of the Chief Counsel
DHS-ICE/Office of the Chief Counsel
12445 E. Caley Avenue
Centennial, CO 80111

via priority mail of U.S. Postal Service;

and to counsel for Respondent at the following addresses:

Christina Fiflis, Esq.
Fiflis Law, LLC
1129 Cherokee Street
Denver, CO 80204

via priority mail of U.S. Postal Service; and

Hans Meyer
1029 Santa Fe Drive,
Denver, CO 80204

via hand delivery.

(signature)