New York Supreme Court

APPELLATE DIVISION – FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against -

New York County
Ind. No. 5131/07

ANTONIO BADIA,
Defendant-Appellant.

BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT, POST-DEPORTATION HUMAN RIGHTS PROJECT IN SUPPORT OF DEFENDANT-APPELLANT BADIA

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PRELIMINARY STATEMENT

Amici Curiae Immigrant Defense Project and The Post-Deportation Human Rights Project, Center for Human Rights and International Justice, Boston College ("*amici*") are nonprofit organizations devoted to the defense of the rights of noncitizens who have been accused or convicted of crimes or who have been deported from the United States. *Amici* respectfully offer this brief in support of Defendant-Appellant Badia to apprise the Court of significant fairness and constitutional concerns raised by the dismissal of Defendant-Appellant's post-conviction relief proceeding and, as experts in immigration law affecting noncitizens convicted of crimes and subjected to deportation, to inform the Court of relevant provisions of immigration law that bear on this Court's consideration of this appeal.

INTEREST OF *AMICI CURIAE*

Amicus the Immigrant Defense Project (IDP) is a not-for-profit legal resource and training center dedicated to defending the legal, constitutional, and human rights of immigrants. A nationally recognized expert on the intersection of criminal and immigration law, IDP supports, trains, and advises both criminal defense and immigration lawyers, as well as immigrants themselves, on issues that involve the intersection of immigration and criminal law. Since 1997, IDP, with its former parent organization the New York State Defenders Association, has

produced and maintained the only legal treatise for New York defense counsel representing immigrant defendants. *See* Manuel D. Vargas, Representing Immigrant Defendants in New York (5th ed. 2011). IDP seeks to improve the quality of justice for immigrants accused or convicted of crimes and therefore has a keen interest in ensuring that noncitizen defendants receive meaningful judicial review of their Sixth Amendment claims.

Amicus The Post-Deportation Human Rights Project, Center for Human Rights and International Justice, Boston College (PDHRP) is the first and only legal advocacy project dedicated to the representation of individuals who have been deported from the United States. The PDHRP also aims to conceptualize the new field of post-deportation law, not only by providing direct representation to individuals who have been deported and promoting the rights of deportees and their family members, but also through research, legal and policy analysis, media advocacy, training programs, and participatory action research. Its ultimate goal is to introduce correct legal principles, predictability, proportionality, compassion, and respect for family unity into the deportation laws and policies of this country. The PDHRP has a strong interest in ensuring that noncitizens who have been deported from the United States and who have been convicted of crimes receive the full measure of due process in challenging those convictions and have a full

and fair opportunity to exercise their rights to re-open their immigration cases or otherwise seek lawful return to the United States.

Numerous courts, including the United States Supreme Court and the New York Court of Appeals, have accepted and relied on *amicus curiae* briefs prepared and submitted by IDP (on its own or by its former parent, NYSDA) or PDHRP in many of the key cases involving the intersection of immigration and criminal laws. *See, e.g.*, Brief of *Amici Curiae* IDP et al. in Support of Defendants-Appellants Ventura and Gardner in *People v. Ventura*, 958 N.E.2d 884, 17 N.Y.3d 675 (N.Y. 2011); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellant in *People v. Chacko*, 2012 N.Y. Slip Op. 06840 (N.Y. App. Div. 1st Dep't Oct. 11, 2012); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellant in *People v. Baret*, 2012 N.Y. Slip Op. 06550 (N.Y. App. Div. 1st Dep't Oct. 2, 2012); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellee in *People v. Mercado*, No. 01106/2004 (N.Y. App. Div. 1st Dep't filed Sept. 18, 2012); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellant in *People v. Harrison*, No. 2011-03751 (N.Y. App. Div., 2d Dep't filed June 14, 2012); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellant in *People v. Andrews*, No. 2011-05310 (N.Y. App. Div., 2d Dep't filed Apr. 5, 2012); Brief of *Amici Curiae* IDP et al. in Support of Petitioner in *Chaidez v. United States*, No. 11-820 (U.S. filed Jul. 23, 2012); Brief of *Amici Curiae* IDP et al. in Support of Petitioner in *Carachuri-*

Rosendo v. Holder, 130 S. Ct. 2577 (2010); Brief of *Amici Curiae* IDP et al. in support of Petitioner in *Padilla v. Kentucky*, 559 U.S. __, 130 S. Ct. 1473 (2010); Brief of *Amici Curiae* IDP et al. in support of Petitioner in *Nijhawan v. Holder*, 577 U.S. 29 (2009); Brief of *Amici Curiae* NYSDA Immigrant Defense Project, et al. in support of Respondent, cited in *INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001); Brief of *Amici Curiae* PDHRP et al. in support of Petition for Rehearing En Banc in *Contreras-Bocanegra v. Holder*, 629 F.3d 1170 (10th Cir. 2010); Brief of *Amicus Curiae* NYSDA Immigrant Defense Project in support of Petitioner in *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008); Brief of *Amici Curiae* NYSDA Immigrant Defense Project in support of Petitioner in *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008); Brief of *Amici Curiae* NYSDA in support of Petitioner in *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003).

