

00-6165

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Ana ZGOMBIC,

Appellee/Petitioner,

v.

Steven FARQUHARSON, District Director,
Immigration and Naturalization Service, et al.

Appellants/Respondents.

ON APPEAL FROM THE DISTRICT OF CONNECTICUT

**BRIEF OF *AMICUS CURIAE*
New York State Defenders Association**

NEW YORK STATE DEFENDERS ASSN.
Jonathan E. Gradess
Executive Director
Manuel D. Vargas
Project Director
Criminal Defense Immigration Project
Sejal R. Zota
Law Graduate on the Brief
P.O. Box 20058
West Village Station
New York, New York 10278
(212) 367-9104

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

IDENTITY AND INTEREST OF AMICUS CURIAE 3

ISSUE ADDRESSED 4

STATUTORY AND CASE LAW BACKGROUND 4

SUMMARY OF ARGUMENT 6

ARGUMENT 7

THE GOVERNMENT’S APPLICATION OF THE 1996 IMMIGRATION LAW
AMENDMENTS BARRING ELIGIBILITY FOR 212(C) RELIEF FROM
REMOVAL TO ANY INDIVIDUAL WHOSE REMOVABLE CONDUCT PRECEDED
ENACTMENT OF THE AMENDMENTS IS IMPERMISSIBLY RETROACTIVE

A. This court has correctly found that the government’s application of the amendments barring relief from removal to a pre-amendment guilty plea is impermissibly retroactive as it changes the legal effect of prior conduct - the guilty plea 7

B. This court should also find impermissibly retroactive the government’s application of the amendments barring relief in any case based on pre-amendment criminal conduct even where a guilty plea was not entered before enactment 8

1. Supreme Court decisions analyzing the retroactivity of new civil statutes establish that a showing of reliance on prior law is only one way to demonstrate that a new statute has impermissibly changed the legal effect of prior conduct 10

2. The Supreme Court’s decisions rely in part on the Court’s ex post facto decisions in criminal cases which also make clear that reliance on prior law need not be shown in order for a new statute to have impermissible retroactive effect 16

3. The Supreme Court’s and this Court’s ex post facto decisions establish that the date of the underlying conduct is the appropriate measuring date for analyzing the permissible retroactivity of laws imposing new penalties for criminal conduct 18

4. The date of conduct measuring marker for retroactivity analysis developed in the Supreme Court's ex post facto cases provides a clear test and avoids the need for the Court to develop a case-by-case reliance standard . . . 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Carmell v. Texas, 120 S.Ct. 1620 (2000) 17,18

Collins v. Youngblood, 497 U.S. 37 (1990) 19

Dobbert v. Florida, 432 U.S. 282 (1977) 19

Dunbar v. INS, 64 F.Supp.2d 47 (D.Conn. 1999)
15

Francis v. INS, 532 F.2d 268 (2d Cir. 1976) 4

Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998),
cert. denied, 119 S.Ct. 1140 (1999) 15

Henderson v. INS, 157 F.3d 106 (2d Cir. 1998),
cert.denied, 119 S.Ct. 1140 (1999) 5

Hughes Aircraft Company v. United States ex rel. Schumer,
520 U.S. 939 (1997) 12,13,14,16

Johnson v. United States, 120 S. Ct. 1759 (2000) 22

Landgraf v. USI Film Products,
511 U.S. 244 (1994) 10,11,12,14,16

Lindsay v. Washington, 301 U.S. 397 (1937)
17,19,20

Lynce v. Matthis, 519 U.S. 433 (1991)
16,17,18

Maria v. McElroy, 68 F.Supp.2d 206 (E.D.N.Y. 1999)
15

Martin v. Hadix, 119 S.Ct. 1998 (1999)
10

Matter of Silva, 16 I&N Dec. 26 (BIA 1976) 4

Miller v. Florida, 482 U.S. 423 (1987) 19

Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997)
15

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 13

<u>Pena-Rosario v. Reno</u> , 83 F. Supp.2d 349 (E.D.N.Y.)	15,28
<u>Pottinger v. Reno</u> , 51 F.Supp.2d 349 (E.D.N.Y. 1998)	15
<u>Rivers v. Roadway Exp. Inc.</u> , 114 S.Ct. 1510 (1994)	12,13
<u>Santos-Gonzalez v. Reno</u> , 93 F.Supp.2d 286 (E.D.N.Y. 2000)	15
<u>St. Cyr v. INS</u> , No. 99-2614, 2000 WL 1234850 (2d Cir.)	passim
<u>State v. Lindsay</u> , 61 P.2d 293 (Wash. 1936)	20
<u>United States v. Labeille-Soto</u> , 163 F.3d 93 (2d Cir. 1998)	20
<u>United States v. Meeks</u> , 25 F.3d 1117 (2d Cir. 1994)	18,21,22
<u>United States v. Patasnik</u> , 89 F.3d 63 (2d Cir. 1998)	20
<u>United States v. Rivers</u> , 50 F.3d 1126 (2d Cir. 1995)	21
<u>United States v. Zagari</u> , 111 F.3d 307 (2d Cir. 1997)	21
<u>Warden, Lewisburg Penitentiary v. Marrero</u> , 417 U.S. 653 (1974)	17
<u>Weaver v. Graham</u> , 450 U.S. 24 (1981)	19
<u>Yesil v. Reno</u> , 958 F. Supp. 828 (S.D.N.Y. 1997)	25

