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**Immigration Case Notes for Massachusetts Criminal Defense Attorneys**  
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**U.S. Supreme Court**

*Esquivel-Quintana v. Sessions*, No. 16-54, 2017 WL 2322840 (U.S. May 30, 2017)

This case addressed the question of whether a California statutory rape law, Cal. Penal Code Ann. § 261.5(c) (West 2014), qualifies as an aggravated felony crime of sexual abuse against a minor, § 1101(a)(43)(A).<sup>1</sup> The statute in question criminalizes consensual sexual intercourse with a minor (defined as someone under age 18) who is more than three years younger than the perpetrator. In an opinion by Justice Thomas, the Supreme Court unanimously held that a statutory rape offense based solely on the age of the participants only qualifies as an aggravated felony if the statute requires that the victim is below age 16.

The Court began by providing an overview of the categorical approach, noting that the “[p]etitioner’s state conviction is... an ‘aggravated felony’... only if the least of the acts criminalized by the state statute falls within the generic federal definition of sexual abuse of a minor.” The least of the acts criminalized by the statute in question include consensual sexual intercourse between a victim who is about to turn 18 and a perpetrator who has just turned 21. In determining whether such conduct is encompassed within the generic definition of “sexual abuse of a minor,” the Court first considered the general meaning of the term “minor” in statutory rape laws in 1996 when the definition of aggravated felony was amended to include crimes of sexual abuse against a minor. Based on several dictionary definitions, the Court determined that the age of consent for purposes of age-based statutory rape in 1996 was commonly understood to be 16.

The Court also looked to other sources of federal law for guidance as to the generic definition of “sexual abuse against a minor.” Specifically, the Court examined 18 U.S.C. § 2243, which

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<sup>1</sup> 8 U.S.C. § 1101(a)(43)(A) defines “aggravated felony” as “murder, rape, or sexual abuse of a minor.” Some courts have found that statutory rape offenses qualify as both sexual abuse of a minor and rape crimes. *See, e.g., Silva v. Gonzales*, 455 F.3d 26 (1<sup>st</sup> Cir. 2006) (finding that M.G.L. ch. 265, § 23 constitutes a rape aggravated felony because “[u]nder the explicit language of the INA, all rape—including statutory rape—comes within the aggravated felony taxonomy”). Under the categorical approach, however, a conviction only qualifies as an aggravated felony if it is a categorical match for the “‘generic’ crime [mentioned in the INA]—*i.e.*, the offense as commonly understood.” *See Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). Therefore, after *Esquivel-Quintana*, a statutory rape conviction may be found not to constitute an aggravated felony under § 1101(a)(43)(A) either because it defines “minor” too broadly to qualify as sexual abuse of a minor, or, for example, because the non-consent or sexual acts requirements do not match the generic crime of rape.

criminalizes “[s]exual abuse of a minor or ward” and defines “minor” as anyone under age 16. Section 2243 was first enacted in 1986 and amended in 1996 as part of the same omnibus law that broadened the definition of aggravated felony. The court was careful to emphasize, however, that the full definition of crimes of sexual abuse of a minor or ward in § 2243 should not be extended to the aggravated felony provision, given that the Immigration and Nationality Act does not directly reference § 2243 and § 2243 is narrower than most state statutes. Nevertheless, the Court found § 2243’s definition of “minor” as anyone under age 16 instructive. The Court’s conclusion was bolstered by a state law survey showing that in 1996 a significant majority of states defined age-based statutory rape laws as crimes against victims under age 16.

In reaching a clear decision as to the overbreadth of California’s statutory rape law, the Supreme Court left several questions deliberately unanswered. First, the court acknowledged that the age of consent within the generic definition of crimes of sexual abuse against a minor may differ where the victim and perpetrator share a special relationship of trust (such as a teacher-student relationship). Furthermore, the Court declined to consider whether the aggravated felony definition of crimes of sexual abuse against a minor require a certain minimum age differential between the victim and perpetrator.

### Practice Tip

Mass. Gen. Laws ch. 265, § 23 criminalizes consensual sexual intercourse with a child under age 16. *Esquivel-Quintana* therefore does not change how a Massachusetts conviction for statutory rape would be analyzed under immigration law, and defense counsel should assume that a conviction under § 23 or any aggravated rape of a child conviction constitutes a sexual abuse of a minor aggravated felony.

Immigration attorneys should argue, however, that because § 23 has no minimum age differential between the victim and perpetrator and even criminalizes consensual sexual intercourse between two minors as long as the victim is under age 16, the statute is overbroad and not a match for the generic definition of “sexual abuse against a minor.”