SUMMARY OF ARGUMENT

Post-conviction relief subsequent to deportation is crucially important to a defendant whose deportation rested on a conviction obtained in violation of the Sixth Amendment. The trial court in the instant case summarily dismissed the appellant's Article 440 motion solely because of the appellant's deportation. *See People v. Badia*, Ind. 5131/07 (N.Y. Sup. May 10, 2011), slip op. at 3. In doing so, the trial court suggested that a hearing was the appropriate next step, but refused to hold one. *Id.*

There are ways for New York trial courts to reach the merits of a deported defendant's 440 motion, as exemplified by hearings where the defendant testifies from Immigration and Customs Enforcement (ICE) detention and hearings where the defendant's testimony is unnecessary because the facts are uncontested. Cases from other states also offer practical approaches to solving the problem created by a deported defendant. Therefore, it is both unnecessary and extremely unfair to summarily dismiss the Article 440 motion of a deported defendant without attempting to reach the merits of the motion.

The trial court also based its dismissal on the fact that the appellant was "not within the court's jurisdiction," *id.*, evincing an apparent concern that appellant would be unable to submit to re-prosecution after a successful 440 motion. In fact, there are myriad ways for a deported defendant to make himself available for re-prosecution. In some cases the vacatur itself removes the obstacle to return in the lawful status the defendant enjoyed previously. In other cases, the defendant may apply for a temporary visa, or parole, for the purposes of submitting to re-prosecution. Additionally, some defendants are eligible to re-apply for lawful status through family members. There are numerous examples from other jurisdictions of a deported defendant making himself available for re-prosecution after a successful post-conviction relief petition. Therefore, a categorical

presumption that a deported defendant will be unable to resolve the open criminal case is unwarranted.

The unfairness of reflexive dismissals due to deportation is compounded by some trial courts' emerging practice of discouraging the filing of an Article 440 motion before deportation proceedings commence. Because deportation proceedings, once commenced, are frequently completed in less time than it typically takes to obtain relief on a 440 motion, and because there is no right to a continuance in deportation proceedings to pursue post-conviction relief, the trial courts' decisions discouraging 440 motions prior to the commencement of deportation proceedings trap defendants in an unacceptable catch-22: to maximize the chance of proving prejudice and thus obtaining relief on the Sixth Amendment violation, the defendant must wait until removal proceedings are commenced to file the 440 motion, but such defendants may be then deported rapidly and face dismissal of their motion on that basis. While *amici* submit that the trial courts' practice of requiring the existence of removal proceedings to prove prejudice misapprehends *Padilla v. Kentucky*, 559 U.S. __, 130 S. Ct. 1473 (2010), that issue is not squarely presented in the instant case. However, the current state of the law in New York threatens to deny a group of 440 movants any meaningful remedy for claims brought pursuant to *Padilla v. Kentucky* and highlights the acute unfairness of dismissing Article 440 motions on the basis of the defendant's deportation.

When the deportation of a legal resident rests on an unconstitutional conviction, a deep injustice results. This injustice requires a remedy. Therefore, this Court should reverse the trial court's summary denial of the appellant's 440 motion, and remand with instructions to address the merits of the motion.

ARGUMENT

I. Defendants who are unable to appear in person have the ability to successfully litigate post-conviction relief motions.