Statutes

AEDPA 440(d)	passim
IIRIRA 304(b)	passim
INA 212(a)(2)(A)(i),(C),(D) & (E), 8 U.S.C. 1182(a)(2)(A)(i),(C),(D) & (E)	23
INA 212(c), 8 U.S.C. 1182(c) (1994)	passim

PRELIMINARY STATEMENT

This Court is confronted in this case with determining whether it is permissible for the government to apply new statutes to conduct that occurred many years earlier. The Constitution's Ex Post Facto Clause clearly prohibits retroactive application of criminal statutes to past conduct. Where the statute at issue is civil, however, the Supreme Court has generally held that the prohibition of the Ex Post Facto Clause does not apply. Nevertheless, when legislative intent regarding application of a new civil statute to past conduct is unclear, the Court applies a presumption against retroactive application. And, regardless of whether the statute at issue is criminal or civil, the Court applies the same analysis to answer the preliminary question of whether the statute has a "retroactive effect."

In this case, the new statutes at issue -- 1996 immigration law amendments barring relief from removal for certain criminal offenses -- are deemed civil. Thus the prohibition of the Ex Post Facto Clause has been found not applicable. However, as this Court has already found, Congressional intent regarding retroactive application of these new statutes is unclear. Thus, this Court must determine if application of these statutes in a removal case based on prior conduct has retroactive effect in conflict with the traditional presumption against retroactive application of a new civil statute. Given that the same "retroactive effect" analysis applies regardless of whether a new statute is criminal or civil, this Court should look to the analysis of criminal ex post facto as well as civil retroactivity

cases on this question. This is especially so since the past conduct in question here is criminal.

The New York State Defenders Association - a criminal justice organization - therefore offers this amicus curiae brief to present this Court with law developed by the Supreme Court in criminal as well as civil cases on the question of whether a new statute has impermissible retroactive effect when applied in a case based on past criminal conduct. Quite simply, the Supreme Court precedents establish that there is retroactive effect whenever application of a new statute to past criminal conduct results in changing the legal effect of the conduct, regardless of whether the affected individual acted in reliance on prior law. The Supreme Court's precedents thus support the district court's finding below that it is impermissibly retroactive for the government to apply the immigration law amendments at issue here - which change the legal effect of certain criminal offenses by mandating deportation -- to an individual whose criminal conduct preceded these amendments.

This amicus curiae brief is filed pursuant to Rule 29 of the Federal Rules of Appellate Procedure.

IDENTITY AND INTEREST OF AMICUS CURIAE

The New York State Defenders Association (NYSDA) is a not-for-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and other persons throughout the State of New York. Its objectives are to improve the quality of public defense services in the state, establish standards for practice in the representation of poor

people, and engage in a statewide program of community legal education. Among other initiatives, NYSDA operates the Criminal Defense Immigration Project, which provides public defender, legal aid society, and assigned counsel program lawyers with legal research and consultation, publications, and training on issues involving the interplay between criminal and immigration law.

In seeking to improve the quality of justice for individuals accused of crimes in New York State, NYSDA has an interest in the fair and just administration of the nation's immigration laws relating to individuals who have been convicted of crimes. It thus seeks to assist the Court in correctly deciding whether it is impermissibly retroactive for the government to apply new immigration laws eliminating relief from removal against persons whose criminal conduct preceded enactment of the new laws. NYSDA believes that its insights, borne from its expertise in both criminal and immigration law and practice will assist the Court in reaching a fair and just resolution of this issue.

ISSUE ADDRESSED

The brief addresses whether the district court correctly concluded that application of the 1996 immigration law amendments barring relief from removal is impermissibly retroactive in a case of an individual whose criminal conduct underlying the removal charge preceded enactment of the amendments.

STATUTORY AND CASE LAW BACKGROUND

For decades prior to the immigration law amendments of 1996, lawful permanent resident immigrants charged with committing a crime had a statutory right to seek a waiver of any resulting charge of excludability or deportability under Section 212(c) of the Immigration and Nationality Act (INA), provided the immigrant had been lawfully domiciled in the United States for seven years. See former INA 212(c), 8 U.S.C. 1182(c) (1994), as added by Immigration and Nationality Act of 1952; see also Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (holding that 212(c) relief is available in deportation as well as exclusion proceedings); Matter of Silva, 16 I&N Dec. 26 (BIA 1976) (adopting and applying Francis holding nationwide). The 212(c) waiver was unavailable only for so-called "aggravated felonies" for which the individual had served five or more years in prison. See former INA 212(c), 8 U.S.C. 1182(c) (1994).

In 1996, Congress amended the Immigration and Nationality Law twice. First, in section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA), Congress barred 212(c) waivers for several categories of criminal offenses. Pub. L. No. 104-132, 110 Stat. 1214 (1996). Subsequently, in section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act

(IIRIRA), Congress repealed section 212(c) and replaced it with a form of relief called cancellation of removal that is barred for individuals convicted of any aggravated felony, regardless of time served. Pub.L. 104-208, 110 Stat. 3009.

