SUPREME COURT RULES ON SEXUAL ABUSE OF A MINOR

Cal. P.C. § 261.5(c) is not an aggravated felony, but the law may change for the worse on § 261.5(d)

Esquivel Quintana v. AG Sessions (May 30, 2017)

By Kathy Brady, ILRC

A. Overview

The Supreme Court held that sex with a person age 16 or older is not an aggravated felony as sexual abuse of a minor ("SAM") under INA 101(a)(43)(A), at least absent a caretaking relationship or other aggravating factor. The Court overturned rulings by the Sixth Circuit and Board of Immigration Appeals and found that California Penal Code 261.5(c), intercourse with a person under the age of 18 and at least three years younger than the perpetrator, is not SAM. *Esquivel Quintana v. AG Sessions*, __U.S.__ (May 30, 2017), reversing *Esquivel-Quintana v. Lynch,* 810 F.3d 1019 (6th Cir. 2016) and *Matter of Esquivel-Quintana*, 26 I&N Dec. 469 (BIA 2015). This already was the rule in the Ninth Circuit.

Unfortunately, the opinion may cause the Ninth Circuit to withdraw from its current position and hold that Cal PC 261.5(d), intercourse with a person under the age of 16, is SAM. Hopefully the court will leave intact its ruling that conduct with lewd intent toward a person aged 14 or 15, Cal PC 288(c) is not SAM. See Part C.

Congratulations and many thanks to the advocates who achieved this victory: Jeffrey Fisher, Pamela Karlan, and Jayashri Srikantiah of Stanford Law School. The National Immigration Project of the National Lawyers Guild (NIPNLG), Immigrant Defense Project (IDP), and ILRC submitted an amicus brief.

NIPNLG and IDP will publish an Advisory analyzing the decision and its implications in general. This ILRC Advisory will discuss the likely effect of *Esquivel-Quintana* on Ninth Circuit and California law.

B. Holding

Esquivel-Quintana sets out a fairly limited rule in a unanimous decision (with Justice Gorsuch abstaining). The Court found that absent aggravating factors, "in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." *Esquivel-Quintana* at * 4. (A "generic federal definition" is the technical definition of a criminal law term that appears in a federal statute such as a removal ground, which is the standard against which a person's conviction is compared.[i])

The Court stated that 18 USC 4423, the federal offense titled "sexual abuse of a minor," does not provide the precise generic definition in this context. This overturned Ninth Circuit law holding that it did.[ii] However, considering that both 18 USC 2243 and the law in the majority of states do not criminalize intercourse with a minor aged 16 or 17, and did not do so at the time the aggravated felony statute was enacted, and that

Congress intended for "aggravated felonies" to be serious crimes, the Court found that the generic definition of SAM requires the minor to be younger than age 16. Employing the categorical approach, the Court found that no conviction of Cal PC 261.5(c) is SAM, because the least criminalized act (minimum conduct required for guilt) includes sex with a minor aged 16 or older.

The Court did not resolve the issue of deference. Rather than rule that federal courts do not owe *Chevron* deference to the BIA's definition of an aggravated felony, or that the rule of lenity applies in favor of the immigrant, the Court held that it did not need to reach these issues because in this context the phrase "sexual abuse of a minor" is not ambiguous.

C. Ninth Circuit and California Law

In light of *Esquivel-Quintana* and other decisions, Cal PC 261.5(c), intercourse with a person under age 18 and at least three years younger than the perpetrator, has the following immigration consequences. Similar California offenses such as PC 288a(b)(1) (oral sex), and offenses with the same elements in other Ninth Circuit states, should have the same consequences.

- Section 261.5(c) is not an aggravated felony as sexual abuse of a minor under INA 101(a)(43)(A). This is the nationally-applicable holding of *Esquivel Quintana,* and it was already the rule in the Ninth Circuit (although under a different rationale[iii]).
- It is not a crime of violence under 18 USC 16.[iv]
- It is not a crime involving moral turpitude.[v]
- Because DHS charges this ground so broadly, it is possible it would be charged as a deportable crime of child abuse, neglect, or abandonment under INA 237(a)(2)(E)(i). Advocates should warn clients of this possibility.

California Penal Code 261.5(d), intercourse with a person under age 16 where the perpetrator is at least age 21, is likely to have the following immigration consequences. Similar offenses such as 288a(b)(2) (oral sex) and offenses with these elements from other Ninth Circuit states should have the same consequences.

