08-0763-ag

United States Court Of Appeals

for the

Second Circuit

DAMIAN MCAUTHUR MCKENZIE,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,

Respondent.

A39-133-198

PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF OF AMICUS CURIAE NEW YORK STATE DEFENDERS ASSOCIATION IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER DAMIAN MCAUTHUR MCKENZIE

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the New York State Defenders Association ("NYSDA") Immigrant Defense Project submits this brief as amicus curiae in support of Petitioner Damian McAuthur McKenzie's petition for review.

STATEMENT OF INTEREST

Amicus 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 others dedicated to developing and supporting legal defense services for all people, regardless of income. NYSDA operates the Immigrant Defense Project ("IDP"), which is a legal resource and training center dedicated to advancing the legal rights of immigrants. A national expert on the intersection of criminal and immigration law, IDP trains and advises both criminal justice and immigrant advocates on issues that involve the immigration consequences of criminal convictions. IDP seeks to improve the quality of justice for non-citizens accused of criminal conduct and has a keen interest in the fair and just administration of the nation's immigration laws.

Federal courts, including the Supreme Court and this Court, have accepted and relied on amicus curiae briefs submitted by NYSDA's Immigrant Defense Project in several important cases involving application of the immigration laws to criminal dispositions. See, e.g., Brief of Amici Curiae

NYSDA Immigrant Defense Project et al. supporting Petitioners, in Lopez v. Gonzales, 127 S. Ct. 625 (2006); Brief of Amici Curiae Nat'l Ass'n of Criminal Defense Lawyers et al. supporting Petitioners (submitted by, inter alia, NYSDA), in Leocal v. Ashcroft, 543 U.S. 1 (2004); Brief of Amici Curiae Nat'l Ass'n of Criminal Defense Lawyers, et al. in support of Respondent (submitted by, inter alia, NYSDA), cited in INS v. St. Cyr, 533 U.S. 289, 323 n.50 (2001); Brief of Amici Curiae NYSDA et al. in support of Petitioner, in Dickson v. Ashcroft, 346 F.3d 44 (2d Cir. 2003); Brief of Amici Curiae NYSDA in support of Petitioner, in Jobson v. Ashcroft, 326 F.3d 367 (2d Cir. 2003).

NYSDA submits this brief to apprise this Court of important fairness, due process, and practical considerations that support continued recognition of the "finality" rule of Pino v. Landon, 349 U.S. 901 (1955), and Marino v. INS, 537 F.2d 686 (2d Cir. 1976), including, among other things, the significant detrimental impact on judicial administration and resources that would result were this Court to abrogate the rule. The costs of undoing the finality rule, both in terms of the burden on the judicial system and the potential unfairness to individual immigrants, who will be subject to deportation on the basis of convictions that lack a sound legal basis, far outweigh any perceived benefits. Further, NYSDA believes that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified in 8 U.S.C. and 18 U.S.C.)

("IIRIRA") affords no foundation for unsettling the rule of Pino and Marino, and that a contrary position is inconsistent with longstanding traditions of interpreting the immigration statutes.

SUMMARY OF THE ARGUMENT

The finality rule, formulated by the Supreme Court in Pino v. Landon, 349 U.S. 901 (1955), and extended by this Court in a long line of decisions, beginning with Marino v. INS, 537 F.2d 686 (2d Cir. 1976), provides that an order of deportation based on an underlying conviction may not be entered until that conviction is final. Under this precedent, a conviction is not deemed "final" unless and until the criminal defendant's direct appeals have been exhausted or waived. See Marino, 537 F.2d at 691-92.

Petitioner McKenzie demonstrates in his principal brief that, contrary to the ruling of the Board of Immigration Appeals ("BIA"), there is no basis in the statutory text and history for the argument that IIRIRA has abrogated the longstanding finality rule. Amicus NYSDA concurs in Petitioner's arguments. Amicus writes separately, however, to call this Court's attention to additional considerations regarding the fair and efficient administration of justice that compel upholding the finality rule, and thereby further support construing IIRIRA in the manner Petitioner advocates.

The finality rule fulfills the government's interest in deporting individuals convicted of certain crimes while at the same time upholding the interest in fair and efficient judicial administration and promoting a respect for the judicial process. By requiring that a criminal conviction be "final," the finality rule provides sufficient certainty that judicial resources in the federal system will be expended on deportation proceedings only when the underlying conviction is likely to withstand appellate scrutiny. In addition, the finality rule provides confidence to the individual immigrant and to society that the legal process has been fair. Moreover, in many instances, state law enshrines the right to a direct appeal. Thus, the finality rule also serves the salutary purpose of respecting the integrity of states' criminal justice process.