In this and other cases, the government seeks to apply AEDPA section 440(d) and IIRIRA section 304(b) to deny the statutory right to seek 212(c) relief even to lawful permanent residents charged with having committed offenses prior to the effective dates of these laws. However, AEDPA and IIRIRA contained no language making either of these bars to relief applicable to pre-Act convictions or conduct.

In 1998, this Court held that Congress did not intend for AEDPA section 440(d) to be applied in deportation cases that were pending when AEDPA was enacted. Henderson v. INS, 157 F.3d 106 (2d Cir. 1998), cert. denied sub nom Navas v. Reno, 119 S.Ct. 1141 (1999). Then, in September of this year, after finding Congressional intent unclear with respect to the application of AEDPA section 440(d) and IIRIRA section 304(b) to pre-enactment convictions in deportation cases not yet pending on the effective dates of these laws, this Court applied the traditional presumption against retroactive application of a new civil statute and held that the AEDPA and IIRIRA bars on applying for 212(c) relief do not extend to a lawful permanent resident who pled guilty or *nolo contendere* to an otherwise qualifying crime prior to the enactment dates of these laws. St. Cyr v. INS, No. 99-2614, 2000 WL 1234850, *15. The Court's St. Cyr decision included a brief discussion, not necessary to the holding of that case,

suggesting that the AEDPA and IIRIRA bars may otherwise permissibly be applied to pre-Act conduct. Id., at *12.

SUMMARY OF ARGUMENT

This Court has correctly found that the government's application of immigration law amendments barring eligibility for relief from removal to an individual who pled guilty to the conduct underlying the removal charge prior to enactment of the amendments is impermissibly retroactive. St. Cyr, No. 99-2614, 2000 WL 1234850. However, while entry of a guilty plea in reliance on the availability of relief from deportation graphically illustrates the unfairness of retroactive application of the amendments barring relief to past conduct, Supreme Court precedents establish that actual reliance need not be shown for a new statute to have impermissible retroactive effect. What matters is simply whether the new provisions attach new legal consequences to prior conduct, regardless of whether actual reliance may be shown. The Supreme Court's retroactivity analysis in criminal ex post facto cases - which the Supreme Court has applied to determining whether civil statutes have impermissible retroactive effect - establishes that the date of the alleged criminal conduct is the appropriate measuring date for analyzing the permissible retroactivity of laws imposing new penalties for criminal conduct. Moreover, the date-of-conduct is an appropriate yardstick because it provides a clear test and eliminates the need for this Court to develop a case-by-case reliance standard. Thus, this Court should affirm the holding of the district court below that it is impermissibly retroactive for the government to apply the immigration law amendments at issue

here to an individual whose underlying conduct pre-dated enactment of the amendments.

ARGUMENT

THE GOVERNMENT'S APPLICATION OF THE 1996 IMMIGRATION LAW AMENDMENTS BARRING ELIGIBILITY FOR 212(C) RELIEF FROM REMOVAL TO ANY INDIVIDUAL WHOSE REMOVABLE CONDUCT PRECEDED ENACTMENT OF THE AMENDMENTS IS IMPERMISSIBLY RETROACTIVE

A. This Court has correctly found that the government's application of the amendments barring relief from removal to a pre-amendment guilty plea is impermissibly retroactive as it changes the legal effect of prior conduct - the guilty plea

This Court has previously addressed whether the immigration law amendments at issue here - AEDPA section 440(d) and IIRIRA 304(b) - have impermissible retroactive effect when applied to a lawful permanent resident immigrant who committed his criminal conduct and pled guilty to the conduct prior to these amendments. See St. Cyr, No. 99-2614, 2000 WL 1234850.

In St. Cyr, the Court started with the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." Id. at *6(citing Landgraf v. USI Film Prod., 521 U.S. 244, 265 (1994) quoting Scalia concurrence in Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990)). After finding Congressional intent unclear with respect to the application of AEDPA section 440(d) and IIRIRA section 304(b) in a case in which the individual pled guilty prior to enactment of these provisions, the Court then turned to the question of whether such application would have "retroactive effect." The Court properly explained: "If application of the statute to the conduct at issue would have retroactive effect, 'then, in keeping with our 'traditional presumption' against retroactivity, we presume that the statute

does not apply to that conduct.'" Id. at *6 (citing Martin v. Hadix, 527 U.S. 343, 352 (1999) quoting Landgraf, 521 U.S. at 280).

The Court correctly found that applying AEDPA section 440(d) and IIRIRA 304(b) in a case where the lawful permanent resident immigrant pled guilty before the effective dates of AEDPA and IIRIRA has retroactive effect because it "would upset settled expectations and change the legal effect of prior conduct." Id. at *12.

