

## Defense-Relevant Immigration News

by Manuel D. Vargas and Sejal R. Zota\*

### 2nd Department again dismisses an appeal because an immigrant defendant was deported

In a two-sentence decision, the Appellate Division, 2nd Department, last summer dismissed an appeal of an immigrant defendant, stating that because the appellant had been deported, he was no longer subject to the court's jurisdiction. *People v Wright*, 712 NYS2d 398 (7/31/00) (*Backup Center Report*, Vol XV, #8, p. 25). This decision is the eighth of such published short decisions in the 2nd Department, dismissing the appeal of a deported defendant without providing legal support for such action. *People v Forde*, 182 AD2d 830, 586 NYS2d 495 (1992); *People v Hernandez*, 157 AD2d 854, 551 NYS2d 806 (1990); *People v Ragsdale*, 144 AD2d 708, 535 NYS2d 63 (1988); *People v Ospina*, 143 AD2d 952, 533 NYS2d 696 (1988); *People v Adamson*, 122 AD2d 147, 504 NYS2d 620 (1986); *People v Bryant*, 103 AD2d 832, 478 NYS2d 809 (1984); *People v Jimenez*, 97 A.D.2d 799, 468 NYS2d 421 (1983). Some of these cases cite to *People v Del Rio*, 14 NY2d 165, 199 NE2d 359 (1964), the one Court of Appeals case that has substantively addressed whether deportation ends a pending appeal.

In *Del Rio*, the Court dismissed the defendant's appeal for "mootness" on a showing that the defendant had left the United States for Cuba, that his sentence had been commuted, and that he had been released from prison on parole and later deported by the INS to Cuba. However, the Court set aside the dismissal upon the defendant's application for vacatur of the dismissal, in which the Court was told that defendant "never executed any waiver, consent, application or other request for commutation" or agreed to his removal from prison and from the United States. The Court later learned that these were an erroneous statement of facts, and that *Del Rio*, in consideration of the commutation of his sentence and of his release from prison, had solemnly agreed that he would go at once to Cuba and never again enter the United States.

Based on *Del Rio*'s actions, the Court reasoned that he must be held to have abandoned the appeal and deliberately waived and forgone his right to have the appeal heard and decided. The Court used two rationales. It analogized *Del Rio*'s case to that of absconding defendant-appellants who may not have their appeals heard. It also compared him to defendant-appellants that have accepted parole or other mitigation of punishment. These appellants are considered to have abandoned their appeals.

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Apart from *Del Rio* and the 2nd Department orders (which provide no legal argument), there appears to be no reported case law in New York on this issue. Therefore, despite the 2nd Department's approach, the issue of whether deportation ends an appeal is still unsettled. New York defense attorneys should argue that a client's appeal must be heard if the client has not agreed to deportation in exchange for early release. Because the Court focused on the fact that it was *Del Rio* who was responsible for his own exile ["having so exiled himself from the jurisdiction..."], it is not difficult to distinguish this case. Ostensibly, if an individual is deported on the sole basis of INS authority, not on the basis of voluntary early release, then the court should still retain jurisdiction because the appellant has not abandoned his appeal. This was illustrated by the Court of Appeals' decision to set aside the dismissal and put the appeal back on the calendar when it believed that *Del Rio* had not agreed to deportation in exchange for the commutation of his sentence, even though he was no longer in the US.

### Supreme Court to review challenges to INS indefinite detention

The Supreme Court has agreed to review two federal appeals court decisions that reached opposite results on the issue of whether the INS may indefinitely detain noncitizens whom the United States is unable to deport. *Reno v Ma*, No. 00-38 (10/10/00) [case below *Kim Ho Ma v Reno*, 208 F3d 815 (9th Cir. 2000)] and *Zadvydas v Underdown*, No. 99-7791 (10/10/00) [case below *Zadvydas v Underdown*, 185 F3d 279 (5th Cir. 1999)].

### INS using NY felony DWI-related offenses as aggravated felonies for deportation purposes

In several recent cases, the INS has used New York felony DWIs with a prison sentence of one year or longer as aggravated felonies for immigration purposes. In doing so, the INS is relying on the Board of Immigration Appeals (BIA) decision, *Matter of Puente-Salazar*, Interim Decision #3412 (9/29/99). There, the BIA ruled that the felony offense of driving while intoxicated under Texas law is a conviction of a crime of violence and therefore an aggravated felony for immigration law purposes. The Board found that operating a motor vehicle in a public place while under the influence involves a substantial risk that physical force against the person or property of another may be used in the commission of the offense, thus meeting the second prong of the 18 USC 16 definition of "crime of violence." See the *Backup Center REPORT* Vol. XIV, #9, at p. 4.

The government's position is that a felony DWI under New York's Vehicle & Traffic Law 1192 [2], [3], or [4] with a one year prison sentence likewise constitutes a crime of violence and is therefore an aggravated felony. Many of the New York DWI cases are being appealed to the 2nd Circuit. The appellants are challenging the INS' position that a felony DWI or related offense always constitutes a deportable aggravated felony offense. While this issue is currently being

litigated, defense attorneys should try to avoid felony DWI convictions with one year prison sentences for immigrant clients.