The BIA's position in this case, which departs from its own precedents, upsets the important balance achieved by the finality rule by undermining the interests of fair and efficient judicial administration. The absence of the finality rule would undermine confidence in the integrity and fairness of the immigration process by allowing the government to enforce deportation orders on the basis of convictions which might not withstand appellate scrutiny, but from which immigrants have been denied statutory or constitutional rights of appeal. Further, in the absence of the finality rule, an increasing number of unripe immigration cases that may be affected by a state court appellate process will

unnecessarily burden the federal court system. Particularly in an era when judicial administration in the federal system is being challenged by an unprecedented surge in immigration proceedings, abrogating the finality rule would further complicate those challenges.

Any perceived gains from abolishing the finality rule in order to expedite deportations would hardly compensate for compromising the foregoing interests. The finality rule itself properly preserves the government's ability to deport individuals convicted of crimes, because individuals whose convictions are upheld on appeal will still be subject to deportation. But the absence of the finality rule unnecessarily exposes potentially innocent persons to the unjust, unnecessary and, as a practical matter, irreversible fate of deportation. Such a process and result is contrary to our traditions of fair judicial administration.

ARGUMENT

I. FAIRNESS AND DUE PROCESS SUPPORT PRESERVING THE RIGHTS OF IMMIGRANTS TO APPEAL ERRONEOUS CONVICTIONS

A. The Finality Rule Promotes Respect for Established Appellate Procedures and Helps Avoid Harsh Results

Elimination of the finality rule would effectively deprive many immigrants of the ability to contest erroneous convictions, in derogation of appellate rights enshrined under state law. This possibility raises serious concerns

about the fairness of judicial administration of the immigration laws. It does so on at least two levels.

First, because it effectively would vitiate the deported person's state court appellate process, abrogation of the finality rule would pose significant due process concerns. Under longstanding Supreme Court authority, "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent" Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (collecting cases; citing, inter alia, Plyler v. Doe, 457 U.S. 202, 210 (1982)).

The ability to appeal from a criminal conviction (at least to an intermediate appellate court) is an established right available to Petitioner (and others similarly situated) under New York law. See People v. Harrison, 652 N.E.2d 638, 638 (N.Y. 1995) (recognizing that a "defendant has a fundamental right to appeal a criminal conviction" under N.Y. Crim. Proc. Law § 450.10); see also N.Y. Crim. Proc. Law arts. 450, 460 (McKinney 2005) (governing the taking of appeals from judgments issued in the lower courts). In fact, as noted in the New York Court of Appeals' 1986 decision in People v. Pollenz, this right has effectively been "constitutionalized" under New York law. See 67 N.Y.2d 264 (1986) (recognizing that Section 4(k) of article VI of the New York Constitution

prohibits legislative curtailment of Appellate Division jurisdiction over appeals from final judgments). A number of other states likewise recognize the right to appeal a criminal conviction as a constitutional matter. See, e.g., Ashwin Gokhale, Finality of Conviction, the Right to Appeal, and Deportation Under Montenegro v. Ashcroft: The Case of the Dog that Did Not Bark, 40 U.S.F. L. Rev. 241, 263 n.154 (2005).

A rule that effectively frustrates a person's ability to pursue a direct appeal that is safeguarded by state law deprives such persons of process afforded by state law. Such deprivation, in and of itself, risks constituting a violation of due process. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 n.5 (1982) (having made access to the courts an entitlement or necessity, a state's deprivation of that access threatens violating due process). Moreover, due process requires that appellate procedures, once established, may not be implemented in a discriminatory fashion. See Douglas v. California, 372 U.S. 353, 356-57 (1963); Griffin v. Illinois, 351 U.S. 12, 18 (1956); People v. West, 789 N.E.2d 615, 619, (N.Y. 2003) (although due process does not guarantee the right to appeal, "when a State grants a defendant a statutory right of appeal, due process compels States to make certain that criminal defendants receive the careful advocacy needed 'to ensure that rights are not forgone'") (citation omitted). The finality rule of Pino v.

Landon, 349 U.S. 901 (1955), ensures that immigrants will not be deprived of their appellate rights because of their status.

Interpreting IIRIRA to have extinguished the finality rule is likely to seriously impair, if not entirely extinguish, many immigrants' ability to pursue established appellate remedies. Such circumstances would present serious due process problems that are best avoided, a course indicated by established precedent counseling avoidance of constitutional doubt. See Douglas, 372 U.S. at 355-57; see also Empire HealthChoice Assurance, Inc. v. McVeigh, 396 F.3d 136, 144 (2d Cir. 2005) (recognizing that "constitutional avoidance," as a canon of statutory construction, "is grounded in 'respect for Congress, which we assume legislates in light of constitutional limitations'") (quoting United States v. Pettus, 303 F.3d 480, 486 (2d Cir. 2002)), aff'd, 547 U.S. 677 (2006).