B. This Court should also find impermissibly retroactive the government's application of the amendments barring relief in any case based on pre-amendment criminal conduct even where a guilty plea was not entered before enactment

In reaching its holding in St. Cyr that AEDPA section 440(d) and IIRIRA 304(b) may not be applied to pre-amendment guilty pleas, this Court cited the reasonable reliance of lawful permanent residents on general and specific knowledge about the availability of relief from deportation when they pled guilty in criminal proceedings. No. 99-2614, 2000 WL 1234850, *12-14. In dicta, however, the Court suggested that there could never be such reasonable reliance -- or the presence of any other factor demonstrating impermissible retroactive effect of the new law -- at the time of commission of the crime.¹

¹ The Court's terse statement was: "[I]t is difficult to argue that barring eligibility for discretionary relief on the basis of pre-enactment criminal conduct - as opposed to a plea going to the guilt of a deportable crime [-] constitutes an impermissible retroactive application of a statute." St. Cyr, No. 99-2614, 2000 WL 1234850, *12. In support of this dicta statement, the Court cited and quoted the language used by other circuits to reject the St. Cyr Court's finding that there is retroactive effect when a new immigration law bars relief based on a pre-enactment conviction (including a guilty plea): "It would border on the absurd to argue that these aliens might have decided not to

This dicta is incorrect. Reliance need not be shown. In fact, as discussed below, the Supreme Court's retroactivity decisions, in both civil and criminal contexts, have established that reliance on prior law is only one way of guiding the determination of whether a new law has retroactive effect. Moreover, the Supreme Court's retroactivity jurisprudence makes it clear that the date of conduct is the appropriate measuring date for assessing whether application of a new law results in a change in the legal consequences of prior conduct and therefore has impermissible retroactive effect.

1. Supreme Court decisions analyzing the retroactivity of new civil statutes establish that a showing of reliance on prior law is only one way to demonstrate that a new statute has impermissibly changed the legal effect of prior conduct.

Supreme Court case law is clear that persons need not show individual reliance before they can avoid the adverse consequences of a retroactive application of a new law where Congress did not expressly provide for such retroactive application. What matters is simply "whether the new provision attaches new legal consequences to events completed before its enactment." Martin v. Hadix, 527 U.S. 343, 357-358 (1999)(quoting Landgraf, 511 U.S. at 269-270). Thus, in Landgraf and other cases where the Supreme Court has analyzed whether a new civil statute has impermissible retroactive effect, the essential question is not whether the person expressly relied on a given understanding of the law, but whether applying the new law to past events changes the

commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation." Id.

consequences of the relevant conduct. Landgraf v. USI Film Prod., 521 U.S. 244 (1994).

In Landgraf, the question was whether new civil rights remedies could be imposed based on past illegal sexual harassment. Landgraf, 521 U.S. 244. The Court ruled that, even though the sexual harassment was illegal at the time it occurred, a change in the legal consequences attaching to it -- in the form of a new type of damage remedy -- should not be applied to conduct pre-dating the enactment of the new damage remedy. "[T]he extent of a party's liability, in the civil context as well as the criminal," the Court explained, "is an important legal consequence that cannot be ignored." Id. at 283-284. (emphasis in original). Among many other tests, the Court stated that "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance," when determining retroactivity. Id. at 270. This is the same test emphasized and applied by this Court in St. Cyr when, in dicta, it indicated that the right to apply for §212(c) should be limited to immigrants who pled guilty prior to IIRIRA's enactment date. St. Cyr, No. 99-2614, 2000 WL 1234850, at *15. However, such reliance concerns were not determinative in Landgraf, as the Court acknowledged that "concerns of unfair surprise and upsetting expectations are attenuated in the case of intentional employment discrimination, which has been unlawful for more than a generation." Despite the lack of reliance interests, the Court stated that "fairness concerns would not be entirely absent if the damages provisions of § 102 were to apply to events preceding its enactment. Even when the conduct in question is morally

reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." Id. at 283, n.35. Thus, the Landgraf court made clear that reliance is not the only factor in determining whether a statute has a retroactive effect.

Furthermore, the Court indicated that there are many ways a new statute could be found to have a retroactive effect invoking the presumption against retroactivity. Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939, 947 (1997). Among the wide range of statutory provisions specified by Landgraf as ones where "a new legal consequence" may be found, are those that: (1) "affect[] substantive rights," Landgraf, 511 U.S. at 278, or (2) "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," id. at 280, or (3) "sweep away settled expectations suddenly and without individualized consideration," id. at 266, or (4) "'change[] the legal consequences of acts completed before [the new law's] effective date,'" id. at 269 n.23, or (5) "give[] 'a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed,'" id., or (6) "impos[e] new burdens on persons after the fact," id. at 270, or (7) may be "retributive," id. at 282.

In Rivers v. Roadway Exp. Inc., 114 S.Ct. 1510 (1994), a case decided the same day as Landgraf, the Supreme Court also made clear that reliance interests are not a determinative factor. Instead, the retroactivity determination hinges on whether the new statute creates substantive liabilities for

preenactment conduct. In this case, the issue was whether §101 of the Civil Rights Act of 1991, which provided an action for discriminatory contract terminations, could apply to a case that was pending prior to the passage of the new law. See id. At the time the allegedly discriminatory charge occurred, Sixth Circuit precedent held that §1981 could support a claim for discriminatory contract termination, but before the case reached trial, the Supreme Court held, in Patterson v. McLean Credit Union, 491 U.S. 164 (1989), that §1981 does not apply to discriminatory contract terminations. While the petitioner's appeal was pending, §101 became law, effectively overruling the Supreme Court's decision in Patterson. The statute in this case did not implicate reliance concerns relating to retroactivity because the new statute simply enacted a rule that the parties believed to be the law when they acted - that it was illegal to terminate a contract based on grounds of racial discrimination. However, despite no claim of unfair surprise, the Court found the statute to be retroactive because it created new liabilities. Id. at 1519-1520.

