

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Quito v. Barr

No. 18-996, United States Court of Appeals for the Second Circuit (January 15, 2020)

SUMMARY

Second Circuit holds that a conviction under New York Penal Law § 263.16 (attempted possession of a sexual performance by a child) categorically matches the federal child pornography statute, 18 U.S.C. § 2252(a)(4)(B), and thus constitutes an aggravated felony under INA § 237(a)(2)(A)(iii). The court ruled that the state statute's scienter requirement—knowing the character and content of the material—requires knowledge that the material involves a minor, matching the federal requirement, and that the absence of an affirmative defense under state law is irrelevant to the categorical approach because affirmative defenses are not elements of the offense. The court also held that challenges to the discretionary denial of a waiver of inadmissibility under INA § 212(h) do not raise colorable constitutional claims or questions of law and are therefore unreviewable.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	JOSEPH F. BIANCO; WESLEY; LIVINGSTON; BIANCO
JURISDICTION	Federal
DECIDED	January 15, 2020
DOCKET	18-996
DISPOSITION	denied
PROCEDURAL POSTURE	Petition for review of a Board of Immigration Appeals decision affirming an immigration judge's order of removal.
STANDARD OF REVIEW	De novo for the aggravated felony determination; jurisdiction limited to colorable constitutional claims and questions of law for the discretionary denial of a waiver of inadmissibility.
PRECEDENTIAL VALUE	Published
PARTIES	Sergio Quito v. William P. Barr, United States Attorney General

TOPICS

removal proceedings deportation statutory interpretation appellate procedure criminal procedure

PRACTICE AREAS

Immigration

Criminal Law

QUESTIONS PRESENTED

1. Whether Quito's conviction for attempted possession of a sexual performance by a child under N.Y. Penal Law § 263.16 is an aggravated felony under the Immigration and Nationality Act, specifically 8 U.S.C. § 1101(a)(43)(I),(U).
2. Whether the agency committed legal or factual errors in denying Quito's application for a waiver of inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h).

HOLDINGS

1. The court held that § 263.16's knowledge requirement categorically matches § 2252(a)(4)(B)'s. Both statutes require the government to prove that the defendant knew the material involves a minor (i.e., child pornography), but not that the defendant knew the specific age of the minor.
2. The court held that affirmative defenses are not relevant to the categorical approach because they are not elements of an offense. Therefore, the absence of the § 2252(c) affirmative defense in § 263.16 does not make the state statute broader.

KEY QUOTATIONS

“We hold that § 263.16's knowledge requirement categorically matches § 2252's.” (at 10)

“In sum, we conclude that § 263.16 categorically matches § 2252(a)(4)(B), and thus the agency correctly determined that Quito's conviction is an aggravated felony rendering him removable under 8 U.S.C. § 1101(a)(43)(I), (U).” (at 22)

“Because we conclude that N.Y. Penal Law § 263.16 categorically matches § 2252(a)(4)(B), and because Quito's challenge to the agency's denial of his application for a waiver of inadmissibility fails to raise a colorable constitutional claim or question of law, we DENY the petition for review.” (at 25)

FACTUAL BACKGROUND

Quito, a native and citizen of Ecuador, entered the United States without inspection in 1994 and became a lawful permanent resident in 2007. In 2012, he was convicted after a guilty plea of attempted possession of a sexual performance by a child in violation of New York Penal Law § 263.16. Based on that conviction, the Department of Homeland Security placed Quito in removal proceedings, charging him as removable for having been convicted of an aggravated felony relating to child pornography. Quito denied removability and moved to terminate proceedings, arguing that § 263.16 is not a categorical match to the federal child pornography statute. He also sought a waiver of inadmissibility and readjustment of status, presenting testimony from his wife, daughter, and sister-in-law about the hardships his family experienced during his detention.

PROCEDURAL HISTORY

Quito entered the US without inspection in 1994, became a lawful permanent resident in 2007. In 2012, he was convicted after a guilty plea of attempted possession of a sexual performance by a child in violation of N.Y. Penal Law § 263.16. DHS placed him in removal proceedings, charging him as removable for an aggravated felony. The IJ denied his motion to terminate, denied his applications for a waiver of inadmissibility and readjustment of status, and ordered him removed. The BIA affirmed. Quito timely petitioned for review to the Second Circuit.

DISPOSITION

denied

REMAND INSTRUCTIONS

The stay of removal previously granted is vacated.

CASES CITED

- Weiland v. Lynch, 835 F.3d 207 (2d Cir. 2016)
- Ming Lam Sui v. I.N.S., 250 F.3d 105 (2d Cir. 2001)
- Santana-Felix v. Barr, 924 F.3d 51 (2d Cir. 2019)
- Moncrieffe v. Holder, 569 U.S. 184 (2013)
- Hylton v. Sessions, 897 F.3d 57 (2d Cir. 2018)
- Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007)
- Johnson v. United States, 559 U.S. 133 (2010)
- Torres v. Lynch, 136 S. Ct. 1619 (2016)
- Oouch v. Department of Homeland Security, 633 F.3d 119 (2d Cir. 2011)
- United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)
- United States v. Haymond, 672 F.3d 948 (10th Cir. 2012)
- United States v. Szymanski, 631 F.3d 794 (6th Cir. 2011)
- United States v. Myers, 355 F.3d 1040 (7th Cir. 2004)
- United States v. Matthews, 209 F.3d 338 (4th Cir. 2000)
- New York v. Ferber, 458 U.S. 747 (1982)
- Staples v. United States, 511 U.S. 600 (1994)
- People v. Henry, 166 A.D.3d 1289 (3d Dep't 2018)
- People v. Yedinak, 157 A.D.3d 1052 (3d Dep't 2018)
- People v. Urtz, 176 A.D.3d 1485 (3d Dep't 2019)
- People v. Gilmour, 177 Misc. 2d 250 (N.Y. Sup. Ct. 1998)
- Mathis v. United States, 136 S. Ct. 2243 (2016)
- Descamps v. United States, 570 U.S. 254 (2013)
- Taylor v. United States, 495 U.S. 575 (1990)

- United States v. Escalante, 933 F.3d 395 (5th Cir. 2019)
- United States v. Velasquez-Bosque, 601 F.3d 955 (9th Cir. 2010)
- Donawa v. U.S. Att'y Gen., 735 F.3d 1275 (11th Cir. 2013)
- Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010)
- Barco-Sandoval v. Gonzales, 516 F.3d 35 (2d Cir. 2008)
- Xiao Ji Chen v. U.S. Dep't of Justice, 471 F.3d 315 (2d Cir. 2006)
- Bugayong v. INS, 442 F.3d 67 (2d Cir. 2006)
- Saloum v. U.S. Citizenship & Immigration Servs., 437 F.3d 238 (2d Cir. 2006)
- Wallace v. Gonzales, 463 F.3d 135 (2d Cir. 2006)

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