Immigration Practice Tips

Defense-Relevant Immigration News

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2nd Circuit Says More Drug Offenses May Be Deemed "Aggravated Felonies" for Illegal Reentry Sentence Enhancement Purposes

The federal Court of Appeals has held that a New York misdemeanor drug offense may be considered an aggravated felony for purposes of the sentence enhancement for illegal reentry after deportation subsequent to an aggravated felony conviction. *US v Simpson*, 319 F3d 81 (2nd Cir 2002, as amended 2/7/03).

The 2nd Circuit had previously held that a state felony drug offense, even for simple possession, would be deemed an aggravated felony for purposes of the sentence enhancement for illegal reentry. *See eg, US v Pornes-Garcia,* 171 F3d 142 (2nd Cir), *cert den,* 528 US 880 (1999). It had been unclear whether certain state misdemeanor drug offenses might also be deemed aggravated felonies in the illegal reentry context.

In the Dec. 24, 2002 *Simpson* decision, the court held that, for illegal reentry sentence enhancement purposes, a state drug offense would be considered an aggravated felony if it is classified as a felony under state law or can be classified as a felony under federal law. Applying the hypothetical federal felony approach, the court found a New York criminal sale of marijuana, 4th degree misdemeanor conviction (Penal Law 221.40) to be an aggravated felony because it would be punishable as a felony under federal law. A second or subsequent New York conviction for criminal possession of marijuana (Penal Law 221.15), also a state misdemeanor, was also found to be an aggravated felony because such an offense would be punishable as a federal felony under 21 USC 844(a).

The 2nd Circuit ruling is bad news for any non-citizen arrested for illegal reentry after previously being convicted of such New York misdemeanor drug offenses. In addition, although the *Simpson* court expressed "no comment" on whether the misdemeanor convictions at issue there would constitute aggravated felonies outside the illegal reentry context, its analysis conflicts with the approach adopted in a series of earlier decisions by the Board of Immigration Appeals (BIA). This leaves unclear whether misdemeanor sale of marijuana or a second conviction for a misdemeanor simple possession offense (for marijuana or other controlled substance) in New York constitutes an aggravated felony for immigration purposes. Conviction of an aggravated felony has numerous and very harsh potential immigration consequences, including probable mandatory deportation, possible mandatory detention, ineligibility for asylum, and ineligibility to return legally to the US after deportation, in addition to greatly enhanced sentencing for illegal reentry.

In the immigration context, the BIA states that it determines whether a state drug offense may be deemed an aggravated felony by reference to the law of the jurisdiction in which the immigration case arose. *Matter of Yanez-Garcia,* 23 I&N Dec. 390 (BIA 5/13/02). Purporting to adopt the 2nd Circuit's approach in the illegal reentry context and citing *Pornes-Garcia*, the BIA held in October 2002 that, for immigration cases arising in the 2nd Circuit, a state drug offense would be deemed a "drug trafficking crime" aggravated felony *only* if the convicting state classified the offense as a felony (no hypothetical federal felony approach). *Matter of Elgendi,* 23 I&N Dec. 515 (BIA 10/31/02) (declining to follow the 2nd Circuit's decision in *Aguirre v INS*, 79 F3d 315 (2nd Cir 1996), which had deferred to prior BIA precedents to hold that a New York felony simple possession conviction was not an aggravated felony for immigration purposes).

At least one district court has recently held that, in light of Simpson, the BIA in *Matter of Elgendi* did not properly apply 2nd Circuit law and therefore should not control in immigration cases on the issue of whether a state misdemeanor drug offense may constitute an aggravated felony for immigration purposes. *See Copeland v Ashcroft*, 2003 US Dist LEXIS 2691 (WDNY 2/10/03) (denying habeas relief after finding petitioner's convictions for NY criminal sale of marijuana, 4th degree, to constitute aggravated felonies). A motion for reconsideration is currently pending.

The Bottom Line: As a result of *Simpson*, defense lawyers should be aware that the 2nd Circuit will now deem a New York plea to criminal sale of marijuana, 4th degree, or a plea to any second or subsequent NY misdemeanor drug possession charge, to be an aggravated felony for illegal reentry sentencing purposes. While the 2nd Circuit specifically expressed no comment on whether such offenses would also be deemed aggravated felonies in the immigration context, defense lawyers should be aware that the government has already argued that NY CSM 4 is an aggravated felony in the immigration context, and may now also argue that conviction of a misdemeanor drug possession charge preceded by a final prior possession conviction is an aggravated felony for immigration purposes. Therefore, despite the BIA's hold-

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ing in *Elgendi*, one can no longer advise a non-citizen that such a misdemeanor offense would definitely not be considered an aggravated felony for immigration purposes. In any event, however, it continues to be true that a *first* misdemeanor drug possession charge, although it may trigger removability under the controlled substance ground of deportability or inadmissibility, should still avoid the negative consequences of an aggravated felony conviction.