- While the Ninth Circuit held that PC 261.5(d) is not SAM (*Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1016 (9th Cir. 2009)), this is likely to change. *Pelayo-Garcia* was based on two findings: that the generic definition of SAM is the federal statute 18 USC 2243, and that sex with a person under the age of 16 generally does not meet the definition of SAM. *Esquivel-Quintana* rejected the first finding and will be read as rejecting the second. Criminal defenders should assume that PC 261.5(d) will be held SAM. Immigration advocates should cite *Pelayo-Garcia* but expect DHS to appeal a positive ruling, and should evaluate whether post-conviction relief to eliminate the conviction is possible.
- The Ninth Circuit has held that PC 261.5(d) is not a crime involving moral turpitude,[vi] and this ruling is not controlled by *Esquivel-Quintana*. However, recent BIA precedent holds that sex with a person under the age of 16 is a crime involving moral turpitude if the statute requires a significant age difference,[vii] a definition that includes PC 261.5(d). Because the Ninth Circuit gives *Chevron* deference to BIA rulings as to what conduct constitutes moral turpitude, [viii] it is possible that at some point in the future the Ninth Circuit will adopt the BIA's position. Criminal defenders should conservatively assume that this will happen.
- It is very likely that 261.5(d) will be charged as a deportable crime of child abuse.

California Penal Code 288(c)(1) prohibits conduct with lewd intent toward a minor who is age 14 or 15. The Ninth Circuit has held that PC § 288(c) is not SAM.[ix] *Esquivel-Quintana* does not directly affect the immigration consequences of PC 288(c), because the Court only addressed the issue of sexual intercourse.

California Penal Code 647.6 prohibits annoying or molesting a minor under the age of 18. Because this can involve non-egregious, non-explicit behavior, the Ninth Circuit has held that this is neither SAM[x] nor a CIMT[xi].

The Ninth Circuit has held repeatedly that Cal PC 288(a), conduct with lewd intent toward a minor under age 14, is SAM.[xii] It will be charged as a CIMT and a deportable crime of child abuse.

End Notes

[i] Under the "categorical approach," the minimum conduct to commit the offense of which the immigrant was convicted must meet the generic definition of the offense listed in the removal ground, in order for the removal ground to apply. For more information see Brady, "How to Use the Categorical Approach Now" (2017) at www.ilrc.org/crimes.

[ii] *Estrada-Espinoza v Mukasey,* 546 F.3d 1147 (9th Cir. 2008) (en banc), overruled in part by *Esquivel-Quintana.*

[iii] See *Estrada-Espinoza, supra,* (holding that PC 261.5(c) is not SAM because the generic definition is 18 USC 2243, which requires the minor to be under the age of 16).

[iv] *Valencia-Alvarez v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006) (felony consensual sex with a person under the age of 18); *U.S. v. Christensen*, 559 F.3d 1092 (9th Cir. 2009) (felony consensual sex with a minor age 14 or 15).

[v] In *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1 (BIA 2017) the BIA held that intercourse with a minor is a CIMT if the minor is under age 14, or is under age 16 and there is a significant age difference. This does not include PC 261.5(c), because the minimum conduct for guilt includes a minor age 16 or 17.

[vi] In *Quintero-Salazar v. Keisler*, 506 F.3d 688, 693 (9th Cir. 2007) the court found that the mínimum conduct to commit 261.5(d) does not involve moral turpitude. While the court assumed that the statute was divisible based on the behavior of the particular defendant, under recent Supreme Court precedent on the categorical approach, 261.5(d) must be evaluated based on the minimum conduct required for guilt. See "How to Use the Categorical Approach Now," *supra.* As long as this decision remains in force, no conviction under 261.5(d) should be a CIMT.

[vii] *Matter of Jimenez-Cedillo, supra.*

[viii] *Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (*en banc*).

[ix] *U.S. v. Castro*, 607 F.3d 566, 567-58 (9th Cir. 2010).

[x] *U.S. v. Pallares-Galan*, 359 F.3d 1088, 1101 (9th Cir. 2004).

[xi] *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1000 (9th Cir. 2008), partially overturned on other grounds by *Marmolejo-Campos v. Holder*, 558 F.3d at 911.

[xii] See, e.g., *U.S. v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999).

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