Second, potentially innocent persons would face unusually harsh consequences if the finality rule were not upheld. As courts have long recognized, deportation is a harsh and drastic remedy. See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure. . . ."); Costello v. INS, 376 U.S. 120, 128 (1964) ("'deportation is a drastic measure'" where the "'stakes are considerable for the individual'") (citation omitted); Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977) ("Deportation is a sanction which in severity surpasses all but the most Draconian criminal penalties.").

Thus, courts have construed the immigration laws to avoid harsh results, see, e.g., Lennon v. INS, 527 F.2d 187, 193 (2d Cir. 1975) ("'[S]ince the stakes [of deportation] are considerable for the individual, we will not assume that Congress [in promulgating deportation statutes] meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used'") (citation omitted), an interpretive principle that remains in place under IIRIRA. See, e.g., INS v. St. Cyr, 533 U.S. 289, 320 (2001) (acknowledging post-IIRIRA the "'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien'") (citation omitted). The underlying concern has driven the logic behind granting stays of removal while petitions for review from deportation orders are pending. See, e.g., Michael v. INS, 48 F.3d 657, 664 (2d Cir. 1995) (recognizing that ordinarily, a party seeking a stay of exclusion pending appeal would suffer an irreparable harm through deportation, while the INS would suffer no offsetting injury); Thapa v. Gonzales, 460 F.3d 323, 331 (2d Cir. 2006) (recognizing the difficulties inherent in pursuing an appeal from abroad as among the bases for finding that post-IIRIRA, the courts of appeals retain the power to suspend removal pending appeal); see also Sandoval v. Reno, No. CIV. 97-7298, 1997 WL 839465, at *13 (E.D. Pa. Dec. 30, 1997) ("[T]he public's interest in deporting certain aliens at the earliest opportunity [should] yield to the public's greater interest in taking enough time to ensure that

the harsh consequences of deportation are not visited on the undeserving."), aff'd, 166 F.3d 225 (3d Cir. 1999); Kahn v. Elwood, 232 F. Supp. 2d 344, 352 (M.D. Pa. 2002) (although the government clearly has an interest in removing aliens who are not entitled to protection, "the public interest is also served by not removing aliens until they have been afforded the opportunity to seek appellate review").

Harsh and severe results are likely to occur, however, if the finality rule is abrogated. Not only will potentially innocent persons be deported, such persons who still seek to appeal their underlying criminal convictions will be forced to do so from outside the United States. Courts have recognized that even if an alien is permitted to maintain an appeal after being deported, an alien's ability to litigate an appeal from abroad is likely to be substantially impaired. See, e.g., Thapa, 460 F.3d at 331; Kahn, 232 F. Supp. 2d at 352 (noting that while a petitioner could still conceivably pursue his petition through counsel following deportation, "the quality of his appeal is likely to be enhanced by his presence and accessibility to his attorney"). Accordingly, extinguishing the finality rule is likely to severely compromise immigrants' ability to undo erroneous convictions. It may also effectively deprive aliens of the ability to overturn wrongful convictions (and any attendant erroneous deportation orders) altogether.

This scenario is not conjectural. Several states, including New York, have begun dismissing the appeals of deported criminal appellants on grounds of

mootness. See, e.g., People v. Diaz, 7 N.Y.3d 831 (2006) (mootness of state appeals appropriate following both voluntary and involuntary deportations).[1] See also, Gokhale, supra, 40 U.S.F. L. Rev. at 264 (collecting similar examples from other jurisdictions).[2]

B. The Finality Rule Allows the Appellate Process to Serve its Important Error-Correction and Legitimizing Function

The appellate process plays a critical function in the criminal justice system, both as a check on faulty convictions, and as a means of promoting both individual and societal confidence in the fairness and integrity of the system. These error-correction and legitimizing functions are especially critical in a system, like New York's, in which both the criminal courts and the indigent representation system are operating under severe strain. In these circumstances, the finality rule –

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[1] Although the majority in Diaz purportedly carved out an exception to its mootness ruling, leaving open the possibility that the appellant in that case could move for reinstatement of his mooted appeal upon "return to th[e] Court's jurisdiction" (id. at 832), the Court failed to acknowledge, however, that in order to do so the appellant would likely have to first violate federal law (which permanently bars the reentry of deported "aggravated felons"). See Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(ii).

[2] This practice is in tension with the position of the federal courts, which retain jurisdiction over petitions for review even after immigrants are deported. See Lopez v. Gonzales, 127 S. Ct. 625, 629 n.2 (2006) ("Although the Government has deported Lopez, we agree with the parties that the case is not moot. Lopez can benefit from relief in this Court by pursuing his application for cancellation of removal, which the Immigration Judge refused to consider after determining that Lopez had committed an aggravated felony.").

by deferring commencement of deportation proceedings until an immigrant has had the opportunity to exhaust or waive his direct appeals – helps promote and support these important appellate functions.