The Supreme Court has also determined that a new law can have a genuinely retroactive effect without changing the theoretical extent of a party's liability. In Hughes Aircraft, the Court found retroactive effect when a 1986 amendment was applied to a case submitted prior to the amendment's adoption, causing a private party to lose a defense against private suits for submitting a false claim to the government. 520 U.S. 939. Elimination of the defense in question technically did not increase the defendant's liability exposure because it had never

been available in suits brought by government litigators. The Court stated: "while we acknowledge that the monetary liability faced by [this] defendant is the same whether the action is brought by the Government or a qui tam relator, the 1986 amendment eliminates a defense to a qui tam suit--prior disclosure to the Government--and therefore changes the substance of the existing cause of action ... by 'attaching a new disability, in respect to transactions or considerations already past.' " Id. at 948(quoting Landgraf).

The Court emphasizes that the legal effect of the 1986 amendment would be to deprive Hughes of that defense. However, nowhere is there a showing that the party *relied* on the government failing to pursue a suit, the only instance in which the defense would be beneficial. Apparently, the court did not regard such a showing of "reasonable reliance, and settled expectations" necessary or even significant to its determination. Under this standard, the application of AEDPA § 440(d) or IIRIRA § 304(b) to a noncitizen who committed a prior criminal offense would have a retroactive effect similar to that in Hughes Aircraft. The elimination of the right to apply for section 212(c) relief, like the elimination of the prior government disclosure defense in Hughes Aircraft, does not change the magnitude of the petitioner's potential liability. It does, however, increase the likelihood that this liability, i.e., deportation, will be imposed. In light of the fact that relief was previously granted in over fifty percent of all Section 212(c) applications, see Goncalves v. Reno, 144 F.3d 110, 128 (1st

Cir. 1998) (citing Mojica v. Reno, 970 F.Supp. 130, 178 (E.D.N.Y. 1997)), cert. denied, 119 S.Ct. 1140 (1999), retroactive application of section 440(d) would effect a major change in the consequences of past conduct.

Under these Supreme Court precedents, the degree to which an individual might have considered the immigration consequences of a crime at the time he or she committed it is not decisive. What is relevant is the imposition of a new burden or liability on a past act. Because both AEDPA § 440(d) and IIRIRA § 304(b) attach "new legal consequences" - increase the likelihood that deportation will be imposed- "to events completed before their enactment," the laws must be found impermissibly retroactive with respect to noncitizens who committed prior criminal offenses. See Santos-Gonzalez v. Reno, 93 F.Supp.2d 286 (E.D.N.Y. 2000); Pena-Rosario v. Reno, 83 F. Supp.2d 349, motion for reconsideration denied, 2000 WL 620207 (E.D.N.Y. 2000); Maria v. McElroy, 68 F.Supp.2d 206 (E.D.N.Y. 1999); Dunbar v. INS, 64 F.Supp.2d 47 (D.Conn. 1999); Pottinger v. Reno, 51 F.Supp.2d 349 (E.D.N.Y. 1999).

- 2. The Supreme Court's decisions in civil retroactivity cases rely in part on the Court's ex post facto decisions in criminal cases which also make clear that reliance on prior law need not be shown in order for a new statute to have impermissible retroactive effect.**

In Landgraf and Hughes Aircraft - cases addressing the retroactivity of civil statutes -- the Supreme Court turned to ex post facto jurisprudence to help it decide what consequences are genuinely retroactive and thus subject to Landgraf's clear

statement rule. Although the Court noted that the Ex Post Facto Clause prohibition itself is limited to punitive legislation, it nonetheless relied on this case law to answer the independent question of what it means for a law - whether civil or criminal - to be retroactive. See, e.g., Hughes Aircraft, 520 U.S. at 948 (citing Collins v. Youngblood, 497 U.S. 37 (1990) and Beazell v. Ohio, 269 U.S. 167, 169-70 (1925)); Landgraf, 511 U.S. at 269 n. 23 (citing Miller v. Florida, 482 U.S. 423 (1987)).

Supreme Court decisions applying the Ex Post Facto Clause recognize that new laws have impermissible retroactive effect when they change the legal consequences of past conduct, regardless of whether actual reliance on prior law can be demonstrated. For example, in Lynce v. Matthis, 519 U.S. 433 (1991), the Supreme Court found that a statute which cancelled defendant's provisional early release credits that were awarded to alleviate prison overcrowding had impermissible retroactive effect, where his offense was committed prior to the enactment of the new statute. The Court did so despite the government's argument that the defendant "could not reasonably have expected to receive any overcrowding credits" when he entered his plea of nolo contendere. Id. at 446. Even though "the State, after all, could have alleviated the overcrowding problem in various ways..." the Court found this argument unpersuasive. Id.