2nd Circuit Issues Unfavorable Rulings on Retroactive Application of Bar on Relief from Deportation to pre-1996 Trial Convictions

The 2nd Circuit recently issued two negative opinions in cases where immigrants challenged the retroactive application of 1996 amendments barring relief from deportation to pre-1996 trial convictions. *Theodoropoulos v INS*, 313 F3d 732 (2d Cir 2003), and *Rankine v Reno*. 319 F3d 93 (2d Cir 2003) (*amicus curiae* brief filed by NYSDA, The Legal Aid Society of the City of New York, and the New York State Association of Criminal Defense Lawyers). In both cases, three judge panels found that "a petitioner convicted after a trial rather than on a guilty plea has not faced a substantial change in expectations… [because a] jury's verdict, not the potential of discretionary waiver or the IIRIRA's removal thereof, determined the legal consequence of the decision to seek trial." *Rankine*, 319 F3d at 100 (quoting *Theodoropoulos*, 313 F3d at 739-740 (internal citations omitted)). Petitions for panel rehearing or rehearing en banc are pending in both cases. A federal district court in Pennsylvania earlier issued a favorable ruling on the trial conviction issue in a case also involving a New York immigrant. *Ponnapula v Ashcroft*, 235 FSupp2d 397 (MD Pa 2002) (*amicus* brief filed by NYSDA in earlier district court proceedings in New York).

Before 1996, most lawful permanent residents (LPRs or green-card holders) who had served less than five years for any single crime were allowed to file for "212(c)" discretionary relief before an Immigration Judge in removal proceedings. This form of relief allowed many LPRs with significant ties to this country to stay here; in fact, about 50% of the people who applied for the relief received it. The availability of this relief was relied upon by LPRs making decisions about their defense; in fact, some LPRs structured plea agreements so their sentences would just fall short of five years, thus ensuring that they could apply for 212(c).

In a series of amendments to the Immigration and Nationality Act in 1996, 212(c) relief was repealed, and a new form of relief called Cancellation of Removal was put in its place. Cancellation is not available to individuals with "aggravated felonies" regardless of sentence or time served. The government subsequently argued that individuals they are currently putting in proceedings should not be allowed to apply for 212(c) relief because it no longer exists. In 2001, however, the Supreme Court held that LPRs who pled guilty before 1996 could not be retroactively barred from applying for 212(c) relief. *INS v St Cyr*, 533 US 289 (2001). The court did not address the issues of (1) whether LPRs with trial convictions predating the 1996 changes in the law could apply for 212(c) relief and (2) whether LPRs whose conduct predated the 1996 changes in the law could apply for 212(c) relief even if their conviction occurred after. These issues have been the subjects of intense litigation throughout the country.

Although the 2nd Circuit has now ruled adversely to LPRs on the trial conviction issue, there is still some hope that the court will issue a favorable ruling on the broader conduct issue.[1] Among the pending cases raising this issue are *Zgombic v Farquharson* (*amicus* brief filed by NYSDA), *Mohammed v Reno*, and *Beharry v Reno.*

IDP Alert Prepared for Noncitizens Subject to Special Registration Who Have Arrests or Convictions

In response to the federal government's requirement that certain male citizens or nationals of mostly Middle Eastern or Muslim majority countries must register with the federal government, NYSDA's Immigrant Defense Project has prepared an alert. The alert, below, is aimed at those required to special register who have past criminal arrests or convictions. To date, countries included on the special registration list are: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.

ALERT FOR INDIVIDUALS REQUIRED TO SPECIAL REGISTER WITH CRIMINAL ARRESTS OR CONVICTIONS

If you are required to register with the Immigration and Naturalization Service under the special call-in registration program and you have been arrested for a crime during your stay in the United States, you should be aware of the following:

◆ ***You may be deportable from the United States and subject to immediate detention***

If you have been arrested and charged with a crime during your current or a prior stay in the United States, you may be subject to detention by the US Immigration and Naturalization Service (INS) and deportation from the United States.