Total filings in the New York state courts are presently at an all-time high. Civil case filings in the New York trial courts increased 19% from 4,244,264 in 2002 to 4,546,080 in 2006.[3] Criminal case filings alone totaled 1,873,785 in 2006, up 3% from 2002.[4] In 2006, 95,017 felony arrests were disposed of in New York City alone resulting in 57,765 felony convictions.[5]

Statistics of this nature support the conclusion reached by a recent study commissioned by Chief Justice Kaye's Commission on Indigent Defense Services, which found that criminal court judges in New York are suffering under an "unbearable caseload."[6] To put matters into perspective, the 854,918 criminal

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[3] See State of New York, Twenty-ninth Annual Report of The Chief Administrator of the Courts for Calendar Year 2006, at 6, available at http://www.courts.state.ny.us/reports/annual/pdfs/2006annualreport.pdf.

[4] Id.

[5] New York State Division of Criminal Justice Services, Dispositions of Felony Arrests, New York City, available at http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/nyc.htm (last visited June 29, 2008).

[6] See The Spangenberg Group, Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services, Final Report (June 16, 2006), at v, 162 (hereinafter, the "IDS Study"), available *(cont'd)*

case filings in the Criminal Court of the City of New York in 2006 would ultimately have to be disposed of by 107 New York City Criminal Court judges.[7] One criminal court judge in Manhattan, who sits primarily in an all purpose part, but who sits in the arraignment part eight weeks per year, told the IDS Study's authors that she has 120-170 cases a day on her calendar, which allows her to spend approximately 3 to 5 minutes per case.[8]

This staggering volume of cases puts extraordinary pressure not just on judges, but also on those who provide the indigent with legal defense services and who are charged with helping to ensure that the many criminal defendants in this state who cannot afford private counsel, are meaningfully represented. A December 2004 study by the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, for instance, found that caseloads for indigent

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at http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf.

[7] See 2006 Annual Administrative Report, supra note 3, at 2, 7.

[8] IDS Study, supra note 8, at 143. Similarly troubling, outside of New York City, many criminal cases are handled by the state's town and village "justice" courts, three-quarters of whose "justices" are not lawyers, and some of whom, the New York Times has observed, are even lacking a high school diploma. William Glaberson, In Tiny Courts of New York, Abuses of Law and Power, N.Y. Times, Sept. 25, 2006, at A1.

defense attorneys in New York "far exceed national standards."[9] In testimony before the ABA, NYSDA's Executive Director, Jonathan A. Gradess has noted, for example, that "[c]aseloads are radically out of whack in some places in New York. There are caseloads per year in which a lawyer handles 1,000, 1,200, 1,600 cases."[10]

These extraordinary burdens harbor the potential for significantly compromising the quality of representation. The New York Times has observed, for example, that its investigative series on New York's indigent defense system in 2001 depicted a system in which "underpaid, ill-prepared, virtually unsupervised private lawyers sometimes represent hundreds of defendants per year, leaving little time or incentive for them to master the facts, prepare and argue the cases or file appeals of dubious convictions."[11] To this point, according to the IDS Study's data,

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[9] See Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, Gideon's Broken Promise: America's Continuing Quest for Equal Justice, at 18 (Dec. 2004) (hereinafter, "Gideon's Broken Promise"), available at http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

[10] Id. at 17; see also id. at 9, 11-12 (the ABA report also notes that New York has failed to abide by national standards for the provision of public funds for the training of indigent defender services, and has responded to 2003 state legislation mandating increased compensation paid to private assigned counsel, by either "eliminating services entirely or replacing assigned counsel programs with lower-cost" and often poorer-quality providers).

[11] Editorial, Drive-By Legal Defense, N.Y. Times, Apr. 12, 2001, at A28.

at least half of all the criminal, non-summons cases in New York City are being pled at first appearance, in many instances after a defendant had been able to spend only minutes with his court-appointed lawyer. IDS Study, supra note 6, at 143. Defense attorneys in these situations are generally only armed with the charging document, defendant's rap sheet and the "CJA" form, setting forth the New York City Criminal Justice Agency's recommendations as to bail. Id.

It is, of course, unreasonable to expect that, in the course of a few minutes, attorneys should be able to consult with a defendant and fully advise him or her of the effects of pleading to a criminal charge and the collateral consequences that attend a criminal conviction, including (though certainly not limited to) potentially serious immigration issues. Id. As in the instant case, these collateral consequences can be especially severe for immigrants charged with crimes, few of whom, the IDS Study noted, are aware or advised that a guilty plea can result in deportation proceedings. Id., at 144-45; see also Gideon's Broken Promise, supra, at 25 (noting the many "harsh, collateral consequences," including deportation, often stemming from uncounseled or poorly-counseled guilty pleas).[12]

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[12] Statistics indicate that as of 2007, 68% of all felony arrests in New York state were being disposed of by plea bargain. See New York State Division of Criminal Justice Services, Dispositions of Felony Arrests, New York State, available at http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/nys.htm (last visited July 1, 2008).

