

## Defense-Relevant Immigration News

By Benita Jain and Marianne C. Yang of NYSDA's  
Immigrant Defense Project (IDP)\*

### **US Supreme Court Rules that State DWI Offenses That Require Mere Accidental or Negligent Conduct Are Not "Crimes of Violence" for Immigration Purposes**

On Nov. 9, 2004, the US Supreme Court ruled unanimously that a Florida offense of driving under the influence and causing serious injury is not a "crime of violence" and therefore not an "aggravated felony"<sup>1</sup> for immigration purposes. See *Leocal v Ashcroft*, 125 SCt 377 (2004). Conviction of an aggravated felony generally results in the mandatory deportation of noncitizens from the US.

The Court held that the definition of "crime of violence" referenced in the immigration statute<sup>2</sup> requires a higher *mens rea*, or intent level, than the merely accidental or negligent conduct required in a DUI offense such as the Florida offense at issue in the case. A conviction for NY DWI under Vehicle and Traffic Law 1192, which does not have a *mens rea* component, therefore will not be deemed a crime of violence aggravated felony. *Leocal* also provides helpful guidance for defense attorneys representing noncitizens on other charges that require less than reckless conduct but that, before *Leocal*, arguably fell under the "crime of violence" definition. For example, a conviction under VTL 600, Leaving Scene of Incident Without Reporting, should not be deemed a crime of violence even though that offense may involve serious physical injury or even death.

*Leocal* does not address whether a state offense that requires proof of reckless conduct may qualify as a crime of violence. It therefore leaves undisturbed the 2nd Circuit's recent decision in *Jobson v Ashcroft*, 326 F3d 367

\* IDP provides backup support concerning criminal/immigration issues for defense attorneys, other immigrant advocates, and immigrants themselves. Marianne Yang is Director of the Project, and Benita Jain is a Staff Attorney. For hotline assistance, call the IDP at (212) 898-4132. IDP staffs the hotline Tuesdays and Thursdays from 1:30 to 4:30 p.m. and returns all messages left outside those times. IDP is located at 2 Washington Street, 7 North, New York NY 10004.

<sup>1</sup> The "aggravated felony" definition includes a "crime of violence" (as defined in 18 USC 16) with a prison sentence imposed of at least one year. See INA 101(a)(43).

<sup>2</sup> A "crime of violence" is: (1) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (2) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. See 18 USC 16.

(2d Cir. 2003), which held that NY second-degree manslaughter—recklessly causing death of another—is not a crime of violence. It may also leave undisturbed other 2nd Circuit and Board of Immigration Appeals (BIA) decisions that analyzed certain other state offenses under the crime of violence definition. See, e.g., *Chrzanoski v Ashcroft*, 327 F3d 188 (2d Cir. 2003)(CT simple assault statute identical in substance to NYPL 120.00(1) Assault 3rd is not crime of violence); *Matter of Vargas-Sarmiento*, 23 I&N Dec. 651 (BIA 2004)(conviction under subsection (1) or (2) of NY first degree manslaughter is crime of violence). For more information on *Jobson*, *Chrzanoski* and *Vargas-Sarmiento*, see *Backup Center REPORT*, Vol XVIII, No 3 [May-June 2003] p. 9 *et seq.* and Vol XIX, No 1 [Jan-Feb 2004] p. 11 *et seq.*

Practitioners should remember that although clients who end up in removal proceedings in any jurisdiction may avail themselves of the decision in *Leocal*, clients in removal proceedings outside the 2nd Circuit may be subjected to broader interpretations of the "crime of violence" definition than those set forth in *Jobson* and *Chrzanoski*, *supra*. Practitioners should also be aware that even if a conviction may not trigger the crime of violence aggravated felony ground of deportability, the same conviction might trigger another ground of removal, such as the "crime involving moral turpitude" ground.

For further guidance on whether a conviction under a particular New York statute may be a crime of violence aggravated felony in light of *Leocal*, practitioners are urged to call the IDP hotline at (212) 898-4132.

NYSDA, together with the National Association of Criminal Defense Lawyers, the Defending Immigrant Partnership, the American Civil Liberties Union, and the American Immigration Lawyers Association, submitted an *amici curiae* brief to the Supreme Court in support of Mr. Leocal. The law firm of Wilmer Cutler Pickering Hale and Dorr drafted and submitted the brief as *pro bono* counsel to *amici*.

### **"Operation Predator" Targets Noncitizen Residents Convicted of Sex-Related Offenses—How to Defend Against Charges to Minimize Immigration Consequences**

On Dec. 1, 2004, US Immigration and Customs Enforcement agents arrested dozens of New York City noncitizen residents as part of a continuing nation-wide enforcement agenda known as "Operation Predator," which targets for immigration detention and deportation noncitizens previously convicted of sex-related offenses. Scores of other New York residents were arrested as part of an earlier Operation Predator raid this past August. Even long-time lawful permanent residents (LPR or green-card holders) with one misdemeanor sex-related offense have fallen under Operation Predator's broad sweep.