Indeed, in the Supreme Court's decision this year in Carmell v. Texas, 120 S.Ct. 1620 (2000), the Court explained that "the absence of a reliance interest is not an argument" for failing to recognize ex post facto increases in punishment, "as there are few, if any reliance interests in planning future criminal

activities based on the expectation of less severe repercussions." Id., at 1632. "There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." Id., at 1633.

Moreover, the retroactivity analysis of the Supreme Court's ex post facto case law specifically recognizes the retroactive effect of a change from a discretionary penalty system to a system of mandatory penalties. See, e.g., Lindsay v. Washington, 301 U.S. 397 (1937) (Court held that a statute changing a maximum sentence to a mandatory sentence for offense committed prior to the statute's enactment is an impermissible ex post facto law); Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 663 (1974) (Court indicated that a statute taking away parole eligibility for offenses subject to parole according to the law at the time they were committed was impermissible as an ex post facto law); see also United States v. Meeks, 25 F.3d 1117 (2d Cir. 1994) (Court held that statute requiring mandatory minimum sentencing of defendant found in possession of controlled substance during supervised release impermissibly violates ex post facto law, where the commission of the original offense predated the mandatory minimum statute). These decisions do not require a showing of reliance on prior law from the individual seeking to demonstrate the retroactive effect of a new law.

- 3. The Supreme Court's and this Court's ex post facto decisions establish that the date of the underlying conduct is the appropriate measuring date for analyzing the permissible retroactivity of laws imposing new penalties for criminal conduct.**

While the Ex Post Facto Clause prohibition does not apply here, the relevant and applicable retroactivity analysis of the Supreme Court's ex post facto decisions makes abundantly clear that the crucial date for determining retroactive effect of laws imposing new penalties for criminal conduct is the date of that conduct. See Carmell v. Texas, 120 S.Ct. 1620 (May 2000) (holding that a new law that alters the legal rules of evidence, and receives less testimony in order to convict the offender may not be applied in a trial for offenses *committed before* the amendment's effective date without violating ex post facto clause); Lynce v. Mathis, 519 U.S. 433 (1999) (holding that retroactive cancellation of provisional early release credits awarded to alleviate prison overcrowding violated the ex post facto clause because the law was applied to events occurring before its enactment); Collins v. Youngblood, 497 U.S. 37, 42 (1990) (law violates ex post facto clause if it "makes more burdensome the punishment for a crime *after its commission...*"); Miller v. Florida, 482 U.S. 423 (1987) (holding that application of revised sentencing guidelines that went into effect between the date of the petitioner's offense and the date of his conviction violated ex post facto clause); Weaver v. Graham, 450 U.S. 24 (1981) (holding that a Florida statute repealing an earlier statute and reducing amount of "gain time" for good conduct and obedience to prison rules deducted from a convicted prisoner's sentence cannot apply to prisoners convicted for acts *committed before* the provision's effective date); Dobbert v. Florida, 432 U.S. 282, 292 (1977) (law violates Ex Post Facto

Clause if it "... makes more burdensome the punishment for a crime after its commission..."); Lindsey v. Washington, 301 U.S. 397, 401 (1937)(holding that the "constitution forbids application of any new punitive measure to crime *already consummated* to detriment or material disadvantage of wrongdoer," and hence "[an] increase in possible penalty is ex post facto, regardless of length of sentence actually imposed...").

For the purposes of retroactivity analysis, these ex post facto cases always look to the date of the offense as the measuring marker, even when the new statute makes reference to the date of conviction. For example, in Lindsey v. Washington, an individual was affected by a new sentencing statute enacted on June 12, 1935, after he committed the offense on April 15, 1935, but before criminal proceedings commenced in September 1935. Lindsey v. Washington 301 U.S. at 398; State v. Lindsay, 61 P.2d 293,294 (Wash. 1936). The old statute authorized a sentence within a maximum and minimum range, but the law at the time of the trial, provided, (section 10249-2): "When a person is *convicted* of any felony ... the court shall sentence such person to the penitentiary ... , and shall fix the maximum term of such person's sentence only." State v. Lindsay, 61 P.2d at 295 (emphasis added). Thus, even though the statute made the sentence contingent on *conviction*, the Court found the statute violated the Ex Post Facto Clause because retroactive effect is measured from the date of the offense.

The Second Circuit's ex post facto jurisprudence also recognizes that the measuring date for retroactivity analysis in cases involving alleged criminal conduct is the date of the

conduct, regardless of the date of conviction. See United States v. Labeille-Soto, 163 F.3d 93 (2d Cir. 1998) (holding that an increased special assessment fine, imposed upon conviction of felony of illegal entry into the United States, violated ex post facto clause where the offense was completed prior to the enactment of the new law); United States v. Patasnik, 89 F.3d 63 (2d Cir. 1998) (finding that district court's use of amended Guidelines manual to depart upward where defendant would not have been subject to such an enhancement under the manual in effect at the time he committed his offense violated the ex post facto); United States v. Zagari, 111 F.3d 307, 323, 325 (2d Cir. 1997) (holding that the trial court's "use of the November 1989 Guidelines to sentence defendant for a course of conduct which ended in October 1989 violated the ex post facto clause" because "the later Manual yielded a more onerous offense level"); United States v. Rivers, 50 F.3d 1126, 1129 (2d Cir. 1995)(holding "that the application of a [sentencing] guideline amendment that takes effect after the defendant commits his offense and increases the punishment for that offense violates the Ex Post Facto Clause, and the sentencing court must therefore apply the pre-amendment version of the Guidelines," citing United States v. Paccione, 949 F. 2d 1183, 1204 (2d Cir. 1991), cert. denied, -- U.S. --, 112 S.Ct. 3029, 120 L.Ed.2d 900 (1992)); United States v. Meeks, 25 F.3d 1117 (2d Cir. 1994)(holding that statute requiring mandatory minimum sentencing of defendant found in possession of controlled substance during supervised release violates ex post facto law, where the commission of the original offense predated mandatory

minimum statute, but supervised release violation occurred after enactment of statute).