Thus, the IDS Study found that the brief availability of criminal defense counsel in the criminal courts of New York City, together with the high rates of criminal convictions, raise serious questions about both the effectiveness of counsel and the potential for unfair convictions. IDS Study, supra, at 153. Indeed, the IDS Study concluded that "New York's indigent defense system is in a serious state of crisis" which, "[e]very day – and for years – . . . subjects indigent adults and children across the state to a severe and unacceptable risk of being denied meaningful and effective representation in violation of their state and federal right to counsel." Id. at 155. See also Comm'n on the Future of Indigent Def. Servs., Final Report to the Chief Judge of the State of New York (June 18, 2006), at 15 ("[T]he Commission has concluded that there is, indeed, a crisis in the delivery of defense services to the indigent throughout New York State and that the right to the effective assistance of counsel, guaranteed by both the federal and state constitutions, is not being provided to a large portion of those who are entitled to it."), available at http://nycrimbar.org/members/newsletter/2005-2006/indigentdefensereport.pdf.

At the very least, these studies and statistics, which depict a criminal justice system that functions under significant strain and pressure, support the conclusion that criminal appeals play a vital error-correction role. And if confidence in the outcome and integrity of immigration proceedings that rely on

outcomes garnered through this criminal justice system is an essential part of fair judicial administration – which it is – then pressing the finality rule of Pino is essential. [13]

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[13] In fact, the significance of this error-correction function has factored into a long line of post-IIRIRA decisions in which the BIA and this court have recognized that convictions that have been overturned for substantive or procedural reasons should not serve as a basis for removal. See In re Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003) ("[T]here is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a 'conviction' within the meaning of section 101(a)(48)(A)."), rev'd on other grounds sub nom. Pickering v. Gonzales, 465 F.3d 263 (6th Cir. 2006); Saleh v. Gonzales, 495 F.3d 17, 24 (2d Cir. 2007) (deeming "reasonable" the BIA's distinction in Pickering between convictions vacated on substantive or procedural defects, and convictions vacated for rehabilitative reasons or to avoid adverse immigration causes); Pinho v. Gonzales, 432 F.3d 193, 209-10 (3d Cir. 2005) (upholding the BIA's distinction between substantive and rehabilitative vacaturs, the former of which defeats deportability); Sandoval v. INS, 240 F.3d 577, 583 (7th Cir. 2001) (conviction did not count for deportation purposes where it was vacated pursuant to a legal defect); In re Rodriguez-Ruiz, 22 I. & N. Dec. 1378, 1379-80 (B.I.A. 2000) (where vacatur occurs because there was a legal defect in the underlying proceeding (i.e., a violation of a constitutional or statutory right), rather than a vacatur or expungement for rehabilitative purposes, then there is no longer a conviction for INA purposes). Remedying substantive or procedural defects is precisely what is contemplated by the direct appeal process under New York law, and is precisely what Petitioner is attempting to achieve in the New York courts now. Thus, a holding here that would effectively foreclose immigrants from pursuing efforts to undo erroneous convictions, cannot be reconciled with the case law establishing that a conviction that has been vacated on the merits defeats deportation; In re Adamiak, 23 I. & N. Dec. 878, 881 (B.I.A. 2006) (conviction vacated for failure of the trial court to advise the alien defendant of *(cont'd)*

II. UNDOING THE FINALITY RULE WOULD RESULT IN SIGNIFICANT AND UNNECESSARY ADMINISTRATIVE BURDENS ON THE FEDERAL JUDICIARY

Federal immigration and appellate courts have been inundated with an "avalanche" of immigration cases in recent years.[14] If even a small percentage of these cases are ones implicating the Pino finality rule, expenditure of scarce judicial resources at the federal level on immigration proceedings that may be affected by continued state court criminal appeals would not be a wise manner of prioritizing judicial and court administrative time.

As recently noted by Judge Katzmann, as of 2002, the BIA had accumulated a backlog of more than 56,000 cases nationally.[15] To reduce the

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the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes).

[14] See, e.g., Ashwin Gokhale, Finality of Conviction, the Right to Appeal, and Deportation Under Montenegro v. Ashcroft: The Case of the Dog that Did Not Bark, 40 U.S.F. L. Rev. 241, 271 & n.206 (2005) (citing Claire Cooper & Emily Bazar, Immigration Appeals Swamp Federal Courts, Sacramento Bee, Sept. 5, 2004, at Al (discussing IIRIRA's impact on the burden placed on immigration and appeals courts by deportation cases) and Lawyer's Comm. for Human Rights, Assessing the New Normal: Liberty and Security for the Post-September 11 United States 31-47 (Fiona Doherty & Deborah Pearlstein, eds., 2003) (discussing how the Patriot Act and other post-September 11 measures may have further contributed to this state of affairs)).

