Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

Early Parole for Deportation on Hold for Most Noncitizens

Although New York law allows for the early release from prison of certain nonviolent noncitizen offenders subject to immediate Immigration and Naturalization Service (INS) custody and prompt deportation, the state's Early Conditional Parole for Deportation Only program remains suspended until further notice for those who had not already received release decisions from the State Board of Parole prior to the program's suspension in 1998.

New York law provides that the Board of Parole may, prior to completion of the minimum term of a sentence of imprisonment, grant early parole to certain noncitizens with final orders of deportation. Under state law, such early parole is statutorily barred only for an inmate convicted of either a violent felony offense or an A-1 felony offense, other than a section 220 controlled substance A-1 felony offense. See New York Executive Law 259-i(d). In March 1998, however, the State suspended the early parole program due to controversy over the early release and deportation of certain A-1 drug felons.

Earlier this year, the New York State Division of Parole reported that the State had reactivated the early parole program beginning with the processing of some of the backlog of cases that had previously been approved. (*See Backup Center REPORT,* Vol. XIV, #2, at pg. 9.)

Despite the reactivation of the program, state prisoners requesting early parole continue to receive written notices from the Division of Parole informing them that the program is presently on hold until further notice. Parole officials informed NYSDA when contacted that to date the only individuals who have been processed for early parole since March, 1998 are a small number of eligible D and E felons who had received release decisions from the Board of Parole prior to March 1998. According to Parole, a larger group of eligible B and C felons with pre-March 1998 Board release decisions may also be processed soon. As for eligible noncitizen state prisoners who are still awaiting Board action on their requests, however, apparently no action is being taken on their cases until the Parole Division's new Executive Director (see p. 4) completes review of a new protocol for the program. A Parole official reports that this review might be completed and Board action on these cases may resume as early as July 1999.

Court Challenges to New Mandatory INS Detention Policy Yield Mixed Results

As reported earlier, the INS is now required to take most noncitizens convicted of deportable offenses into INS custody, without the possibility of release on bond, as soon as the noncitizen is released from criminal custody. This detention policy was mandated by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), but full implementation was delayed until October 9, 1998. Under the IIRIRA terms 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." INA 236(c), 8 U.S.C. 1226(c). (*See Backup Center REPORT,* Vol. XIV, #2, at pp. 8-9.)

Since the previous report, numerous INS detainees have brought habeas corpus petitions in various parts of the country challenging this mandatory INS detention policy on statutory and constitutional grounds. The following is a listing compiled by the Immigrants' Rights Project of the American Civil Liberties Union of the federal court decisions issued to date:

236(c) Unconstitutional
Martinez v Greene, 28 FSupp. 1275 (D. Colo. 1998)
Van Eeton v Beebe, 1999 WL 312130 (D. Ore. 4/13/99)
Nguyen v Beebe, CV 99-340-HV (D. Ore. 4/13/99)
Danh v Demore, 1999 WL 219718 (N.D. Cal. 5/28/99)

236 (c) Does Not Apply (statutory grounds)
Velasquez v Reno, 37 FSupp.2d 663 (D. N.J. 4/5/99)
Alwaday v Beebe, 1999 WL 184028 (D. Ore. 1/29/99)
Alves-Curras v Fasano, 98 CV 2295 (S.D. Cal. 2/2/99)
Reyes-Rodriguez v Fasano, 99 CV 0023 (S.D. Cal. 2/26/99)
Baltazar v Fasano, 99 CV 380 BTM (S.D. Cal. 3/25/99)
Alvarado-Ochoa v Reno, 99-0470-IEG(AJB) (S.D. Cal. 5/28/99)

236(c) Constitutional
Parra v.Perryman, 172 F.3d 954 (7th Cir. 3/ 24/99)
Diaz-Zaldierna v Fasano, 1999 WL 199110 (S. D. Cal. 3/16/99)
Aguirre-Garcia v Fasano, 99-0629-IEG (S.D. Cal. 5/17/99) (but also found that 236(c) does not apply to persons released from criminal custody prior to October 9, 1998)
Aguiniga-Junes v Reno, 99-0471JM (JAH) (S.D. Cal. 5/25/99)
Edwards v Blackman, 1999 WL 350122 (M.D. Pa. 3/27/99)

To date, there are no reported decisions from the federal courts in New York. For assistance or guidance in bringing a habeas challenge to mandatory INS detention under IIRIRA, contact the American Civil Liberties Union, Immigrants' Rights Project, 125 Broad Street, New York, New York 10004.

