

Resources Sighted, Cited, or Sited

This section of the *REPORT* contains resources of potential interest to defense teams. Whether sighted in other publications by staff or others, cited by members or others in pleadings, or sited on the Internet, these resources are noted for readers' information; Backup Center staff have not investigated every one, and no representation as to their quality or continuing availability is made by listing them here.

- ✓ "More Than Meets the Eye: Rethinking Assessment, Competency and Sentencing for a Harsher Era of Juvenile Justice," Marty Beyer, Thomas Grisso, Malcolm Young, article, *The Advocate* [publication of the KY Dept. of Public Advocacy] 1/99.
- ✓ *New York Legal Research Guide, 2nd ed.*, Ellen M. Gibson, book, \$68, 1998. [Reviewed in *NYS State Bar Journal* 1/99, noting that special features include NY Indian Law sources and a 200-pg. NYC guide]. Published by William S. Hein & Co., Buffalo.
- ✓ "New York Felony Sentencing: Shift in Emphasis to Increase Penalties for Violent Offenders," Bonnie Cohen-Gallet, article, *NYS State Bar Journal*, 1/99.
- ✓ "Failure to Provide Supporting Deposition," Raymond J. Elliott III, article, in column "Justice Court Topics" in "Town Topics" [publication of the Association of Towns of the State of New York], 1-2/99. [Deals with "simplified

traffic informations."] Copy available from the Backup Center.

- ✓ "Harassment—Lack of Intent," Raymond J. Elliott III, article, in column "Justice Court Topics" in "Town Topics" [publication of the Association of Towns of the State of New York], 11-12/99. [Describes dismissal of a harassment charge where an office manager grabbed the complainant by the wrist during an argument and led her to an adjoining room.] Copy available from the Backup Center.
- ✓ "Recanted Testimony—New Trial," redacted decision of Town Justice Victor J. Alfieri, Jr., of the Town of Clarkstown, in column "Justice Court Topics" by Raymond J. Elliott III, in "Town Topics" [publication of the Association of Towns of the State of New York], 11-12/99. [Discusses the 1916 case of *People v Shilitano*, 218 NY 161 and vacates conviction, ordering a new trial in sexual abuse and endangerment case.] Copy of redacted decision available from the Backup Center.
- ✓ *1998 AIDS in Prison Bibliography*, National Prison Project, 68 pg., \$10 (prepaid). Write: Jackie Walker, AIDS Information Coordinator, ACLU National Prison Project, 1875 Connecticut Avenue NW, Suite 410, Washington DC 20009.
- ✓ *Prison Writing in 20th Century America*, H. Bruce Franklin, ed., book, \$13.95 (+\$3 ship). Write: Prison Legal News, 2400 NW 80th St #148, Seattle WA 98117. ☪

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

Mandatory INS Detention Follows Most Deportable Offense Convictions

When noncitizens convicted of most deportable offenses are released from criminal custody, it is mandatory for the Immigration and Naturalization Service (INS) to detain them, under a rule effective October 9, 1998. There is no longer any statutory right to release on bond pending completion of removal proceedings. This means that a deportable (or inadmissible) noncitizen should expect to be picked up by the INS when he or she completes federal or state prison

time, or is otherwise released from criminal custody. The noncitizen will be held in an INS detention facility until removal (unless relief from removal is obtained). The INS also appears to be applying the new mandatory detention policy to some deportable or inadmissible noncitizens released from criminal custody prior to October 9.

This mandatory detention policy was mandated by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), but full implementation was delayed for two years because the Attorney General certified that the INS did not have sufficient bed space to detain all those covered by the new legislation. The legislation did not allow the Attorney General to delay implementation beyond two years.

Under the terms of the legislation now in effect, an individual may be released pending completion of removal proceedings only if release "is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation." (8 U.S.C. 1226(c)).

Noncitizen defendants and their attorneys should be aware that, for a noncitizen who is already deportable or inadmissible based on a prior offense or illegal immigration

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status, getting out of criminal custody on bail may merely result in being transferred to an INS detention facility. To make matters worse, such a defendant will not get credit towards any subsequent prison sentence for the time he or she has spent in INS custody.

Some noncitizens subjected to the new mandatory detention policy have filed federal habeas corpus petitions in New York and elsewhere to challenge the policy on various statutory and constitutional grounds. There has been some success so far in other jurisdictions. See *eg Martinez v Greene*, 1998 WL 879834 (D.Colo., December 14, 1998). A copy of the opinion is available from the Backup Center.

