U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - WAS
1901 S. Bell Street, Suite 900
Arlington, VA 22202

Name: AGUILAR, DEIVIS RENE

A 055-815-373

Date of this notice: 1/30/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John
Malphrus, Garry D.
Pauley, Roger

Userteam: Docket

U.S. Department of Justice

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1901 S. Bell Street, Suite 900
Arlington, VA 22202

Name: AGUILAR, DEIVIS RENE

A 055-815-373

Date of this notice: 1/30/2017

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John
Malphrus, Garry D.
Pauley, Roger

Userteam:

File: A055 815 373 – Arlington, VA

Date: JAN 30 2017

In re: DEIVIS RENE AGUILAR

IN REMOVAL PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Ashley Shea Ham Pong, Esquire

ON BEHALF OF DHS: Ian N. Gallagher
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination of proceedings

On January 20, 2016, this Board remanded the record to the Immigration Judge as his original decision, dated September 2, 2015, ordering the respondent's removal from the United States, did not contain sufficient analysis and fact finding. On February 18, 2016, the Immigration Judge issued a new decision setting forth the reasons for his decision. The respondent's appeal will be dismissed and the Immigration Judge's decision will be affirmed.

We review Immigration Judges' findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, a native and citizen of El Salvador, was previously admitted to the United States as a lawful permanent resident. The Department of Homeland Security ("DHS") charges that the respondent is subject to removal from the United States as his District of Columbia conviction for Misdemeanor Sexual Abuse of a Minor or Child constitutes a conviction for a sexual abuse aggravated felony. Sections 101(a)(43)(A), 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii).

Under D.C. CODE § 22-3010.01(a):

> Whoever, being 18 years of age or older and more than 4 years older than a child, or being 18 years of age or older and being in a significant relationship with a minor, engages in sexually suggestive conduct with that child or minor shall be imprisoned for not more than 180 days, or fined not more than the amount set forth in [D.C. CODE] § 22-3571.01, or both.

We conclude that a conviction under D.C. CODE § 22-3010.01(a) is not categorically a conviction for a crime of sexual abuse of a minor. Given that, under D.C. CODE § 22-3001(5A), the term "minor" is defined as a person who has not yet attained the age of 18 years, D.C. CODE § 22-3010.01(a) provides for criminal penalties, in some circumstances, where the victim is a 16- or 17-year old who shares a "significant relationship" with the perpetrator. Generally, where an offense may include a 16- or 17-year old victim, in order to be categorically "sexual abuse of a minor," the statute must require a meaningful age differential between the victim and the perpetrator. *Matter of Esquivel-Quintana*, 26 I&N Dec. 469, (BIA 2015). Nonetheless, regardless of the age differential, sexual intercourse between a 16-year-old high school student and his or her school teacher is properly viewed as abusive because of the inherent coercive nature of the relationship and the potential for exploitation. *Id.* at 473, n.4.

Under D.C. CODE § 22-3010.01(a), where the victim and the perpetrator share a "significant relationship," the statute does not require the showing of a meaningful age differential between the perpetrator and the minor victim. The term "significant relationship" includes a parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption. D.C. CODE § 22-3001(10). In many instances, the "significant relationship" will involve an inherently coercive nature and the potential for exploitation. Nonetheless, given that the District of Colombia also provides for criminal penalties under D.C. CODE § 22-3010.01(a) where the victim was the minor sibling of the perpetrator, such offense would not necessarily involve such inherently coercive nature and the potential for exploitation. For example, D.C. CODE § 22-3010.01(a) could provide criminal punishment where an 18-year old engaged in sexually suggestive conduct with his 17-year old stepsister. We must carry out the congressional intent to impose immigration consequences on those who have been convicted of sexual abuse of a minor without including nonabusive consensual sexual intercourse between older adolescent peers. *Matter of Esquivel-Quintana, supra* at 476. Overall, considering the breadth of conduct prohibited by D.C. CODE § 22-3010.01(a), we agree with the respondent that his conviction does not categorically constitute a conviction for a sexual abuse of a minor aggravated felony.