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[1] The 2nd Circuit had issued an opinion prior to *St. Cyr* called *Domond v INS*, 244 F3d 81 (2001), which held that 212(c) was not available to individuals simply because their conduct predated the 1996 amendments. However, the line of reasoning employed in *Domond* was explicitly rejected by the Supreme Court in *St. Cyr.*

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The U.S. immigration laws list several types of crimes that may subject a noncitizen to detention and deportation from the United States. For a general list of the categories of offenses that may subject a noncitizen to detention and deportation from the United States, see the first column ("Grounds for Deportation") in the Immigration Consequences of Convictions Checklist [available from the IDP or the Backup Center]. The law in this area is very complicated and confusing. If you have a past arrest, you are strongly advised to consult with an attorney or other immigration law expert *before you register.*

◆ ***If you fail to register, you may lose any opportunity to obtain a "green card" or other lawful admission status in the United States in the future***

If you are required to register with the INS and willfully fail to do so, there may be serious negative consequences—potentially including arrest, detention, deportation, and criminal penalties. Failure to register may also cause problems with any current or future application that you make for any status or benefit under the US immigration laws. For example, if you have applied for a "green card" (lawful permanent resident status), or intend to do so in the future, failure to register may result in such status being denied to you.

The US immigration laws list several types of crimes that prevent a noncitizen from obtaining lawful admission —whether permanent or temporary—to the United States. For a general list of the categories of offenses that prevent lawful admission of a noncitizen to the United States, see the second column ("Grounds of Inadmissibility") in the Immigration Consequences of Convictions Checklist [available from the IDP or the Backup Center]. Note that there are certain crimes that may make you deportable from the United States, but do not prevent you from being able to seek lawful admission status (for example, a misdemeanor theft offense may qualify for the petty offense exception—see explanation under "crime involving moral turpitude" column in the Checklist). The law in this area also is very complicated and confusing. If you have a past arrest, you are strongly advised to consult with an attorney or other immigration law expert *before you register.*

◆ ***If you have been arrested and charged with a crime at any time during your current or a prior stay in the United States, seek expert legal help***

If you have been arrested and charged with a crime at any time during your current or a prior stay in the United States, you are strongly advised to consult with an attorney or other legal expert with experience in criminal and immigration law. You have the right to bring an attorney with you when you register. If you or your attorney have a question regarding the legal effect of a past criminal arrest, you may contact the Immigrant Defense Project hotline (212) 367-9104 on any Tuesday or Thursday between 1:30 and 4:30 p.m.

Draft Patriot Act II Would Further Limit Long-time LPR's Ability to Avoid Deportation Based on Past Criminal Convictions

The US Justice Department has drafted a new bill that includes a section that could severely further limit the already very limited ability of long-time lawful permanent resident immigrants to avoid deportation based on past criminal convictions. The new bill would do so no matter how minor the crime, no matter how long ago the crime, and no matter what adverse effect deportation would have on US citizen family members, US citizen employees, or US interests generally. The Justice Department has not yet officially released the bill—drafted by the staff of Attorney General John Ashcroft and entitled the "Domestic Security Enhancement Act of 2003" (DSEA) or "Patriot Act II"—but the Center for Public Integrity obtained a copy of a draft dated January 9 and has posted the draft on its website at http://www.incunabula.org/DSEA/INDEX.HTM. The section that relates to immigrants with past criminal convictions is Section 504, entitled "Expedited Removal of Criminal Aliens." The bill also includes several other provisions that would have a severe negative impact on immigrants. (For a brief summary of them, contact the Backup Center.) It is unclear when the Justice Department will seek to have the bill introduced in Congress, or whether it will remain in its current form.[2]

Through DIP, New Jersey Defense Lawyers and New York Public Defense In-house Experts Receive IDP Help

NYSDA's IDP has initiated new efforts to defend the rights of immigrants accused of criminal conduct as part of its collaboration with other immigrant defense organizations across the country. These efforts are part of the Defending Immigrants Partnership (DIP).

As part of its DIP work, the IDP is expanding its technical legal assistance, training, and resource material offerings to immigrants accused of crimes in New Jersey. The IDP teamed up recently with the Office of the Public Defender in New Jersey to hold trainers for public defenders and other criminal defense attorneys. New Jersey is a high-immigrant state where it appears there has been virtually no training or formal back-up support provided previously to defense lawyers on the immigration consequences of criminal convictions. For this trainer and the preparation of training materials geared to New Jersey, the IDP has had the assistance of Assistant Clinical Professor Joanne Gottesman at Rutgers Law School-

[2] According to an Associated Press article on Fox News online 4/16/03, this draft "was never reviewed by Attorney General John Ashcroft and about two-thirds of it will not be proposed to Congress, according to Justice Department officials speaking on condition of anonymity."