In defending an LPR client against sex-related offenses

es, defense counsel should bear in mind that each sex-related charge must be analyzed under several distinct categories of deportability:

- Crime of violence with a prison sentence imposed of at least one year, thus constituting an “aggravated felony”;
- Rape, or sexual abuse of a minor, constituting an “aggravated felony” regardless of sentence imposed;
- Crime of domestic violence or crime against child, regardless of sentence imposed;
- Crime involving moral turpitude (CIMT), if it is (i) a New York Class A misdemeanor or higher offense level committed within five years of the client’s admission to the United States, or (ii) one of two or more CIMTs of any offense level committed at any time. Offenses in which sex-related conduct is a necessary element are almost always deemed CIMTs.

In general, LPRs would want most to avoid a conviction for an “aggravated felony,” because such a conviction triggers mandatory detention and deportation without the opportunity to apply for most forms of relief from deportation.

The following are some tips practitioners may follow to avoid the “crime of violence” or “rape or sexual abuse of a minor” categories of aggravated felony:

- Get young client “youthful offender” disposition. If client is a juvenile offender, remove case to family court. New York youthful offender dispositions and family court juvenile delinquency findings are not “convictions” for immigration purposes.<sup>3</sup>
- Avoid prison sentence imposed of one year or more. If your client is pleading to an offense that could be considered a “crime of violence” as defined in 18 USC 16, keeping the imposed sentence to under one year (*i.e.* 364 days or less) would avoid triggering the crime of violence “aggravated felony” category. It would NOT, however, work to avoid the “rape, or sexual abuse of a minor” category, which does not depend on sentence imposed and must be analyzed separately.
- Avoid a plea to an offense that will or might constitute rape, such as New York offenses of rape, sodomy, aggravated sexual abuse, or sexual misconduct;
- Avoid a plea to an offense that will or might constitute sexual abuse of a minor. The immigration statutes do not define what constitutes sex abuse of

a minor, but the following practices might minimize risk that a conviction be considered to fall under that category:

- Avoid a plea to any offense that has as required elements *both* sex-related conduct and that the victim be a minor (almost certainly sex abuse of minor).
- If the elements of the offense do not necessarily establish that the victim was a minor, try to keep out of the record of conviction any admission or other evidence that the victim was a minor.
- If the elements of the offense do not necessarily require that the offending conduct be sex-related, try to keep out of the record of conviction any admission or other evidence that the conduct was sex-related.
- Offer a plea to an appropriate non-sex offense of the same or higher level that would not be considered sex abuse of a minor. Keep in mind, however, that you would have to analyze that other offense for its own potential immigration consequences.

- The following example of potential alternative plea offers to avoid the “rape or sexual abuse of a minor” aggravated felony category comes from IDP’s *Representing Noncitizen Criminal Defendants in New York State*, 3rd ed., by Manuel Vargas:

Instead of pleading guilty to a Class D or E felony or Class A or B misdemeanor that might constitute rape or sexual abuse of a minor, your client could offer, if a factual basis exists, to plead to:

- unlawful imprisonment in the second or first degrees (PL 135.05 and 135.10) (Class A misdemeanor and Class E felony);
- coercion in the second or first degree (PL 135.60 and 135.65) (Class A misdemeanor and Class D felony);
- criminal trespass in the third, second, or first degrees (PL 140.10, 140.15, and 140.17) (Class B misdemeanor, Class A misdemeanor, and Class D felony);
- burglary in the third degree (Penal Law 140.20) (Class D felony);
- endangering the welfare of a child (Penal Law 260.10) (Class A misdemeanor); or
- unlawfully dealing with a child in the first degree (Penal Law 260.20) (Class A misdemeanor).

When possible, LPRs facing sex-related charges should also avoid convictions that would trigger the crime of domestic violence/crime against child and crime involving moral turpitude grounds of deportability.

<sup>3</sup> *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000).

The above practice tips assume that your client is an LPR. Immigration-sensitive defense approaches for non-citizens who are not LPRs are quite different. For additional advice on how to minimize immigration consequences for any noncitizen defendant, whether LPR or otherwise, facing sex-related charges, defense counsel may call the IDP hotline at (212)898-4132.