We conclude, however, that D.C. CODE. § 22-3010.01(a) is divisible between offenses which involve an offender "18 years of age or older and more than 4 years older than a child" and "being 18 years of age or older and being in a significant relationship with a minor." As held by the Immigration Judge, "these are not simply alternative means for convicting someone of sexual abuse of a minor or child; rather, they are factual circumstances that create alternative elements of the crime – thus essentially dividing the DC Statute into two separate crimes" (I.J. at 2).

A statute is divisible when it "lists multiple, alternative elements, and so effectively creates 'several different . . . crimes.'" *Descamps v. United States*, 133 S.Ct. 2276, 2285 (2013). To determine whether the District of Columbia statute contains alternative elements, we first "examine the relevant statutory language and interpretations of that language by the state's highest court." *United States v. Mungro*, 754 F.3d 267, 269 (4th Cir. 2014). Additionally, "we consider how [District of Columbia] courts generally instruct juries with respect to that offense." *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013). "[A]n indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime." *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016).

A review of District of Columbia case law does not reveal any specific authority which states whether D.C. CODE. § 22-3010.01(a) contains separate elements with respect to the relationship between the victim and the perpetrator. Likewise, D.C. CODE. § 22-3010.01(a) does not have specific jury instructions. Nonetheless, we conclude that the criminal jury instructions for Enticing a Child or Minor in violation of D.C. CODE. § 22-3010(a) are persuasive. Like D.C. CODE. § 22-3010.01(a), D.C. CODE. § 22-3010(a) uses the phrase "being at least 4 years older than a child or being in a significant relationship with a minor." The jury instructions for Enticing a Child or Minor provide that the elements of the offense necessarily include that (1) the defendant took the complainant to a place and (2) s/he did so for the purpose of committing a sexual act or sexual contact with the complainant. Criminal Jury Instructions for the District of Columbia § 4.410. In turn, the jury instructions provide two divergent paths to conviction. If the complainant was a child, the jury is instructed that the elements consist of (3) at the time the defendant took him/her, the complainant was less than 16 years of age; and (4) the defendant was at least than 4 years older than the complainant. However, when the complainant was a minor, the jury is instructed that the elements consist of (3) at the time, the defendant took him/her, the complainant was less than 18 years of age; and (4) at the time the defendant was/is in a significant relationship.

A review of the charge in the Amended Information, to which the respondent was found guilty, further supports a holding that D.C. CODE. § 22-3010.01(a) is divisible. The charge explicitly alleged that the respondent, being 18 years or older and being more than 4 years older than his victim, a child under 16 years of age, engaged in sexually suggestive conduct "with that child" (Exh. R). Thus, this is not a case where a charging document reiterated all the terms of District of Colombia law. The Amended Information made no reference to a possible alternative means of committing the offense, i.e., being in a significant relationship with his victim, a minor, and engaging in sexually suggestive conduct with that minor.

Considering the jury instructions for the related offense of Enticing a Child or Minor and the Amended Information, we conclude that Misdemeanor Sexual Abuse of a Minor or Child in violation of D.C. CODE. § 22-3010.01(a) has two separate elements which must be proven by the District. The District must establish either (1) that, at the time of the offense, the complainant was a child (i.e., a person less than 16 years of age) and the defendant was more than 4 years older than the complainant or (2) that, at the time of the offense, the complainant was a minor (i.e., less than 18 years of age) and the defendant was in a significant relationship with the complainant. In turn, inasmuch as the respondent was convicted of his offense as charged in the Amended Information, the record establishes that he was convicted of the "child" as opposed to the "minor" elements of D.C. CODE. § 22-3010.01(a). "[I]t is clear that the respondent was over the age of 18 and was more than four years older than the victim, who was under the age of 16" (I.J. at 2).