While a criminal defendant seeking to vacate his or her conviction under Article 440 of the Criminal Procedure Law generally bears the burden of showing that relief is warranted, *see, e.g.* N.Y. Crim Proc. L. § 440.30(4)(a), the statute does not require the personal appearance of the defendant. *See* N.Y. Crim. Proc. L. § 440.30(5) (providing that a defendant may waive his or her right to be present at a hearing). Thus, defendants in New York who are unable to appear in person may litigate post-conviction relief motions and can and do meet their burden of demonstrating a basis for relief under Article 440. A defendant may testify via phone, two-way video connection, or video-taped deposition; alternatively, the testimony of the defendant is not always necessary to the resolution of the post-conviction relief motion. In myriad cases in New York and elsewhere, courts have allowed post-conviction relief motions to proceed despite the defendant's deportation, or other inability to personally appear. *See People v. Michael*, 16

Misc.3d 84, 842 N.Y.S.2d 159 (App. Term, 9th & 10th Jud. Dist's 2007) (defendant in federal custody); *see also Reyes-Torres v. Holder*, 645 F.3d 1073, 1075 (9th Cir. 2011) (defendant deported to Mexico); *Pruidze v. Holder*, 632 F.3d 234, 235 (6th Cir. 2011) (defendant deported to Russia); *Estrada-Rosales v. INS*, 645 F.2d 819, 820 (9th Cir. 1981) (defendant deported to Mexico); *State v. Cabanillas*, 2012 WL 2783182 (Ct. App. Az. Jul. 10, 2012) (defendant deported to Mexico); *People v. Wiedersperg*, 44 Cal.App.3d 550 (1975) (defendant deported to Austria); *State v. Sosa*, __ S.E.2d __, 2012 WL 4855473 (Ga. 2012) (defendant deported to Mexico); *People v. Guzman*, 962 N.E.2d 1182 (Ill. App. Ct. 2011), *appeal allowed*, 968 N.E.2d 85 (Ill. 2012) (defendant deported); *State v. Santos*, 210 N.J. 129 (2012) (defendant deported to Mexico); *Ex Parte Olvera*, __ S.W.3d __, 2012 WL 2336240 (Tex. App.-Dallas) (defendant deported to Mexico). Therefore, the trial court erred in dismissing the post-conviction relief motion in the instant case solely on the basis of the appellant's deportation.

A. A defendant may present testimony via alternative means.

Defendants who are unable to personally appear in court, either because they are detained in Immigration and Customs Enforcement (ICE) facilities, or because they have been deported, have the ability to testify via telephone, video-conference, or video-taped deposition. While Article 440 makes no specific provision for remote testimony, the Court of Appeals clarified in *People v.*

Wrotten, 14 N.Y.3d 33 (2009), that a trial court has broad discretion to solve any problems presented by an unavailable witness. In *Wrotten*, the Court noted in response to a criminal defendant's challenge to a complainant's video testimony that "[n]owhere does the CPL purport to list all instances where live video testimony is permissible or all possible solutions to the problem of an unavailable witness." *Id.* at 38. It held that video testimony by a witness unable to attend the trial was within the trial court's sound discretion to use "innovative procedures" to "'carry into effect the powers and jurisdiction possessed by [the court].'" *Id.* at 37 (quoting N.Y. Judic. L. § 2-b(3)). Therefore, trial courts have the discretion to allow a deported defendant to testify via telephone or two-way video, or use other methods to solve the problem of the inability of the defendant to personally appear. Many trial courts have accordingly allowed post-conviction relief cases to proceed, and have rendered decisions on the merits, despite the inability of the defendants to personally appear. In *People v. Paredes*, Ind. 1104/04 (N.Y. Sup. Nov. 22, 2010, Ward, J.) (attached as Appendix A), the defendant testified via closed-circuit television from an ICE detention facility in upstate New York. The court credited the defendant's testimony that he would have "fought the case" if he had known that his plea to possession of a controlled substance would cause his deportation. *Id.*, slip op. at 3. Thus, the court granted the 440 motion and vacated the conviction. *See id.* In *People v. Roberts*, 2012 N.Y. Slip Op. 51747(u) (N.Y. Sup.

Sept. 7, 2012), the 440 court held a hearing in which the defendant testified "via a video hookup from a detention center in Alabama." *Id.* at *1. After "listening carefully to the testimony at the hearing, [and] closely observing the demeanor of each witness," the court denied the 440 motion, in large part because the defendant was not a "credible witness." *Id.* at *3. The defendant's physical absence from the courtroom clearly did not prevent either court from assessing the defendant's credibility as a witness. In *People v. Gasperd*, 2011 N.Y. Slip Op. 52147(u) (Kings Sup. Dec. 2, 2011), the court also received testimony at a 440 hearing from the defendant via "audio and visual teleconference" from an ICE detention facility. *Id.* at *2. Although the court did not rule in the defendant's favor on the 440 motion, the court reached the merits of the case despite the defendant's lack of personal appearance.[1] 440 movants who have been deported will often have the same ability to provide video testimony as a defendant in ICE detention, and similarly deserve a decision on the merits as opposed to a procedural dismissal.[2]

