

# Immigration Practice Tips

## Defense-Relevant Immigration News

By Manny Vargas and Marianne Yang of NYSDA's  
Immigrant Defense Project (IDP)\*

### Updated and Supplemented 3rd Edition of Manual on Representing Noncitizen Defendants Now Available

NYSDA has published and is now distributing the updated 3rd Edition of its immigration resource manual entitled *Representing Noncitizen Defendants in New York State*. This binder-format practice manual offers detailed, practical, straightforward information for criminal defense attorneys about potential immigration consequences for non-citizen clients of specific New York dispositions, and about strategies to pursue to try to avoid these adverse consequences. Prior editions of this manual have been updated and supplemented to include several immigration law developments relevant to state criminal practice since the last edition was issued in 2000. In addition,

### New Address, Phone & Fax for the Immigrant Defense Project

We continue to receive letters, faxes, and phone calls directed to our old address. Please note that our new address, hotline phone number, and fax number are:

**NYSDA Immigrant Defense Project**  
**2 Washington Street, 7 North**  
**New York, NY 10004**  
**Hotline: (212) 898-4132**  
**Fax: (212) 363-8533**

tion, the 3rd Edition includes expanded and improved appendix practice aids (eg, updated Quick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses, and detailed chart of "aggravated felony" case law determinations nationwide), and a new section and appendix on strategies to avoid adverse immigration consequences in the removal proceedings that take place after the criminal case is completed. This book is available at low cost to the criminal defense community, other immigrant advocates, and immigrants themselves. To order, download the PDF order form on the NYSDA website ([www.nysda.org](http://www.nysda.org)), or contact the Backup Center at (518) 465-3524.

\* The IDP provides backup support concerning criminal/immigration issues for public defense attorneys, other immigrant advocates, and immigrants themselves. For hotline assistance, call the Project on Tuesdays and Thursdays from 1:30 to 4:30 pm at (212) 898-4132.

## 2nd Circuit Limits Use of Information in Pre-Sentence Reports in Deportation Proceedings

Immigration courts may not look to the narrative statement of facts in a pre-sentence report to determine the crime for which a noncitizen has been convicted, the US Court of Appeals for the 2nd Circuit ruled on Sept. 9, 2003. *Dickson v Ashcroft* (346 F2d 44 [2d Cir. 2003]) held that New York first-degree Unlawful Imprisonment (Penal Law 135.10) is divisible into crimes that are categorically grounds for removal—in this case, "crime of violence" aggravated felony—and others that are not. Specifically, the court found that the unlawful imprisonment statute is divisible into two crimes: one, the unlawful imprisonment of a competent adult, which is a crime of violence because it cannot be accomplished without the use or risk of force (see Penal Law 135.10 & 135.00[1][a]), and two, the unlawful imprisonment of an incompetent person or child under sixteen, which is not a crime of violence because it neither has as an element the use of force nor categorically involves a substantial risk that force may be used. See Penal Law 135.10 & 135.00[1][b]).

Reiterating its past pronouncements on the "categorical approach" to criminal statutory interpretation for immigration law purposes, the 2nd Circuit stated that when a statute is divisible, the immigration judge may look to the "record conviction" for the limited purpose of determining whether the noncitizen's conviction was under the branch of the statute that triggers removability, but not to examine the particular factual circumstances underlying that conviction. Under *Dickson*, immigration courts may not rely on the "inherently unreliable" factual narratives in a pre-sentence report to determine the crime for which a noncitizen has been convicted. Applying this ruling to the *Dickson* facts, the court vacated the Board of Immigration Appeal's order of removal, finding that the BIA improperly based its conclusion that *Dickson* had been convicted of a crime of violence on a pre-sentence report narrative statement that indicated that "*Dickson* apparently forced the mother of his child to partake in a car ride against her will while bound."

**The bottom line:** Defense counsel may be comforted to know that in immigration proceedings arising in the 2nd Circuit, judges should not look to narrative portions of a pre-sentence report to determine whether a conviction falls under a ground of removability. Counsel should remain vigilant, however, about what to keep out of a noncitizen's "record of conviction," which includes: certificate of disposition; charging document; plea agreement and plea colloquy transcript; verdict or judgment of conviction; and record of sentence. Also, because *Dickson* does not control outside the 2nd Circuit, statements in pre-sentence reports might be relied upon if noncitizen clients end up in immigration proceedings elsewhere. There is still reason to be vigilant about challenging unproven statements in pre-sentence reports that might

later be used by immigration authorities to establish a non-citizen defendant's deportability.