Applying the modified categorical approach, we conclude that the respondent's conviction constitutes a conviction for sexual abuse of a minor as defined under section 101(a)(43)(A) of the Act. In order to sustain the conviction, the District was required to establish that the respondent (1) was 18 years of age or older and more than 4 years older than a child, a person who has not yet attained the age of 16 years, and (2) engaged in sexually suggestive conduct with

that child. D.C. CODE. § 22-3010.01(a); *see also* D.C. CODE. § 22-3001(3) (defining the term "child"). Under the Act, "sexual abuse of a minor" means the "perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification." *Larios-Reyes v. Lynch*, 843 F.3d 146, 159 (4th Cir. 2016).

As the respondent discusses in his supplemental brief, the District was not necessarily required to establish that he committed his offense for his own sexual arousal or gratification. Instead, in order to establish that the respondent engaged in sexually suggestive conduct with his child victim, the District was required only to establish that he engaged in any of a limited number of acts in a way which was intended to cause or reasonably cause the sexual arousal or sexual gratification of "any person."[1] D.C. CODE. § 22-3010.01(b). However, in order to amount to sexual abuse of a minor, there is no requirement that the defendant commit his offense in order to gratify specifically himself. The "sexual gratification" requirement is necessary to distinguish sexual abuse offenses from offenses which are committed for purely harmful, injurious, or offensive reasons. *See Larios-Reyes v. Lynch*, *supra*, at 160. As such, an act which was committed to sexually gratify a victim or a third party, as opposed to only the perpetrator, may fall within the definition of sexual abuse of a minor.

We are also not persuaded that D.C. CODE. § 22-3010.01(a) is broader than the Act's definition of sexual abuse of a minor as the offense can be committed with the intention of causing or reasonably causing sexual arousal, as opposed to only sexual gratification, of any person. While we have considered that sexual arousal and sexual gratification may carry distinct definitions, we are not persuaded that the District of Columbia Courts would define sexual arousal in a manner which is not "associated with sexual gratification." *Larios-Reyes v. Lynch*, *supra*, at 159. The applicant has not provided any plausible instance where one could commit the proscribed offense for purposes of sexual arousal in a manner which is not "associated with sexual gratification."

We disagree with the respondent's argument that D.C. CODE. § 22-3010.01(a) does not contain a sufficient mental state. In order to convict a defendant of a violation of D.C. CODE. § 22-3010.01(a), the District must, as discussed above, establish that the defendant engaged in "sexually suggestive conduct," which, in turn, required a showing that the act was committed with the intent to cause or reasonably cause the sexual arousal or sexual gratification of any person. D.C. CODE. § 22-3010.01(b). As such, the respondent's claim that a defendant can unknowingly commit a violation of D.C. CODE. § 22-3010.01(a) is without merit. As expressed by the DHS in its response to the respondent's supplemental brief, an act done intentionally

[1] The term "sexually suggestive conduct" means engaging in any of the following acts in a way which is intended to cause or reasonably causes the sexual arousal or sexual gratification of any person: (1) Touching a child or minor inside his or her clothing; (2) Touching a child or minor inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks; (3) Placing one's tongue in the mouth of the child or minor; or (4) Touching one's own genitalia or that of a third person. D.C. CODE. § 22-3010.01(b).

which reasonably causes sexual arousal or gratification is an act done for a purpose associated with sexual gratification, the standard announced in *Larios-Reyes v. Lynch*.

Ultimately, all of the conduct which falls within the scope of "sexually suggestive conduct," as defined by D.C. CODE. § 22-3010.01(b), meets the definition of sexual abuse of a minor. *See Larios-Reyes v. Lynch*, *supra*, at 160 (recognizing that "sexual abuse of a minor" is a "broad phrase" capturing physical or nonphysical conduct and that it is the sexual-gratification element that polices the line between lawful and unlawful conduct). The four proscribed forms of sexually suggestive conduct defined at D.C. CODE. § 22-3010.01(b) necessarily amount to physical or nonphysical misuse or maltreatment of a minor. Moreover, in order to meet the definition of D.C. CODE. § 22-3010.01(b), the proscribed act must necessarily be committed with the intent to cause or reasonably cause the sexual arousal or sexual gratification of any person.