INS Deportations of Noncitizens in 1998 at All-Time High

The INS announced last month that it removed 171,154 "criminal and other illegal aliens" in Fiscal Year 1998, breaking the prior year record of 114,386 removals. This marks the fifth year of record-setting removal figures.

"Criminal alien" removals reached 56,011, representing an average of over a thousand such noncitizens removed each week. According to INS statistics, most of these removals were accounted for by drug convictions (47 percent), criminal violations of immigration law (15 percent), and convictions for burglary (5 percent), assault (5 percent) and sex crimes (4 percent).

2nd Circuit Finds AEDPA Immigration Relief Restriction Not Retroactive

There was a bit of good news for criminally convicted lawful permanent resident (LPR) noncitizens who were already in deportation proceedings on April 24, 1996, the date of enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The United States Court of Appeals for the 2nd Circuit has held that AEDPA's restrictions on relief from deportation for such LPRs could not be applied retroactively to their cases.

At issue in the court's decision was the government's retroactive application of AEDPA Section 440(d), which barred LPRs from eligibility for a waiver of deportation if they were convicted of any of several enumerated criminal offenses no matter how minor the offense or what equities were present. The 2nd Circuit held, as a matter of statutory interpretation, that Congress did not intend for this relief restriction to be applied in pending cases. *Henderson v INS*, 153 F3d 106 (2d Cir. 1998). The Circuit did not reach the issue of whether Section 440(d) applies in cases that were not pending on April 24, 1996, but which involved pre-Act convictions.

The government has petitioned the U.S. Supreme Court for a writ of *certiorari*. The Court is expected to conference in February on whether it will grant the writ. In the meantime, the 2nd Circuit has stayed issuance of its mandate in *Henderson*.

LPR noncitizens currently in criminal proceedings and their attorneys should be aware that the 2nd Circuit's decision in *Henderson* is directly applicable only to LPRs placed in removal proceedings before April 1, 1997 and thus subject

to AEDPA. LPRs placed in removal proceedings on or after April 1, 1997 are subject to the subsequently enacted, and at least equally harsh, immigration law amendments included in IRIRA. The temporal applicability of IRIRA's amendments remains an open issue.

Early Parole for Deportation Suspended, Now Being Reactivated

Although New York and federal law continued to allow for the early release from prison of certain nonviolent noncitizen offenders subject to immediate INS custody and prompt deportation, the state's early release program was suspended for much of last year. According to the New York Division of Parole, however, the program is now in the process of being reactivated.

New York law provides that the State Board of Parole may, prior to completion of the minimum term of a sentence of imprisonment, grant parole to certain noncitizens with final orders of deportation. Such early parole is statutorily barred for an inmate convicted of either a violent felony offense or a Penal Law A-1 felony offense, other than a section 220 controlled substance A-1 felony offense. See Executive Law 259-i(d).

Due to controversy last year over the early release and deportation of certain A-1 drug felons, legislation was proposed to eliminate eligibility of A-1 drug felons, and to make release of A-II drug felons subject either to prosecutor or court approval. Although the legislation was not enacted, the State suspended the early release program.

According to Parole, they are now processing some of the backlog of cases that had previously been approved, after which they will begin considering new cases. It appears that Parole, as a matter of administrative policy, will be increasing efforts to obtain prosecutor and court recommendations before granting early parole for deportation.

NY Passing a Bad Check Not a Crime Involving Moral Turpitude

In a case before an Immigration Judge in New York last month, the INS switched positions and accepted an argument that the New York offense of Issuing a Bad Check (Penal Law 190.05) is not a crime involving moral turpitude (CIMT) for immigration purposes. The Immigration Judge then terminated removal proceedings.

The current version of the New York offense of Issuing a Bad Check requires a showing that the issuance was "knowing" but, unlike its precursor statute, does not contain an "intent to defraud" element. Therefore, under precedent of the Board of Immigration Appeals, it should not be considered a CIMT for deportability or inadmissibility purposes.* See *Matter of Balao*, Int. Dec. #3166 (BIA 1992). ☺

*Note: Owners of the *NYSDA Criminal Defense Immigration Project manual*, Representing Noncitizen Criminal Defendants in New York State, should amend the entry for *Issuing a Bad Check* on Page A-15 of Appendix A to reflect that this offense probably would not be considered a CIMT.