Contrary to the Supreme Court's and this Court's focus on the date of the alleged criminal conduct as the measuring marker for determining whether application of a new law changing the legal consequences of such conduct has impermissible retroactive effect, this Court's dicta in St. Cyr instead focused principally on the noncitizen's secondary conduct - the date on which the noncitizen pleaded guilty. See St. Cyr, No. 99-2614, 2000 WL 1234850. However, in the ex post facto cases, the Supreme Court has held that the date of the primary conduct - the alleged criminal conduct -- should be the governing date for determining the retroactive effect of a new statute, regardless of the date of any secondary conduct. For example, in a case where an individual violated supervised release after a new law changing post-revocation penalties, the Court held that the date of the original conviction, not the date of the secondary violation of supervised release, was the operative event for retroactivity analysis. See Johnson v. United States, 120 S. Ct. 1759, 1800 - 1801 (2000); see also Meeks, 25 F.3d 1117 (rejecting government argument that the new penalty for supervised release is not retroactive because it was enhanced before the defendant engaged in his supervised release-violative conduct, hence having had notice and fair warning that the conduct will result in the enhanced penalty).

In the deportation context, fairness concerns present even a stronger case than the ex post facto cases for deeming the date of the criminal offense, the primary conduct, as the operative

event. In the ex post facto cases involving parole and supervised release, the individual could avoid the new penalty by not engaging in the secondary conduct triggering the new penalty. In this and similar deportation or removal cases, however, the options at the secondary plea or trial stage are unavoidably changed by the government's application of the 1996 immigration amendments to past criminal conduct.

Moreover, it is a legal fiction to conclude that "... the conviction, not the underlying criminal act, triggers the disqualification from §212 (c) relief." St. Cyr, No. 99-2614, 2000 WL 1234850, at *12. Such a determination ignores that deportation - like the mandatory minimum sentence in Lindsey v. Washington -- is clearly meant to be a penalty for the commission of the criminal conduct itself, not for the guilty plea or conviction. Thus, lawful permanent residents can be prevented from reentering the United States solely on the basis of an *admission or reasonable suspicion* of certain criminal conduct, even if that person has not been *convicted*. See INA § 212(a)(2)(A)(i),(C),(D) &(E), 8 U.S.C. § 1182(a)(2)(A)(i),(C),(D) &(E). The actual act of committing the crime, not the conviction or the guilty plea, is the dispositive factor. Accordingly, barring 212(c) relief is impermissibly retroactive for permanent residents who committed their crimes prior to the effective date of AEDPA and IIRIRA.

4. The date of conduct measuring marker for retroactivity analysis developed in the Supreme Court's ex post facto

cases provides a clear test and avoids the need for the Court to develop a case-by-case reliance standard

This brief has demonstrated that it would be contrary to Supreme Court precedent to find that reliance must be shown in order for a new statute to have impermissible retroactive effect. However, should this Court be reluctant to find impermissible retroactive effect in the absence of some showing of reliance, this Court should consider that its decision in St. Cyr addresses the potential for reliance in only one context - where an individual pleads guilty or nolo contendere (hereinafter referenced as pleas of guilt) prior to the new laws. In fact, there are several other circumstances where an individual may have acted prior to the new statute in reliance on the possibility of avoiding deportation afforded by prior law.

Other examples of circumstances where lawful permanent resident immigrants may have relied on the possibility of avoiding deportation afforded by prior law - other than where an individual pled guilty prior to the new laws -- include the following:

- Lawful permanent resident immigrant rejected a plea and pursued acquittal in reliance on the possibility of relief from deportation even if found guilty after trial²
- Lawful permanent resident immigrant did not reject plea but agreed to cooperate with law enforcement authorities,

² Alternatively, the immigrant choosing to go to trial may have examined the immigration effects of a possible conviction and realized, accurately at that time, that the conviction had no immigration consequences whatsoever. This may have been a catalyst for a decision to forego a guilty plea, as there was no need to worry about negotiating a plea for the goal of preserving immigration status.

with plea delayed until completion of cooperation resulting in plea being entered after enactment of new laws³

- Lawful permanent resident immigrant pursued motion to suppress, discovery motion, or other pre-trial motion, with plea delayed until such preliminary proceedings completed resulting in plea being entered after enactment of new laws
- Lawful permanent resident immigrant did not reject plea, but plea hearing was not scheduled until after enactment of new laws for reasons beyond the control of the individual
- Lawful permanent resident immigrant was already in immigration proceedings when the new laws were enacted and could have relied on the law then in effect even if the individual did not plead guilty to a criminal offense until later (as in the case of Ms. Zgombic)

