

Defense-Relevant Immigration News

By Adam Lubow and Marianne C. Yang of NYSDA's
Immigrant Defense Project (IDP)*

2nd Circuit Rules NY Felony Reckless Assault Is a "Crime Involving Moral Turpitude," But Attempt Is Not

The Second Circuit recently affirmed a Board of Immigration Appeals (BIA) decision that a conviction for second-degree assault under NY Penal Law 120.05(4) (recklessly cause serious physical injury to another by means of a deadly weapon or dangerous instrument) constitutes a "crime involving moral turpitude" for immigration purposes. See *Gill v INS*, 420 F3d 82 (2d Cir. 2005). Focusing on the *mens rea* with which the crime must be committed, the court found the BIA's determination consistent with 2nd Circuit and BIA precedents that have ruled that crimes that must be committed knowingly or intentionally (or even recklessly in certain aggravated circumstances, such as reckless assault with a deadly weapon or when the resulting injury is serious), categorically involve moral turpitude. See *id.*, at 89-90 (internal cites omitted). A conviction that constitutes a "crime involving moral turpitude" under immigration law may trigger severe negative immigration consequences for non-citizens, among them immigration detention, removal from the US and ineligibility to obtain lawful immigration. See, e.g., 8 USC 1227(a)(2)(A)(i); 8 USC 1182(a)(2)(A)(i); 8 USC 1226(c)(1).

Mr. Gill, however, had been convicted of *attempted* second-degree assault under NY Penal Law 110/120.05(4) (attempting to recklessly cause serious physical injury to another by means of a deadly weapon or dangerous instrument), for which he had received a nine-month sentence of incarceration. The 2nd Circuit ruled that this conviction for the attempted reckless assault does not constitute a crime involving moral turpitude and, therefore, does not make Mr. Gill, a lawful permanent resident, deportable as charged under 8 USC 1227(a)(2)(A)(i). Noting that under New York's attempt statute (NY Penal Law 110.00), a defendant can only be guilty of an attempted crime if he specifically intends all elements of that crime, the court found it a "legal impossibility" in New York to be guilty of attempting to commit a reckless crime: "[A] person cannot 'attempt' (as this term is used in New

* IDP provides training and legal support to defense attorneys, other immigrant advocates, and immigrants themselves in defending against the immigration consequences of criminal dispositions. For back-up assistance on individual cases, call the IDP at (718) 858-9658 ext. 201. We return messages. IDP is located at 25 Chapel Street, Box 703, Brooklyn, NY 11201.

IDP UPDATED CONTACT INFO

NYSDA Immigrant Defense Project moved to a new home this year, thanks to the Center for Community Alternatives' Brooklyn office. The new mailing address is: NYSDA Immigrant Defense Project, 25 Chapel Street, Box 703, Brooklyn, NY 11201.

Defense Attorneys with questions about how to avoid or minimize the immigration consequences for their noncitizen clients should call (718) 858-9658 ext. 201. Messages will be returned as soon as possible.

Web site: www.immigrantdefenseproject.org

York criminal law) to commit a crime of recklessness, particularly not one defined, as in §120.05(4), by an unintended result such as bodily injury" *Gill*, 420 F3d at 91.¹ Because of the legal impossibility of the crime of attempted reckless assault, the court reasoned:

Without in any way questioning the *state's* ability to hold a defendant to his plea to an attempted reckless crime (which may have made practical sense in terms of reaching a contextually appropriate sentence or sentencing range), we find that, in the immigration context, *no* mental state can be clearly discerned from the conviction, let alone the sort of aggravated recklessness that has been found to demonstrate moral turpitude . . . [footnote omitted]

Id. The court accordingly reversed Mr. Gill's removal order and remanded with instructions to close his removal proceedings.

With *Gill*, the 2nd Circuit joins the 3rd Circuit in ruling that the legal impossibility of an attempted reckless crime under criminal law precludes a finding of moral turpitude in the immigration context. In *Knapik v Ashcroft*, 384 F3d 84 (3d Cir. 2004), the 3rd Circuit held that a conviction for New York attempted first-degree reckless endangerment under NYPL 110/120.25² was legally incoherent and therefore not a crime involving moral turpitude for immigration purposes.

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¹ To demonstrate its point the court cited, among other cases, *People v Campbell* (72 NY2d 602 [1988]) [dismissing a conviction for attempted Penal Law 120.05(3) which at that time penalized causing serious physical injury to a peace officer, police officer, etc., with the intent to prevent the officer from performing a lawful duty, because the physical injury can be unintended], and *People v Trepanier* (446 NYS2d 829, 833 [4th Dept 1982]) ["The crime of attempted reckless endangerment is nonexistent since it is a nonintentional offense"].