[15] Judge Robert A. Katzmann, United States Court of Appeals for the Second Circuit, The Legal Profession and the Unmet Needs of the Immigrant Poor, The Orison S. Marden Lecture of the Ass'n of the Bar of the City of N.Y. (Feb. 28, 2007) (hereinafter, "Katzmann Lecture"), available at

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backlog, the BIA began to expand its reliance on summary procedures, including permitting single Board members to decide appeals through summary dismissals and affirmances without opinion. As a result, however, as Judge Katzmann explained, "the number of petitions for review in federal court increased exponentially."

> My colleague Judge Jon O. Newman put it this way: "It's as if a dam had built up a massive amount of water over the years, and then suddenly the sluice gates were opened up and the water poured out." By 2005, appellate courts were receiving about five times as many petitions for review as they were before 2002. As then Second Circuit Chief Judge John M. Walker, Jr., remarked in April 2006: "What we thought was a one-time bubble has turned into a steady flow of cases, in excess of 2,500 a year, and about a 50% increase in our total annual filings."

Katzmann Lecture, supra, at 3.

This Court currently receives "about 21% of the more than 12,000 petitions for review filed each year nationwide."[16] Even after institution of a non-argument calendar ("NAC") for asylum cases in October 2005, as of 2007, this Court was still adjudicating 27-36 NAC cases per week, in addition to one or two immigration cases per sitting day on the regular argument calendar.[17] As then-Chief Judge Walker noted in April 2006 testimony before the Senate Judiciary

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http://www.abanet.org/publicserv/immigration/katzmann_immigration_speech.pdf.

[16] Id. at 4.

[17] Id.

Committee, "[e]specially with respect to decisions that are affirmed by the BIA without opinion, the Court of Appeals is effectively the first line of review, however limited, in a system where the immigration judges and the Board of Immigration Appeals, which hears appeals from the immigration court, are under extraordinary pressure to resolve cases."[18] At the time of Judge Walker's testimony in April 2006, each immigration judge, he noted, had to dispose of 1,400 cases a year to stay current with his docket.[19] That translates to adjudicating five cases per day. "Similarly, even with streamlining so that dispositions can be made by a single judge, each BIA member, Judge Walker reported, had to dispose of about 80 cases per week."[20]

There is no reason why the efficiency of federal judicial administration should be further compromised by abrogating the finality rule. It makes practical sense to maintain the finality rule and to initiate deportation proceedings only after the necessary certainty with respect to the underlying conviction has been obtained. Any other approach would inevitably result in the expenditure of scarce judicial resources on cases that are unripe. Cf. Gokhale, supra note 14, 40 U.S.F. L. Rev. at 272 (noting that it is unwise to "needlessly

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[18] Id.

[19] Id.

[20] Id.

expend[] limited ICE resources on trying to deport any number of people whose erroneous convictions will be overturned through normal judicial process").

Notably, the government acknowledges the inefficiency of proceeding against aliens before their criminal convictions are final. As the BIA recognized in its January 2008 opinion in this matter, even after the 1996 enactment of IIRIRA, many of the BIA's unpublished orders have repeated the pre-IIRIRA rule requiring that a conviction should attain "finality" before deportation proceedings are commenced. See In re McKenzie, File A39 133 198 (B.I.A. Jan. 29, 2008) (unpaginated text available at 2008 WL 486878). "In part," the BIA posited, "such statements to date have reflected the practice of the former Immigration and Naturalization Service, continued under its successor agency DHS, of [even since the passage of IIRIRA] instituting proceedings only after an alien's direct appeal rights were exhausted, with rare exceptions." Id. at 5 (emphasis added). Indeed, "[a]t oral argument, DHS counsel indicated that this was, and is, done for prudential reasons." Id.[21]

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[21] It also bears noting that, unlike collateral attacks on judgment, which are usually not time-bound, and which historically have not been covered by the finality rule (see, e.g., Marino, 537 F.2d at 691-92), defendants seeking to assert direct appellate rights are subject to strict time limitations for exercising those rights. For instance, under New York law, a defendant has 30 days from the entry of a formal judgment to seek review before the New York Appellate Division. See N.Y. Crim. Proc. Law § 460.10(1)(a) (McKinney 2005).

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The finality rule preserves agency resources and promotes judicial economy by keeping successful criminal appellants out of the immigration courts. Given the extraordinary burdens and challenges presented by the number of immigration cases, it makes no practical sense to add to these burdens by abrogating this rule.