NYSDA submitted an *amicus curiae* brief in support of the petitioner in *Dickson*. The brief was drafted, submitted and argued before the 2nd Circuit by Terry Maroney of the law firm of Wilmer, Cutler & Pickering as *pro bono* counsel to NYSDA. The petitioner himself is represented by NYSDA member George Terezakis of Mineola.

### ***Defender Organizations Develop In-house Immigration Expertise***

More than twenty New York defender organizations and public defender offices now have staff attorneys trained to be in-house immigration experts. Trained by the Immigrant Defense Project (IDP) in May 2003, these attorneys are now available to their colleagues for guidance in defending noncitizen clients in criminal proceedings.

Defense attorneys at the following organizations may consult with their in-house immigration experts to ask noncitizen clients the right immigration-relevant questions, analyze potential immigration consequences and formulate strategies to minimize them, counsel clients on what to expect post-conviction, and provide clients with helpful resource materials:

Appellate Advocates  
The Bronx Defenders  
Brooklyn Defender Services  
Center for Appellate Litigation  
Chautauqua County Public Defender  
Dutchess County Public Defender Office  
Erie County Assigned Counsel Program  
Genesee County Public Defender Office  
The Legal Aid Bureau of Buffalo  
Legal Aid Society of Nassau County  
Legal Aid Society of Suffolk County  
The Legal Aid Society of New York  
Legal Aid Society of New York, Federal Defender Office  
Legal Aid Society of Westchester County  
Monroe County Public Defender Office  
Neighborhood Defender Service  
New York County Defender Services  
Office of the Appellate Defender  
Otsego County Public Defender Office  
Queens Law Associates, PC  
Saratoga County Public Defender

The IDP conducted the May 2003 trainings in collaboration with in-house immigration experts Bryan Lonagan of The Legal Aid Society of New York and Peter Markowitz of The Bronx Defenders, among others, as part of its ongoing work in partnership with criminal defense counsel so that they may adequately advise and defend non-citizens in criminal proceedings. The Project wel-

comes the opportunity to help develop similar in-house immigration expertise at other defender offices and invites hearing from interested organizations.

### ***New Immigration Resources Available***

Defense lawyers and others representing or counseling immigrants in criminal or immigration proceedings may find useful the following new or updated resources:

- **The Defending Immigrants Partnership (DIP) page of the website of the National Legal Aid and Defender Association**—For access to this Internet resource, which includes practice tips, case blurbs, how-to question and answer exchanges, selected training resources and model pleadings, agency developments, and state and federal offenses immigration consequences charts, visit the NLADA website page at <[http://www.nlada.org/Defender/Defender\\_Immigrants](http://www.nlada.org/Defender/Defender_Immigrants)>.
- **Immigration/Criminal Practice Alert on *Practical Tips to Avoid Aggravated Felonies*, by Bronx Defenders staff attorney and IDP collaborator Peter Markowitz**—See box on p. \_ of this Backup Center Report.
- **Updated *Removal Defense Checklist in Criminal Charge Cases***—For access to this resource recently updated to reflect legal developments through Oct. 14, 2003, visit the NYSDA website page at: <[http://www.nysda.org/NYSDA\\_Resources/Immigrant\\_Defense\\_Project/03\\_RemovalDefenseChecklistSept.pdf](http://www.nysda.org/NYSDA_Resources/Immigrant_Defense_Project/03_RemovalDefenseChecklistSept.pdf)>.

### ***State Court of Appeals Hears Argument in Two Cases Where Noncitizen Defendants Sought Vacatur of their Guilty Pleas Based on Incorrect Regarding Deportation***

[*Ed. Note: These cases were decided after this was written, see p. 3.*]

The New York State Court of Appeals heard argument on Oct. 15, 2003, in two cases in which the noncitizen defendants sought vacatur or withdrawal of their guilty pleas based on the fact that they had been provided incorrect immigration-related information by their defense lawyers. *People v Bruce McDonald*, No. 110, and *People v Jian Jing Huang*, No 115.

In *McDonald*, the petitioner, a Jamaican citizen who has lived in the US for more than 25 years as a lawful permanent resident, sought to withdraw his guilty plea to marijuana sale and possession charges on the ground that he received ineffective assistance of counsel when his defense attorney incorrectly advised him that conviction would not result in deportation. In *Huang*, the petitioner, a Chinese citizen who fears arrest or worse if deported to

China because of his defection to the United States, his conversion to Christianity and his political beliefs, sought to withdraw his guilty plea to second degree kidnapping because his defense attorney incorrectly advised him that there was no Immigration and Naturalization Service detainer pending against him.

