

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

Youthful Offender Adjudication Likely to Equal Conviction for Deportation Purposes

A new precedent decision of the Board of Immigration Appeals includes language strongly indicating that New York youthful offender adjudications will now be considered convictions for immigration law purposes. See *Matter of Roldan-Santoyo*, Int. Dec.#3377 (BIA 3/3/99).

In *Roldan-Santoyo*, the Board found that a noncitizen who had had his guilty plea to the offense of possession of a controlled substance vacated and his case dismissed upon termination of his probation under the criminal laws of the State of Idaho was nevertheless deemed to have a conviction for immigration purposes. The Board held that such a disposition counted as a conviction for immigration purposes under the new federal statutory definition of conviction in the Immigration and Nationality Act, 8 USC 1101(a)(48)(A) (Supp. II 1996).

CORRECTION

Immigration Practice Tips

The Immigration Practice Tips column that appeared in the February *REPORT* contains a misprint.

The correct citation is:

Henderson v INS, 157 F3d 106 (1998)

Going further than it needed to decide the case at hand, the Board stated: "We find that the language of the statutory definition and its legislative history provide clear direction that this Board and the federal courts are not to look to the various state rehabilitative statutes to determine whether a conviction exists for immigration purposes . . . We therefore interpret the new definition to provide that an alien is considered convicted for immigration purposes upon the initial satisfaction of the requirements of section 101(a)(48)(A) of the Act, and that he remains convicted notwithstanding a subsequent state action purporting to erase all evidence of

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the original determination of guilt through a rehabilitative procedure." *Id.* at pp. 12 and 14-15.

Defense attorneys should be aware that precedent decisions of the Board of Immigration Appeals are binding on immigration judges in deportation or removal proceedings throughout the country. Nevertheless, through submission of *amicus curiae* briefs, the New York State Defenders Association is continuing its efforts to persuade the Board that the new definition of conviction does not cover New York youthful offender adjudications. In addition, application of the Board's decision to different state rehabilitative procedures, such as New York youthful offender adjudications, is subject to challenge in the federal courts.

A copy of the *Roldan-Santoyo* decision, as well as a copy of the most recent *amicus* brief submitted by the Association on the immigration consequence of a New York youthful offender adjudication (post-*Roldan* brief filed March 8, 1999 in *Matter of Pereira*), are available from the Backup Center.

Supreme Court Denies Cert.—Government Sought to Overturn 2nd Circuit Decision Finding AEDPA Restriction Not Retroactive

The U.S. Supreme Court has let stand rulings of two lower federal courts holding that 1996 federal amendments restricting relief from deportation for criminally convicted lawful permanent resident (LPR) noncitizens could not be applied retroactively to LPRs already in deportation proceedings when the new laws were enacted. See Supreme Court orders denying U.S. Attorney General petitions for writ of certiorari in *Reno, et al., v Navas, et al.*, No. 98-996, and *Reno, et al., v. Goncalves*, No. 98-835 (U.S. S.Ct., 3/8/99), 64 CrL 2182, 2183. The Attorney General had asked the Court to overturn a decision of the United States Court of Appeals for the 2nd Circuit, as well as a similar decision of the 1st Circuit. See *Henderson v INS*, 157 F3d 106 (2nd Cir. 1998); *Goncalves v Reno*, 144 F3d 106 (1st Cir. 1998).

In the 2nd Circuit's decision in *Henderson*, which is now binding legal precedent for still pending deportation proceedings in New York, the Court of Appeals held that the federal government was wrong to apply retroactively the restriction on relief in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to individuals who were in deportation proceedings on April 24, 1996, AEDPA's enactment date. For a more detailed discussion of the 2nd Circuit's decision, see the *Backup Center REPORT* Vol. XIV, #2, at pg. 9.

Checklist of Defenses in Removal Proceedings Now Available

The NYSDA Criminal Defense Immigration Project has prepared a checklist of removal defense arguments and strategies for lawyers counseling or representing noncitizens in removal proceedings based on criminal charges. For a copy of "Removal Defense Checklist in Criminal Charge Cases," contact the Backup Center. ☺

Case Digest

The following is a synopsis of recent case law of interest to the public defense community. The index headings appearing before each case are from the Association's Subject Matter Index. These case briefings are not exhaustive, nor are they designed to replace a careful reading of the full opinion.