III. THERE IS NO INDICATION IN THE LANGUAGE, STRUCTURE OR HISTORY OF IIRIRA THAT CONGRESS INTENDED TO ABROGATE THE LONGSTANDING FINALITY RULE

For nearly four decades following the Supreme Court's decision in Pino v. Landon, 349 U.S. 901 (1955), federal courts, including this court, accepted the general rule that "an alien is not deemed to have been 'convicted' of a crime under the [Immigration and Nationality] Act until his conviction has attained a substantial degree of finality." Marino v. INS, 537 F.2d 686, 691 (2d Cir. 1976) (citing Pino). This "finality" requirement has consistently been considered to be a separate requirement that had to be met before deportation could be allowed, see Martinez-Montoya v. INS, 904 F.2d 1018, 1025 (5th Cir. 1990), and was

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Motions seeking leave to file a late appeal must be brought within 1 year thereafter. See N.Y. Crim. Proc. Law § 460.30(1) (McKinney 2005). Thus, under New York law, a defendant has at most 1 year and 30 days to commence a direct appeal from a criminal conviction. As the First Circuit recognized in Griffiths, these sorts of time limitations for exercising direct appellate rights provide assurance that there will be a "determinate end to the proceedings." Griffiths v. INS, 243 F.3d 45, 54 (1st Cir. 2001).

specifically adopted by the BIA as an essential element of establishing the existence of a conviction for deportation purposes. See In re Ozkok, 19 I. & N. Dec. 546, 552 n.7 (B.I.A. 1988).

When Congress enacted a statutory definition for "conviction" in 1996, it largely adopted the very test which, as interpreted for nearly a decade by both the BIA and the federal courts, preserved the separate and independent requirement of finality. Compare 8 U.S.C. § 1101(a)(48)(A), with Ozkok, 19 I. & N. Dec. at 551-52. As discussed below, the language, structure and history of the statute make clear that Congress had no intent to silently extinguish this separate and long-established finality requirement.

A. The BIA in Ozkok standardized the administrative definition of "conviction" and reaffirmed the well-established rule that convictions must be final to support an order of deportation.

In Ozkok, the BIA attempted, for the first time, to create a uniform definition of "conviction" for immigration purposes. In doing so, the BIA recognized that a profusion of state law programs for deferring formal adjudications of guilt were leading to different immigration consequences in different jurisdictions. As the BIA explained, two similarly situated individuals could receive very disparate treatment under the immigration laws simply because of the varying criminal procedures of states in which they had committed a crime. See Ozkok, 19 I. & N. Dec. at 550-51. To address this situation, the BIA, in

promulgating its definition of conviction, set forth one standard for formal adjudications of guilt, like Petitioners's (i.e., where a court had adjudicated the defendant guilty, or entered a formal judgment of guilt following a plea of guilty or nolo contendere), and formulated a separate three-part inquiry for deferred adjudication settings, where formal adjudication has been withheld. See id. at 551-52.

At the same time, the BIA emphasized that the separate and distinct requirement that a conviction must obtain "finality" to sustain an order of deportation was not being disturbed. See id. at 552 n.7 ("It is well established that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived."). Numerous federal courts of appeals cases following Ozkok reaffirmed that the "finality" rule of Pino, as applied to formally adjudicated cases followed by assertion of direct appeal rights, remained unaffected. See, e.g., Montilla v. INS, 926 F.2d 162, 164 (2d Cir. 1991) (holding, post-Ozkok, that a "drug conviction is considered final and a basis for deportation when appellate review of the judgment – not including collateral attacks – has become final"); Urbina-Mauricio v. INS, 989 F.2d 1085, 1089 (9th Cir. 1993) ("A criminal conviction is final for the purposes of immigration review if the alien has exhausted or waived direct

appellate review."); accord In re Thomas; 21 I. & N. Dec. 20, 21 n.1 (B.I.A. 1995); In re Polanco, 20 I. & N. Dec. 894, 895-96 (B.I.A. 1994).

B. In basing IIRIRA's determination of conviction on the Ozkok test, Congress gave no indication that it intended to abandon well-established judicial and administrative interpretation governing application of the test.

When Congressional legislation takes the form of adopting language from decisional law, courts presume that Congress also intends to import the judicial and administrative interpretations of that language, unless there is a clear indication to the contrary. See New York Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth., 757 F.2d 502, 509 (2d Cir. 1985) ("[W]hen Congress adopts a new law that incorporates sections of a prior law, it is presumed to be aware of administrative interpretations of that law and to adopt those interpretations . . . ."); Lorillard, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575, 581-82 (1978) (noting that Congress' detailed knowledge of the prior law and its selectivity in incorporating provisions and departing from others, strongly suggested that "but for those changes Congress expressly made," it intended to maintain the existing remedies and interpretations). Because the specific language of Congress' definition of a conviction under IIRIRA, see 8 U.S.C. § 1101(a)(48)(A), is imported nearly verbatim from governing BIA authority in Ozkok, 19 I. & N. Dec. at 551-52, these customary interpretive presumptions should govern.