While one or both cases raise procedural issues on which the Court's decisions may focus, these cases also may afford the Court an opportunity to revisit the issue of when defense lawyer failure to provide correct advice regarding immigration issues constitutes ineffective assistance of counsel that could invalidate a plea under New York law. In 1994, the New York Court of Appeals held that a counsel's failure to advise a defendant of the deportation consequences of a guilty plea did not, *per se*, constitute ineffective assistance of counsel. See *People v Ford*, 86 NY2d 397 (1994). However, until now, the Court of Appeals has not had the opportunity to make clear, as have other courts, that a noncitizen defendant's showing of reliance on an affirmative misrepresentation about deportation consequences does invalidate a plea. See *eg US v Couto*, 311 F3d 179 (2d Cir. 2002), reported in *Backup Center REPORT*, Volume XVII, No. 6, Nov-Dec 2002, p. 18.

McDonald, previously represented in his NYCPL 440 motion by former IDP attorney Sejal Zota, is currently represented by Al O'Connor of the New York State Defenders Association in Albany. Huang is represented by Daniel A. Warchawsky of the Office of Appellate Defender in New York City. ♠

### Immigration/Criminal Practice Alert

#### **PRACTICAL TIPS TO AVOID AGGRAVATED FELONIES**

Aggravated felonies ("AF") are one category of crime that may trigger deportation. While we should, of course, always strive to avoid convictions that may trigger deportation, it is particularly important to avoid AF convictions because, in most cases, these convictions render a client mandatorily deportable without any possibility of discretionary relief. AF's also have all sorts of other nasty consequences including: a potential twenty-year prison term for illegal reentry and expedited removal procedures for non-permanent residents. While there are disadvantages for all non-citizens who are convicted of AF's, it is particularly important to avoid AF convictions for Lawful Permanent Residents.

There are twenty-one categories of AF's, which you are free to read at your leisure. See 8 USC 1101(a)(43). I wanted to quickly offer you some tips to avoid two common types of AF's.

#### **AGGRAVATED FELONIES TRIGGERED BY A ONE-YEAR TERM OF INCARCERATION**

*The following types of convictions will be considered AF's if the client is sentenced to one year or more of incarceration "regardless of any suspension of the imposition or execution of that imprisonment":*

Theft  
Violent Crimes  
Burglary  
Counterfeiting/Forgery  
Commercial Bribery  
Obstruction of Justice (possibly including Hindering Prosecution)  
Trafficking in Vehicle ID Numbers  
Receipt of Stolen Property  
Document Fraud  
Perjury/Bribery of a Witness/Subornation of Perjury

Below is a list of strategies designed to avoid triggering the AF grounds listed above. Since this list encompasses most felonies it is necessary to be mindful of the strategies below whenever a non-citizen client is facing a sentence of one year or more.

- *Stack counts to run consecutively*—as long as no individual count results in a sentence of a year or more, a total term of incarceration of more than a year will not trigger these AF grounds.
- *Waive presentence credits*—if a client has served time pre-sentence it may be possible to waive credit for that time in return for an actual sentence imposed of less than a year.
- *Waive future conduct credits*—it may be possible to waive future good conduct credits in return for an actual sentence imposed of less than a year.

#### **AGGRAVATED FELONIES TRIGGERED BY A \$10,000 FINANCIAL INTEREST**

The following types of convictions will be considered aggravated felonies if the record of conviction reveals that the financial interest in the crime exceeded \$10,000:

- Crimes Involving Fraud or Deceit (\$10K loss to victim)
- Money Laundering (involving \$10K)
- Tax Evasion (\$10K loss to Government)

Below is a list of strategies designed to avoid the AF with \$10,000 triggers.

- *Keep restitution under \$10,000*
- *During plea allocution contest any allegation in complaint involving \$10,000 or more.*
- *Have client pay a portion of the loss voluntarily pre-sentence to reduce restitution under \$10,000*
- *Make written plea agreement or oral stipulation that the loss to the victim is \$10,000 or less*
- *If all else fails, make sure that the fine is labeled as "Restitution" not "Reparation" PL § 60.27*

**THESE STRATEGIES ARE DESIGNED TO GIVE CLIENTS A FIGHTING CHANCE IN SUBSEQUENT IMMIGRATION PROCEEDINGS. THEY DO NOT GURANTEE PROTECTION FROM AN AF CHARGE**

—Peter Markowitz, The Bronx Defenders