² NYPL 120.25 reads: "A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person."

From My Vantage Point *continued*

for the poor—things are worse in many, many respects than when I began.

NYSDA's Services Illustrate the Need for An Independent Public Defense Commission

The pride that I feel, and hope all of you share, in what NYSDA is and does cannot blind me to the fact that we are not enough. Only an entity that has oversight authority and the power of the purse can bring about the change needed to achieve our goal of high quality legal representation for all persons eligible for public defense representation in every county of the state. I have written here many times about the need for a statewide Independent Public Defense Commission. In this column, I wanted to make clear to you that our call for that Commission is a direct outgrowth of all we do at the Backup Center. I hope also that what NYSDA does has helped each of you, and will help you in the future. I hope that you will help us bring about the creation of a body that can do what we cannot.

About Katrina

This column was conceived before the massive tragedy wreaked upon New Orleans and the Gulf Coast by a natural disaster compounded rather than ameliorated by governmental reaction. My use of water analogies is not meant to disparage or exploit the suffering of Hurricane Katrina victims. Like all of you, I grieve for the loss of life, homes, and livelihoods there. I cannot help but note that the disregard that allowed New Orleans to be swept away is not unlike the disregard we have seen in the trickle-down policy failures that have for years assaulted our clients.

Let us mourn the dead and the destroyed lives of those who survived. Let us remember them and their losses, and honor them not by promises but by daily efforts to see and rectify the economic, racial, and social disparities that currently ensure more people suffer every day. As defenders, let us renew our work to bring real justice to every client. As New York residents, let us demand that our state put money into public defense and other programs to guarantee everyone in New York justice, freedom, and a chance to pursue happiness. As Americans, let us make known that we will no longer accept administration policies of deceit and death. ♪

Katrina Legal Aid Resource Center

The National Legal Aid and Defender Association, the American Bar Association, Probono.net, and the Legal Services Corporation present:

www.katrinalegalaid.org

A website with resources for people affected by the hurricanes, for legal aid and defender programs helping them, and for private attorney volunteers.

Immigration Practice Tips

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Bottom line: *Knapik* and *Gill* provide defense attorneys potential safe havens to avoid or minimize immigration consequences for their noncitizen clients. In removal proceedings that take place in the 2nd and 3rd Circuits, a conviction by guilty plea or trial to a New York *attempted* reckless crime should not be deemed a crime involving moral turpitude, even though the completed crime would be deemed moral turpitude. Practitioners should remember, however, that even if a conviction does not trigger the crime involving moral turpitude ground of removability, the same conviction might trigger another ground of removal, such as the "aggravated felony" ground. ♪

Job Opportunities *(continued from page 10)*

of Defender Legal Services, NLADA, 1140 Connecticut Avenue NW, Suite 900, Washington, DC 20036. Email to DDLS@nlada.org. Position is open until filled.

The Quixote Center, a non-profit social justice organization, seeks an exceptional, savvy, and experienced **Field Organizer** to launch our Equal Justice USA (EJUSA) program's Southeast Field Office. The EJUSA program is a recognized leader in the national movement to halt executions and raise public awareness about systemic inequities corrupting the imposition of the death penalty in the United States. The Field Organizer will work from home or in local office space and can be based anywhere in Tennessee, South Carolina, Georgia, or Alabama. Other states may be possible for the right candidate. The Field Organizer will work with campaigns in each of the above target states to help state-based groups develop anti-death penalty and moratorium campaigns and build their movements. The position will involve travel. The Quixote Center is a non-hierarchical workplace. All full-time staff receive equal base salaries and benefits regardless of tenure or position and decisions are made by consensus. AA/EOE. For a full job description see www.ejusa.org. Minimum Commitment: two years. Salary: \$32,000/year (plus up to \$6,000/year additional for staff with dependents). Excellent benefits, including 4 weeks vacation, 12 sick days, 12 paid holidays, employer-paid health insurance, retirement plan, and prof. development. Target start date: December 2005. Send résumé, cover letter, writing sample, three references, to Shari Silberstein: sharis@quixote.org; fax: 301-864-2182; or mail: Quixote Center, PO Box 5206, Hyattsville, MD 20782.

The Legal Action Center (LAC) is seeking to hire 3 new attorneys: **Senior Staff Attorney – Litigation and Legal Counseling, Staff Attorney – Litigation and Legal Counseling, and Staff Attorney – Criminal Justice Policy/National H.I.R.E. Network.** LAC is a non-profit public interest law firm and policy organization with offices in New York City and Washington, DC that specializes in the areas of alcohol and drug addiction, AIDS and criminal justice. Details available at www.lac.org. ♪