These are all examples of situations where individuals may have relied on well settled expectations that deportation might be avoided. Just like those who pled guilty prior to enactment of the new laws, some persons affected by new laws may be capable

³An example of such an individual is the petitioner in Yesil v. Reno, who, "at great risk to his life and safety," began cooperating with law enforcement authorities after his alleged criminal conduct in the years before the enactment of AEDPA section 440(d) and IIRIRA section 304(b). 958 F.Supp. 828, 830 (S.D.N.Y. 1997). He infiltrated a cocaine and heroin organization and his efforts led to a number of arrests and the seizure of kilograms of drugs. Had the plea of guilty of someone like Mr. Yesil been delayed due to his cooperation until after the enactment of the new laws, he would under St. Cyr be denied the possibility of seeking 212(c) relief of which he might have been assured.

of showing reliance; others may not. The fact that one is unable to document reliance, however, does not mean that there was no reliance or settled expectations. For example, there may be no record and it may be difficult to document that a plea was rejected and conviction of a more serious offense was risked based on an immigrant's belief that he or she would still be eligible for a waiver of deportation even if convicted of the more serious offense.

The point is that the measuring date cutoff suggested in dicta in St. Cyr - the date a guilty plea was entered -- is an underinclusive measure of those who may have counted on the relief from deportation that existed under prior law. In order to remedy this underinclusiveness, the courts need not make difficult, individualized determinations concerning the existence of actual reliance in each case. Case-by-case review is not the Supreme Court's standard for retroactivity analysis, and it would be impractical under the circumstances.

The standard delineated by the Supreme Court's ex post facto case law -- which looks to the date of the commission of the offense -- is the more practical method of measuring the retroactive effect in a situation where the underlying conduct is the commission of a crime. This measuring date is easy to administer and has been tested through the years of experience that the courts have had with the ex post facto doctrine.

In sum, failure to follow the rule of these Supreme Court precedents for analyzing the retroactive effect of AEDPA section 440(d) and IIRIRA section 304(b) in deportation or removal cases based on prior conduct will lead to the arbitrary, unfair, and

irrational results that we have described. On the other hand, the simple rule of retroactivity analysis in the Supreme Court's ex post facto jurisprudence - where the conduct date is the measuring date for assessing whether a new law has retroactive effect - will provide a simple and easy to administer test in the cases of lawful permanent resident immigrants whose pre-1996 criminal cases, for various random and often capricious reasons, did not result in guilty pleas prior to 1996.

CONCLUSION

What the Supreme Court's retroactivity decisions recognize, in both the civil and criminal contexts, is that people have a right to know the possible legal consequences of their actions at the time of their conduct, whether or not they will later be able to demonstrate actual individual reliance on that knowledge. Thus, whether or not a long-time lawful permanent resident like Ms. Zgombic is able to demonstrate actual reliance on the availability of relief from deportation at the time of her alleged deportable conduct, such reliance on prior law is presumed. As U.S. District Judge John Gleeson has stated:

Individuals are presumed to act against a backdrop of legal obligations. If they were not, there would be little problem with the retrospective application of many laws; there are likely to be few instances of an individual poring over a statute book before acting. "Whether or not the operative conduct might have been different, the immigrant has a presumptive right to the imposition of only those consequences which could have attached at the time he committed his act."

Pena-Rosario v. Reno, 2000 WL 150710, *16 (E.D.N.Y.) (quoting Maria v. McElroy, 68 F.Supp. 2d 206, 229 (E.D.N.Y., 1999)).

Here, the government's application of AEDPA section 440(d) and IIRIRA section 304(b) to lawful permanent residents convicted

of committing deportable offenses prior to the new law unquestionably eliminates a legal right -- eligibility for 212(c) relief from deportation -- based on criminal conduct that occurred in the past. Under prior law, long-time lawful permanent residents with criminal convictions faced possible, but not certain, deportation due to eligibility to seek 212(c) relief. However, if AEDPA section 440(d) and IIRIRA section 304(b) are applied to them, their statutory right to seek 212(c) relief is taken away and deportation becomes virtually inevitable. Thus, for such lawful permanent residents, the government's position changes a mere possibility of deportation into a certainty of deportation. Based on the Supreme Court's retroactivity jurisprudence, in the absence of a clear statement of retroactive legislative intent, such retroactive effect is presumptively impermissible.

For the foregoing reasons, amicus curiae respectfully urge that the Court affirm the district court's holding that the government's application of AEDPA Section 440(d) and IIRIRA Section 304(b) to Ms. Zgombic has retroactive effect and is, therefore, impermissible under the traditional presumption against retroactivity of a new civil statute.

Respectfully submitted,

NEW YORK STATE DEFENDERS ASSOCIATION
Jonathan E. Gradess,
Executive Director
Manuel D. Vargas,
Director,
Criminal Defense Immigration Project
Sejal R. Zota,
Law Graduate on the Brief

By: _____

Manuel D. Vargas (MDV 4515)
Criminal Defense Immigration Project
NEW YORK STATE DEFENDERS ASSOCIATION
P.O. Box 20058, West Village Station
New York, New York 10014
(212) 367-9104