Finally, we acknowledge that, as a result of his misdemeanor offense, the respondent received a 90-day suspended sentence. Nonetheless, a misdemeanor offense of sexual abuse of a minor may constitute an aggravated felony under section 101(a)(43)(A) of the Immigration and Nationality Act. *Matter of Small*, 23 I&N Dec. 448 (BIA 2012). Accordingly, as we affirm the Immigration Judge's decision to sustain the charge of removability under section 237(a)(2)(A)(iii) of the Act and order the respondent's removal from the United States, the following order is entered.

ORDER: The Immigration Judge's decision is affirmed and the respondent's appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ARLINGTON, VIRGINIA

File: A055-815-373 February 18, 2016

In the Matter of

DEIVIS RENE AGUILAR	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended.

APPLICATION: Motion to terminate.

ON BEHALF OF RESPONDENT: ASHLEY HAM PONG, Esquire

ON BEHALF OF DHS: IAN GALLAGHER, Assistant Chief Counsel

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent, a 27-year-old man, has been convicted of sexual abuse of a child or minor, pursuant to DC Code § 22-3010.01. I believe that constitutes an aggravated felony, sexual abuse of a minor, under the Immigration and Nationality Act. Thus, I will sustain the charge of removability in the Notice to Appear.

I believe that all of the conduct covered by the DC Statute qualifies as sexual abuse of a minor under INA Section 101(a)(43)(A). The victim must be a minor under the age of 18 and the punishable conduct in the statute all qualifies as sexual abuse.

Moreover, I believe the DC Statute meets the Board of Immigration Appeals requirement that there exist a meaningful age differential between the victim and the abuser. Of course, that portion of the DC Statute that requires the perpetrator be 18 years or older and more than four years older than the child victim would clearly meet that requirement. But in addition, I am persuaded by the Department of Homeland Security's brief that even the other provision of the statute, which covers a perpetrator 18 years or older who is in a significant relationship with a minor victim, also meets the meaningful age differential requirement intended by the Board. Perpetrators in a "significant relationship" with a victim as defined in the DC Code are inherently in relationships of authority and trust with the victim and thus involve an inherent risk of coercion and exploitation. That is so, regardless of the difference in chronological or numerical age. Although, as a practical matter, there would be a significant difference in actual age in virtually every case - and certainly in every case in which the statute is utilized in an actual prosecution.

Alternatively, although it is a close issue, I agree with DHS that the DC Statute is divisible. The DC Statute establishes two separate versions of sexual abuse of a minor or child. One covers adults at least four years older than the child victim; the other covers adults in a significant relationship with the minor victim. These are not simply alternative means for convicting someone of sexual abuse of a minor or child; rather, they are factual circumstances that create alternative elements of the crime - thus essentially dividing the DC Statute into two separate crimes.

In conducting a modified categorical analysis and reviewing the record of conviction, it is clear that the respondent was over the age of 18 and was more than four years older than the victim, who was under the age of 16. Thus, the meaningful age difference clearly existed and the respondent was convicted of "sexual abuse of a

minor". I believe that the Fourth Circuit cases cited by the respondent (eg. Omargharib and Royal) are distinguishable from this case and this statute.

The motion to terminate is denied.

ORDERS

Thus, in the absence of any application for relief, given the sustained charge, the respondent is ordered removed to El Salvador.

The matter is recertified to the Board pursuant to 8 C.F.R. 1003.7.

Please see the next page for electronic signature

THOMAS G. SNOW
Immigration Judge

//s//

Immigration Judge THOMAS G. SNOW

snowt on March 4, 2016 at 10:30 PM GMT