For those who are litigating this issue in immigration removal proceedings or the federal courts, NYSDA's Criminal Defense Immigration Project has prepared a memo compiling various arguments why a New York felony DWI offense does not constitute a "crime of violence" (COV), and should thereby not render someone deportable. The arguments include that 1) DWI is not a specific intent offense, and thus does not fall under 18 USC 16(b); 2) congressional intent regarding 18 USC 16(b) demonstrates that Congress never intended for COV's under 18 USC 16 to include DWI's; 3) Veh. & Traf. 1192 is a divisible statute that covers conduct that does not necessarily meet the definition of "crime of violence"; and 4) subsequent DWI in NY is not a substantive felony offense, and thus does not fall under 18 USC 16(b). This memo is available on the NYSDA web site ([www.nysda.org](http://www.nysda.org)), or from the Backup Center.

### Supreme Court to review constitutionality of citizenship law that restricts acquisition of US citizenship based on birth to a citizen father

The Supreme Court will also review a decision upholding the constitutionality of the gender-based distinction in US citizenship law that allows a citizen mother but not a citizen father to confer citizenship on a child born "out of wedlock" outside of the United States. *Nguyen v INS*, No. 99-2071 (9/26/00). In *Miller v Albright*, 523 US 420 (1998), an earlier case presenting the same issue, the Court did not reach a majority opinion on the merits. In the case now to be reviewed, the 5th Circuit held that the gender distinction was not unconstitutional. *Nguyen v INS*, 208 F3d 528 (5th Cir. 2000). Two other circuit courts have struck down this distinction on equal protection grounds, including the 2nd Circuit. *US v Ahumada-Aguilar* (9th Cir. 1999); *Lake v Reno*, (2d Cir. 9/15/00) (reported in the *Backup Center REPORT* Vol. XV, #8, at p. 17).

### New federal law will expand grants of automatic citizenship to certain foreign-born children of US citizens

A new federal law confers US citizenship on certain foreign-born children who are or will be adopted by a citizen parent, or one of whose noncitizen parents is or becomes a US citizen before the child reaches the age of 18. Public Law No. 106-395 (10/30/00). The new law will take effect on or about Feb. 27, 2001. ☪

## Job Opportunities

Disability Advocates seeks a **System Reform Litigator** to undertake complex system reform litigation and advocacy regarding abuse and neglect of prisoners with mental illness in New York State. Disability Advocates is a not-for-profit law firm providing free protection and advocacy services to persons with disabilities. Salary DOE, outstanding benefits. EOE. Send resume and writing sample ASAP to Disability Advocates, Inc., 5 Clinton Square, 3rd Floor, Albany NY 12207.

Pace University School of Law expects **two entry-level, tenure-track positions** for the 2001-2002 academic year. Academic areas needed include criminal procedure, an integrated criminal law/legal research and writing program, and others. Strong academic record and potential for excellent scholarship and teaching required; two to five years in legal practice or clerkships preferred. Send resume, including references, to Prof. Barbara Black, Chair Appointments Committee, Pace University School of Law, 78 N. Broadway, White Plains NY 10603, e-mail: [Bblack@law.pace.edu](mailto:Bblack@law.pace.edu).

The Brennan Center for Justice seeks a **staff attorney** for its Criminal Justice Program, to start no later than March 2001. The Program, launched in September 2000, works to ensure the right to effective assistance of counsel, improving the quality of indigent defense, fair enforcement of criminal law,

and measured and meaningful sanctions. The Program's inaugural project will be to create a community justice institute to support defenders working in partnership with community groups, to promote fairness and safety. Candidate should be lawyer with three to five years' experience, demonstrated commitment to social justice, imaginative and collaborative approach to problem solving and advocacy, and excellent verbal, writing and analytical skills. Criminal justice experience (policy-makers, policy advocates, litigators, community organizers) preferred. Salary CWE, excellent benefits. Submit, by Dec. 22, 2000, a resume, two writing samples, three references, and a cover letter explaining interest in the Criminal Justice Program to: Administrative Director, Criminal Justice Program, Brennan Center for Justice at NYU School of Law, 161 Avenue of the Americas, 12th Floor, New York NY 10013. Web site <http://www.brennancenter.org>.

The Brennan Center Criminal Justice Program also seeks a **National Association for Public Interest Law (NAPIL) Fellow**. The fellowship begins Sept. 2001 for a two-year period. Recent law graduates and third-year law students eligible to apply. Candidates should have strong writing and analytical skills, imagination, and versatility. Experience in criminal justice or community organizing preferred. Salary scale

starts at \$42,000 for first-year lawyers. EOE. Submit by Dec. 18, 2000, a resume, two writing samples, three references, and a cover letter explaining interest in the Criminal Justice Program to: Administrative Director, Criminal Justice NAPIL Fellowship, Brennan Center for Justice at NYU School of Law (address above).

Prisoner's Legal Services of NY seeks applicants for four **Managing Attorney** positions (Albany, Ithaca, Plattsburgh, and Poughkeepsie). Responsible for managing legal and administrative matters for 3 attorneys, 3 paralegals, and 2 support staff. Must be admitted to practice in NYS or be eligible for admission *pro hac vice* and be willing to take the next available bar exam. Must have minimum of 5 years legal practice experience (preferably in civil legal services, civil rights, poverty law, or federal litigation). Previous management and supervisory experience preferred. Outstanding benefits package, liberal and flexible leave policies. EOE. Send resume, writing sample, and list of three references (with phone numbers) to Maria McGuinness, Human Resources Manager, Prisoners Legal Services of New York, 118 Prospect Street, Suite 307, Ithaca NY 14850; tel (607) 273-2283; fax (607) 272-9122.

**FOR MORE JOBS, CHECK OUR WEB SITE: [www.nysda.org](http://www.nysda.org)** ☪