Citations to the cases digested here can be obtained from the Backup Center as soon as they are available.

United States Supreme Court

Due Process (Notice) **DUP; 135(20)**

Search and Seizure (General) **SEA; 335(42) (65[f])**
(Search Warrants [Execution])

West Covina, Calif. v Perkins, No. 97-1230, 1/13/99

Items were seized from the respondents' home during execution of a search warrant issued in a homicide investigation focusing on a former boarder. City police left the respondents a form telling them that the search had occurred and named certain members of the police force that they could contact for further information. A list of property seized was attached. After initial inquiries, during which one of the respondents was told that he needed a court order to regain his property, the respondents filed suit in federal court. The district court found that the procedures satisfied due process. The 9th Circuit Court of Appeals reversed the grant of summary judgment for the city, saying that the police had to give notice of state procedures for return of seized property.

Holding: Once property owners have been notified that their property has been seized, they can turn to public sources to find available remedial measures. The 9th Circuit's notice requirement lacks precedential support and conflicts with well-established practice. Judgment reversed.

Concurrence: [Thomas, J] The suggestion in *dicta* that procedural due process requires police to take reasonable steps to notify owners that their property has been taken is an unwarranted extension of due process; the 4th Amendment governs criminal matters.

New York Court of Appeals

Weapons (Firearms) **WEA; 385(21)**

People v Thompson, No. 167, 11/18/98

Holding: The defendant's violation of the terms and conditions of his weapons license by transporting weapons in an unlocked container did not constitute a violation under Penal Law 400.00. The statute does not expressly address the manner and circumstances under which a person licensed to carry a target pistol may carry it. The licensing authority has the power to impose conditions and restrictions (*see Matter of O'Connor v Scarpino*, 83 NY2d 919, 921), but violations of

those conditions may not carry a penal sanction. As the legislature has not prescribed penal consequences for violations, available sanctions are confined to the administrative apparatus. *See People v Parker*, 52 NY2d 935 *rvsing on dissent of Birns, J*, 70 AD2d 387, 391-394.

Religious Freedom (General)

RLG; 328(10)

People ex rel DeMauro v Gavin, No. 163, 11/20/98

Holding: The defendant's request that the town court charge the jury in a zoning ordinance violation case as to the language of the Free Exercise of Religion clause of the state constitution (NY Const art I §3) was properly refused. County Court erred in reversing. The question of whether state action has unconstitutionally abridged a defendant's religious freedom is a question of law for the court. The individual right of religious worship may be properly balanced against the interest of the state in the law to be enforced. *People v Woodruff*, 26 AD2d 236, 238 *affd no opn* 21 NY2d 848. Order reversed, matter remitted for determination of the facts. CPL 470.25(2)(d).

Counsel (Conflict of Interest)
(Competence/Effective Assistance/Adequacy)

COU; 95(10) (15)

Ethics (Defense)

ETH; 150(5)

People v Longtin, No. 193, 12/17/98

Defense counsel did not learn until *voir dire* had begun that a prosecution witness, Investigator Lishansky, who obtained fingerprint evidence in this case, had been suspended for alleged evidence tampering. Lishansky was not called to testify, nor was the fingerprint evidence offered at trial. Defense counsel had interviewed as a potential client Investigator Harding, who had served in the same unit as Lishansky and had recently plead guilty to charges of evidence tampering. The Appellate Division upheld the defendant's conviction.

Holding: The defendant's motion for a mistrial or dismissal due to untimely production of *Brady* material was properly denied where the prosecutor learned of Lishansky's conduct when defense counsel did. The defendant made no showing that "the conduct of his defense was in fact affected by the operation of the conflict of interest," or that the conflict "operated on" counsel's representation, and so was unable to make out a valid claim of ineffective assistance of counsel. *People v Alicea*, 61 NY2d 23, 31. Harding did not handle any of the evidence in this case, nor was he listed as a witness for either side. When the prosecution withdrew all fingerprint evidence, Harding's general knowledge of fingerprint processing became irrelevant. Harding's only connection to the defendant's case was that he served in the same unit as Lishansky, but neither Lishansky nor the fingerprint evidence obtained by him appeared at trial. Lishansky was not involved with any other evidence. Order affirmed.