IMMIGRANT DEFENSE PROJECT

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Key Immigration Consequences of Common New York Offenses:

Practice Note

June 8, 2017

This Practice Note updates the following NYPL chart references:

- 130.20(1) (Sexual misconduct)
- 130.25(2) (Rape in the third degree);
- 130.40(2) (Criminal sexual act in the third degree);
- 130.55 (Sexual abuse in the third degree); and
- Additional limits on Article 130 offense consequences.

The United States Supreme Court has issued a decision that changes the aggravated felony determination for at least the four New York offenses listed above. **The listed subsections of these New York sex offenses -- which penalize sexual intercourse or other sexual conduct based on the age of the participants, but are not limited to cases where the younger participant is under age 16 -- should no longer be categorically deemed "sexual abuse of a minor" aggravated felonies under the Court's decision.** *See Esquivel-Quintana v. Sessions*, No. 16-54 (U.S. May 30, 2017).

In 2009, Mr. Esquivel-Quintana pleaded no contest in California to "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator" under Cal. Penal Code Ann. §261.5(c) (West 2014). For purposes of that offense, California defines "minor" as "a person under the age of 18 years." *Id.*

On May 30, the Supreme Court, in a unanimous opinion written by Justice Thomas, held that the INA "sexual abuse of a minor" aggravated felony ground does not reach such a state statutory rape offense focused solely on the age of the participants unless the offense categorically requires the younger participant to be under the age of 16. The Court's decision overrules *Matter of Esquivel-Quintana*, 26 I&N Dec. 469 (BIA 2015) and other BIA and federal court decisions, including *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001), that have ruled that the "sexual abuse of a minor" ground reaches statutory rape offenses as long as the younger participant is under age 18.

The New York Penal Law Section 130.20(1) (Sexual misconduct) and 130.25(2) (Rape in the third degree) offenses are also statutory rape-type offenses that reach cases where the younger individual is not under age 16 as New York law provides that they reach persons up to age 17. *See* NYPL Sections 130.05(3)(a) (providing that a person is deemed incapable of consent when he or she is less than seventeen years old), 130.20(1) (providing that a person is guilty of sexual misconduct when he or she engages in sexual intercourse with another person without such person's consent), & 130.25(2) (providing that a person is

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guilty of rape in the third degree when, being twenty-one years old or more, he or she engages in sexual intercourse with another person less than seventeen years old); *see also* Appendix A to the Supreme Court's *Esquivel-Quintana* opinion. Slip op. 16 (citing these NYPL provisions as reaching individuals under the age of 17).

In addition, the Court's reasoning should apply to New York Penal Law Section 130.40 (2) (providing that a person is guilty of criminal sexual act in the third degree when, being twenty-one years old or more, he or she engages in oral sexual contact or anal sexual conduct with a person less than seventeen years old), and New York Penal Law Section 130.55 (providing that a person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent), as these provisions also cover offenses penalizing sexual conduct based solely on the age of the participants.

The Supreme Court's decision may also support limits on what certain other New York Penal Law Article 130 offenses may be categorically deemed "sexual abuse of a minor" for INA purposes. This is because the Court's decision focused, for determining the reach of the INA "sexual abuse of a minor" ground, on what federal and state criminal codes penalized as sexual abuse of a minor as a matter of criminal liability at the time of enactment of this INA provision. The Court did not discuss nor even make reference to the civil law definition relied on by the BIA to expand the reach of the "sexual abuse of a minor" ground in *Matter of Rodriguez-Rodriguez,* 22 I&N Dec. 991 (BIA 1999) and other BIA decisions to which many courts, including the Second Circuit, have deferred. *See, e.g., Oouch v. Department of Homeland Security*, 633 F.3d 119, 122 (2d Cir. 2011); *Mugalli*, 258 F.3d at 60. Thus, immigrants and their advocates may be able to use the Supreme Court's *Esquivel-Quintana* decision to limit the reach of this ground with respect to other New York offenses based on the more limited reach of federal and state criminal code definitions of "sexual abuse of a minor." If these arguments succeed, the New York Quick Reference Chart will be further updated to reflect the new legal developments.

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