### ***New Regulations Issued on "212(c)" Waivers of Deportation for LPRs With Convictions Pre-April 1, 1997; Nunc Pro Tunc Relief Granted for Immigrants Improperly Denied 212(c) Relief Before Having Served Five Years for an Aggravated Felony***

The Department of Justice issued final regulations<sup>4</sup> implementing *INS v St. Cyr*, 533 US 289 (2001), a Supreme Court decision that held that lawful permanent residents (LPRs or greencardholders) who pled guilty or *nolo contendere* prior to Apr. 24, 1996 (or in some cases Apr. 1, 1997) could not be retroactively barred from applying for discretionary relief from deportation under former section 212(c) of the Immigration and Nationality Act (INA). The new regulations took effect Oct. 28, 2004.

Prior to 1996, most LPRs who had served less than five years for an "aggravated felony" conviction were allowed to file for 212(c) relief before an Immigration Judge in removal proceedings. This form of relief allowed many LPRs with significant ties to the US and other equities to remain in the country. In 1996, Congress repealed 212(c) relief and replaced it with a new form of relief called Cancellation of Removal. Cancellation is barred to anyone with an aggravated felony conviction, regardless of sentence or time served. The continued availability of 212(c) relief under *St. Cyr* therefore is critical for many LPRs with convictions that pre-date the 1996 changes in the law.

Under the new regulations, LPRs previously ordered deported must file special motions to reopen their proceedings by Apr. 26, 2005. Those LPRs, and others who only now are in deportation proceedings, may apply for 212(c) relief if they show that:

- they agreed to plead guilty or *nolo contendere* before Apr. 24, 1996, or, in some cases Apr. 1, 1997. The date the parties agreed to the plea, rather than the date that the plea is entered in court, is the relevant date;
- they have accrued seven years of lawful unrelinquished domicile in the US by the time a final order of deportation was issued or, if not previously ordered deported, by the time they apply for 212(c) relief; and

<sup>4</sup> See 69 Fed.Reg. 57826 (Sept. 28, 2004) (codified at 8 CFR Parts 1003, 1212, and 1240).

- they are otherwise eligible to apply for 212(c) relief as it existed at the time their plea was made.

The regulations also provide that the "five years served" bar to 212(c) relief will not be applied retroactively to persons who pled guilty to an aggravated felony before Nov. 29, 1990, the date that Congress enacted that "five years served" bar.

The regulations limit the scope of people who may apply for 212(c) relief in ways that were not dictated by *St. Cyr*. For example, under the regulations people who were convicted after trial are not eligible to seek 212(c) relief. Nor are people who are now outside the country after having been deported. Practitioners should bear in mind, however, that there may be arguments for availability of 212(c) relief despite these regulatory limitations. See, e.g., *Restrepo v McElroy*, 369 F3d 627 (2d Cir. 2004) (holding that an individual convicted after trial pre-1996 may be able to challenge the retroactive application of the repeal of 212(c) relief based on an argument that she may have subsequently foregone her right to apply for 212(c) relief "affirmatively," i.e. before being placed in deportation proceedings, in reliance on her ability to apply for that relief at a later date); *Wilson v Ashcroft*, No. 98-6880 (SDNY Sept. 3, 2004) (following *Restrepo* and further applying a categorical presumption of reliance-rather than requiring an individualized showing of reliance-by any immigrant who might have affirmatively applied for 212(c) relief when it was available but did not do so); *Ponnapula v Ashcroft*, 373 F3d 480 (3d Cir. 2004) (extending *St. Cyr* to people with trial convictions). For further discussion of *Restrepo* and *Ponnapula*, see *Backup Center REPORT*, Vol XIX, No 3 [June-July-Aug 2004] p. 9 *et seq.*

Finally, other issues related to the availability of 212(c) relief continue to be litigated in the courts. Most recently, on Dec. 17, 2004, in the consolidated cases *Falconi v INS* and *Edwards v INS*, \_\_\_F3d\_\_\_; 2004 WL 2915020 (2d Cir. Dec. 17, 2004), the 2nd Circuit granted equitable relief to two lawful permanent residents who were erroneously denied the opportunity to apply for a 212(c) waiver of deportation post-1996 for their pre-1996 plea convictions.

At the time Ms. Falconi and Mr. Edwards were first denied 212(c), they met all eligibility requirements for 212(c) relief, including the requirement that they not have served five years for an aggravated felony or felonies. Nevertheless, they were denied 212(c) relief at the agency level because that form of relief had been repealed by Congress in 1996. By the time their cases were reopened pursuant to 2nd Circuit and Supreme Court decisions prohibiting retroactive application of the statute repealing 212(c), they had served five years and for that reason were again denied 212(c) relief. The 2nd Circuit ruled that because the initial denial was error, "Petitioners' applications for §212(c) relief should be judged . . . *nunc pro tunc*, that is, as if the Petitioners had not yet accrued five years' imprisonment." *Edwards*, 2004 WL at \*1.