Straightforward comparison reveals that, in enacting Section 322 of IIRIRA (codified at 8 U.S.C. § 1101(a)(48)(A)), Congress adopted Ozkok's definition of conviction essentially verbatim as it related to formal adjudications like Petitioners (i.e., "a formal judgment of guilt of the alien entered by a court"). With respect to Ozkok's three-part inquiry for deferred adjudications, Congress (i) adopted the first element word-for-word; (ii) omitted the parenthetical in the second element (which simply enumerated examples of punishment, penalty and restraints on liberty) and (iii) excised the entirety of the third element. As the legislative history of IIRIRA explains, Congress was concerned that Ozkok had not gone far enough in remedying the differential immigration consequences that were resulting from the myriad state law procedures for deferred adjudication – in particular, the fact that immigrants in states where violations of the terms of a deferred adjudication would only lead to further proceedings on the question of guilt were being spared the immigration consequences faced by immigrants in other states where such violations resulted in an immediate entry of conviction. Thus, Congress sought to promulgate one standard that would apply across all deferred adjudication settings. See In re Punu, 22 I. & N. Dec. 224, 227 (B.I.A. 1998) (quoting H.R. Conf. Rep. No. 104-828, at 224 (1996); H.R. Rep. No. 104-879, at 123 (1997)). The elimination of Ozkok's third prong clarified "Congressional intent that even in cases where adjudication is 'deferred,' the

original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws." H.R. Conf. Rep. No. 104-828, at 224 (1996); see also H.R. Rep. No. 104-879, at 123 (1997). Congress's enactment simply indicates that it intended deportation to apply equally to individuals who had been formally adjudicated, as to individuals who, under some forms of deferred adjudication, had effectively been found guilty, but whose formal adjudication was postponed under certain state law procedures pending a further proceeding.

Nowhere in the language employed by Congress to define "conviction" in IIRIRA, however, is there a hint that it intended to upset the finality rule. Ozkok had noted the continued validity of the finality rule separate and apart from its definition of conviction. The language of Section 322 of IIRIRA, 8 U.S.C. § 1101(a)(48)(A) does not refer to that concept at all. With the focus strictly on the definition of "conviction," as opposed to the separate element of "finality," there can be no inference that Congress intended to extinguish the judicially developed finality requirement. Cf. Monessen Southestern Ry. Co. v. Morgan, 486 U.S. 330, 337-39 (1988).

Further to this point, Congress has demonstrated that, in very comparable situations, it is capable of expressly defining "conviction" in a manner that extinguishes appellate rights. For example, in enacting the Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, 101

Stat. 680, Congress defined the term "convicted" to include situations in which "a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, *regardless of whether there is an appeal pending*." 42 U.S.C. § 1320a-7(i)(1) (emphasis added). Given that Congress had such language for foreclosing appellate review at its disposal when enacting IIRIRA just two years later, the absence of such language in IIRIRA's definition of "conviction" compels the conclusion that Congress did not intend to abrogate the finality rule. See generally United States v. Azeem, 946 F.2d 13, 17 (2d Cir. 1991).[22]

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[22] In its opinion below, the BIA cited language from several post-IIRIRA decisions from other jurisdictions as supposed authority for the extinguishment of the finality rule. See In re Mckenzie, File A39 133 198 (B.I.A. Jan. 29, 2008), text available at 2008 WL 486878. However, these cases arise almost entirely in the deferred adjudication context (and/or address the finality rule in dicta), and thus should not affect this Court's analysis of finality in the context of the present petition, which concerns a formal adjudication. Furthermore, this Court's fleeting observation in Puello v. Bureau of Citizenship & Immigration Services, 511 F.3d 324 (2d Cir. 2007), that the finality rule has been abolished, see id. at 332, is plainly dicta, as the vitality of the finality rule was not before the Court, and thus cannot be construed as this Court's considered statement on such a significant question. In fact, post-Puello, this Court has continued to assume that the finality rule has remained in effect. See, e.g., Walcott v. Chertoff, 517 F.3d 149, 155 (2d Cir. 2008) ("The decision to appeal a conviction . . . suspends an alien's deportability . . . until the conviction becomes final . . . ."); see also id. at 154 (citing Marino v. INS, 537 F.2d 686, 691-92 (2d Cir. 1976)).

CONCLUSION

For the foregoing reasons, amicus curiae respectfully submits that this Court should hold that the finality rule has survived passage of IIRIRA.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i), I certify that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) in that it contains 6,902 in proportionally spaced 14-Point Times New Roman font, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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