Camden, and lawyers from Legal Services of New Jersey, the Center for Law and Social Justice in Camden, New Jersey, and lawyers in private practice in New Jersey. Two separate trainers were held to cover the southern and northern parts of the state. The Mar. 7 trainer in Camden attracted approximately 50 attendees, including representative from most southern offices of the New Jersey Office of the Public Defender. The April 4 trainer, in Newark attracted approximately 70 attendees. A working draft of a chart of the immigration consequences of common New Jersey offenses, prepared by Assistant Clinical Professor Gottesman, with IDP review and input, was distributed.

Another aspect of DIP work involves planning and setting up of two intensive trainers for a group expected to become a corps of in-house immigration experts at criminal defense legal services provider offices throughout the state of New York. Two intensive trainers—one in the New York City and one upstate—were in final planning as the *REPORT* went to press. For these trainers, the IDP teamed up with attorneys from Bronx Defenders and The Legal Aid Society of New York who already serve as expert immigration specialists at their respective organizations. Plans are to distribute an early draft of the 2003 third edition of the IDP immigration manual for New York defense lawyers—*Representing Noncitizen Criminal Defendants in New York State*—at these trainers. Watch the NYSDA web site, www.nysda.org and future issues of the *REPORT* for an announcement that the third edition is final.

In order to help with DIP special projects as well as the IDP's ongoing work, the Project took on a new staff attorney, Marianne Yang, in January 2003. A graduate of Harvard College and the New York University School of Law, Marianne formerly worked for six years as an associate at Simpson Thacher & Bartlett. During that time, she negotiated a unique arrangement with her firm to work for two years as a part-time volunteer attorney at the Immigration Unit of the Legal Aid Society of New York. Her IDP responsibilities include updating and supplementing of the immigration manual and coordination of the intensive trainers for New York defense office in-house experts.

Partners with the IDP in these DIP actions are the National Immigration Project in Boston and the National Legal Aid and Defender Association in Washington, DC. The DIP is funded in part by The Gideon Project of the Open Society Institute and by the Ford Foundation.

Updated IDP Resource Materials Posted on NYSDA's Website

The IDP has prepared, distributed, and published on NYSDA's free-access website several updated resource materials for criminal defense lawyers who represent immigrants, as well as for immigrant advocates and immigrants themselves, regarding criminal/immigration issues. These resource materials include:

- *Immigration Consequences of Convictions Summary Checklist*, legal resource for immigrants and lawyers who represent immigrants in criminal or immigration proceedings, updated through Nov. 15, 2002.
- *Quick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses*, updated through Feb. 1, 2003.
- *Aggravated Felony Practice Aids*, updated through Feb. 1, 2003
- *"Particularly Serious Crime" Bars on Asylum and Withholding of Removal*, updated through Feb. 1, 2003.
- *Removal Defense Checklist for Criminal Charge Cases*, legal resource for immigrants and lawyers who represent immigrants in removal proceedings, updated through Feb. 1, 2003.

To access or download these resource materials, visit www.nysda.org and click on Immigrant Defense Project Resources. ⚖

Resources Sighted, Cited, or Sited

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submissions by practitioners. Content can be browsed or searched by keyword. The categories include: Blood and Bodily Fluids, Coroners, DNA, Dog Scent, Fingerprinting, Firearms, Hair and Fibers, Handwriting, Risk Assessment, Statistical Evidence, and Toxicology. The site is maintained by the National Legal Aid and Defender Association. http://www.nlada.org/Defender/ forensics/for_lib?

✇ *FourthAmendment.com* is a blog, and supplement to John Wesley Hall, Jr.'s, Search and Seizure (3d ed. 2000) published by Lexis Law Publishing. The site includes regular posts about current developments in search and seizure law nationwide. There are also updated links for individual book chapters. http://www.wallywaller.com/4th/

✇ *Federal Probation Journal Archives* is a collection of past issues of the Federal Probation Journal, which is devoted to criminal justice and correctional issues. The archives extend from 1998-2001 and appear on the US Courts Library web site. http://www. uscourts.gov/fpcontents.html

✇ *American Journal of Forensic Medicine and Pathology*, published by Lippincott, Williams & Wilkins, produces articles concerning new developments in forensic science of interest to medical and legal professionals. Current issues and an archive with many free full-text articles are available. http://www.amjforensicmedicine. com/

✇ *Spangenberg Report Archives* is a collection of past issues from 1994–2000. The Spangenberg Group conducts nationwide research on the delivery of indigent defense services. Full-text PDF copies are available for downloading from this site. http://www.spangenberggroup.com/tsg_report.html ⚖