** Manuel D. Vargas is the Director of NYSDA's Criminal Defense Immigration Project, which provides backup support concerning immigration issues to public defense attorneys.* **If you have questions about immigration issues in a criminal case, call Manny at (212) 367-9104. Hours are: Tuesdays and Thursdays, 9:30 a.m. to 4:30 p.m.**

Federal Appellate Court Finds New York Misdemeanor May Serve as Aggravated Felony

In an example of the "Alice in Wonderland" quality of the current immigration laws relating to crimes, a federal court has expressly ruled that a misdemeanor may be considered an "aggravated felony" under the immigration statute. While noting that "it seems odd to hold that a misdemeanor . . . can be an aggravated felony, as it is not a felony," the United States Court of Appeals for the Third Circuit held that New York petty larceny with a one year prison sentence falls within the aggravated felony definition category of "a theft offense . . . for which the term of imprisonment at least one year." 8 U.S.C. 1101(a)(43)(G)(verb missing from sentence, as amended by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996). The ruling was in the context of the 16-point federal sentence enhancement for illegal reentry after deportation subsequent to conviction of an aggravated felony. *United States v Graham*, 169 F3d 787 (3d Cir. 3/ 5/99).

Other New York misdemeanors that might trigger the "aggravated felony" consequence of mandatory and permanent removal from the United States are*:

- Misdemeanor sexual abuse if the victim is a minor, regardless of sentence
- Misdemeanor sale of marijuana, regardless of sentence
- Misdemeanor possession of a controlled substance, if the defendant has a prior conviction of a drug offense
- Theft-related misdemeanors, such as petty larceny and criminal possession of stolen property, fifth degree, with one year prison sentence
- Misdemeanor assault with one year prison sentence

* For a detailed explanation of why and when such misdemeanor offenses might be deemed to be aggravated felonies, see Appendix G, Section 1 ("Aggravated felony") in *Representing Noncitizen Criminal Defendants in New York State,* (Vargas, NYSDA 1998), available from the Backup Center for $25.

There may be ways to avoid the immigration consequences of an aggravated felony conviction, as shown below.

First Department Reduces Robbery Sentence by One Day to Block Deportation

The Appellate Division, First Department, has reduced a noncitizen defendant's one-year sentence for second-degree attempted robbery to 364 days in order to relieve the defendant of the "unanticipated effect on his immigration status" of the one-year sentence. *People v Cuaran*, No. 993 (5/11/99). The court unanimously modified the earlier sentence "in the interest of justice" in resolution of a late appeal in which the defendant pointed out that Congress retroactively rendered a robbery conviction with a one-year prison sentence an "aggravated felony" three months after his June 25, 1996 conviction. The court noted that the prosecutor in this case had conceded that the interest of justice would be served by the reduction. The defendant was represented by 18(b) panel member Jay L. Weiner.

NY Chapter of Citizens and Immigrants for Equal Justice Forms to Advocate for Those Impacted by 1996 Law Changes

Several families of New York State immigrants impacted by the harsh 1996 new immigration laws have formed a New York chapter of Citizens and Immigrants for Equal Justice (CIEJ). CIEJ is a national network of families being torn apart by the new immigration laws relating to immigrants with past criminal convictions. In addition to engaging in advocacy with lawmakers, CIEJ offers affected individuals and their families information, legal referrals, and a support system of other families. Defense lawyers and other advocates for immigrants affected by these laws may wish to refer affected immigrant clients and family members to the CIEJ New York chapter: (212) 946-5476 (voicemail). National CIEJ may be reached in Texas: (972) 279-4168. ⚖

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Correction

Please note the following corrections (in **bold**) to the lesser included offense chart reprinted from the *NY Defender Digest* in the September 1998 (Vol. XII, No. 8) *Backup Center REPORT*:

GREATER OFFENSE	POTENTIAL LESSER	YES/NO	AUTHORITY
MURDER (2d), PL 125.25(2)	Manslaughter, (1st), PL 125.20(2)	**no**	*People v. Farden,* 82 NY2d 638
RAPE (1st), PL 130.35(1)	Coercion, (2d), PL 135.60	no	*People v. Catron,* 143 AD2d 46**8**