Notably, the Court indicated a willingness to use equitable remedies not only to correct inadvertent errors, but also to correct erroneous decisions that “expressed exactly the intention of the [agency] at the time it was made.” *Id.* at \*7. The Court stated that “[f]or more than sixty years, the Attorney General and the Board of Immigration Appeals have recognized its importance in mitigating potentially harsh results of the immigration laws. . . . It is . . . beyond question that an award of nunc pro tunc may, in an appropriate circumstance, be granted as a means of rectifying error in immigration proceedings.” *Id.*

IDP recruited the law firm of Wilmer Cutler Pickering Hale and Dorr to represent Ms. Falconi at the 2nd Circuit.

For more information on the new *St. Cyr* regulations and the availability of 212(c) relief more generally, call the IDP hotline. See also the American Immigration Law Foundation's Practice Advisory, dated Oct. 19, 2004, available at [www.aifl.org/lac/lac\\_pa\\_101904.pdf](http://www.aifl.org/lac/lac_pa_101904.pdf).

**The Bottom Line:** Many noncitizen criminal defendants with pre-1996 criminal convictions, including some who have already been ordered deported, may now be eligible for 212(c) relief from deportation. Defense counsel should bear this in mind as they analyze the potential immigration consequences of current criminal charges. In addition, federal defendants facing charges of illegal reentry after deportation may have as a defense that their initial deportation was unlawful because they were wrongfully denied the opportunity to apply for 212(c) relief in the underlying deportation proceedings.<sup>5</sup>

### ***DMV Policy Continues to Result in Criminal Charges Lodged Against Noncitizens***

As more fully reported in the last issue of the *REPORT*, the New York State Department of Motor Vehicles (DMV) implemented a policy earlier this year to check whether social security numbers submitted by driver's license applicants matched their names. As a result, many noncitizen New York residents have been criminally prosecuted in connection with their alleged submission to the DMV of false social security numbers or possession of false social security cards. Others remain at risk of future prosecution. For practice tips on how to defend your noncitizen client against these DMV-related criminal

<sup>5</sup> See, e.g., *US v Copeland*, 376 F3d 61 (2d Cir. 2004) (immigration judge's failure to inform immigrant-respondent of right to seek 212(c) relief, if prejudicial to the immigrant, renders deportation proceedings fundamentally unfair and thus possibly subject to collateral attack in federal illegal reentry cases); *US v Sosa*, 387 F3d 131 (2d Cir. 2004) (same); *US v Perez*, 330 F3d 97 (2d Cir. 2003) (upholding dismissal of indictment charging illegal reentry after deportation in a case where defendant's immigration lawyer in the prior deportation proceedings had failed to file an application for relief that might have prevented deportation).

charges, see *Backup Center REPORT*, Vol XIX, No 3 [June-July-Aug 2004] p. 9 *et seq.*

### ***Continuation of the National Defending Immigrants Partnership***

Under renewed funding for 2005-06, IDP will continue its work as part of the Defending Immigrants Partnership (DIP), a joint initiative among IDP, the Immigrant Legal Resource Center in California, the National Legal Aid and Defender Association, and the National Immigration Project of the National Lawyers Guild. Launched in 2002, DIP offers information, education, technical assistance and legal backup to state and federal public defenders, appointed counsel, and private defense counsel on the immigration consequences of crime. DIP's initial mandate was to address the law and practices in California, Florida, Illinois, New Jersey, New York, and Texas—the six most immigrant populous states, as well as to work with the federal defender programs across the country. Going forward, DIP will continue its efforts in those jurisdictions but also expand its work to additional states. DIP believes that the best way to ensure that immigrant defendants have informed, effective counsel is for the defender community to embrace the issue of immigration consequences as its own.

### ***Updated Removal Defense Checklist in Criminal Charge Cases Available on NYSDA Website.***

IDP has updated its Removal Defense Checklist in Criminal Charge Cases to include relevant new legal developments over the past several months. The checklist provides a fairly exhaustive list of removal defense arguments and strategies, complete with legal citations, to assist lawyers counseling or representing non-citizens in removal proceedings based on criminal charges. The checklist is also a useful tool for defense attorneys who are trying to weigh the risk of various plea agreements. To access or download this resource material (now updated through Oct. 15, 2004), visit NYSDA's website at [www.nysda.org](http://www.nysda.org) and click on Immigrant Defense Project Resources. ⚡

## ***Defender News*** (continued from page 8)

Saratoga Springs City Court Douglas C. Mills was censured by the Commission on Dec. 6, 2004, for improperly jailing a college student for several days after holding him in contempt for interrupting during a post-acquittal lecture and for causing a courtroom spectator to be arrested for using an expletive to his spouse in the courthouse parking lot. (*Times Union* [online], 12/10/04.)

Information about the State Commission on Judicial Conduct, including its published decisions, is available through a link on NYSDA's web site, or directly at [www.scjc.state.ny.us](http://www.scjc.state.ny.us). ⚡