Courts in other states have gone to great lengths to reach the merits of defendants' Sixth Amendment claims despite the defendants' deportation. In *Lora*

[1] *Amici* are also aware of other instances of courts adjudicating 440 motions based on the defendant's video testimony in cases that did not result in reported decisions. For instance, in *People v. Jaikaran*, Dckt. No. 2007QN03001, the court held a contested hearing at which defendant testified via video-conference from ICE detention in Texas. After the hearing, the court found a Sixth Amendment violation and vacated the conviction. Counsel for defendant Jaikaran has provided a signed letter attesting to the accuracy of the description of his case. This document is on file with counsel for *amici* and is available at the Court's request.

[2] In the experience of *amici*, arrangements with the U.S. government are not restricted to those in ICE custody in the U.S. and can include two-way video testimony from U.S. embassies abroad.

v. State, 2010 WL 2802107 (R.I. Super. July 12, 2010), the court held a hearing on the defendant's ineffective assistance of counsel claim despite the fact that the defendant had been returned to the Dominican Republic. The court allowed Mr. Lora to testify via video but that proved unsuccessful because of a poor internet connection. After an adjournment, the court permitted the hearing to proceed with Mr. Lora testifying "via a deposition transcript." *Id.* The court ultimately denied the petition because the defendant did not establish that counsel had provided deficient representation. However, the defendant's inability to be present did not prevent the court from fully addressing the merits of the case. In a case where the defendant's deportation became imminent after the post-conviction relief filing, the court authorized a videotaped deposition of the defendant "in the event the trial court conducted an evidentiary hearing." *See State v. Cabanillas*, 2012 WL 2783182, at *1 (Ct. App. Az. July 10, 2012). This allowed the prosecutor an opportunity for cross-examination while preserving "live" testimony for the court to consider at the merits hearing. Similarly, the possibility of using a recorded deposition in lieu of personal appearance was also recognized by the Appellate Term in *Michael,* 16 Misc.3d at 87.

The lower court erred when it dismissed Mr. Badia's 440 motion after deeming it "likely that a hearing would be necessary," because the defendant's lack of personal appearance is not a legal or practical bar to holding a hearing in the

matter. As the Court of Appeals confirmed in *Wrotten*, the legislature has entrusted the courts with broad discretion to fashion "innovative procedures" to exercise the jurisdiction conferred upon them. To the extent the use of video and other remote testimony can still be characterized as "innovative" in the internet era, the examples above illustrate that courts can readily adjudicate 440 motions that hinge on the defendant's credibility by using such procedures. Just as important, these cases reflect the sound judgment of many courts that employing such measures to reach the merits is warranted because of the critical importance to a defendant who is facing removal or has been removed of challenging the assertedly unlawful conviction that gave rise to the deportation proceeding. Thus, the Court should reverse the lower court decision and order that the court reach the merits of the case.

B. The testimony of the defendant is not always necessary to the resolution of the post-conviction relief proceeding.

The defendant does not always need to testify to resolve the post-conviction relief proceeding. In *Michael*, 16 Misc.3d at 87-88, the Appellate Term ordered a 440 hearing for a defendant in federal detention, and suggested as possible substitutes for physical presence the following: 1) advocacy of counsel, 2) defendant's affidavit, or 3) defendant's recorded deposition. Furthermore, in some cases, the defense attorney whose conduct is at issue will provide sufficient

information for the court to render a decision, such that the defendant's testimony is unnecessary.

In *People v. Fernandes*, N.Y. Ind. No. 8054/99 and *People v. Read*, N.Y. SCI No. 233N-2007, after initially refusing to consent to the 440 motion, the ADA investigated further and consented to vacatur on the condition that the defendant agree to re-plead to a specified offense. The court in each case then agreed to vacate the conviction, with the defendant entering a guilty plea in satisfaction of the criminal case via video-conference from ICE detention.[3] Importantly, in each case the ADA did not consent immediately, and in *Fernandes* did not consent until after the court had scheduled a hearing, demonstrating that the court cannot know at the initial stage of a 440 proceeding whether material facts will remain in dispute at the hearing, whether at that point only legal differences will remain, or whether the DA will ultimately acknowledge the Sixth Amendment violation and decide not to raise a factual or legal defense to the motion. Therefore, it is error for a court to dismiss a 440 motion based on the defendant's deportation, without giving the defendant a chance to establish the Sixth Amendment violation at a hearing.

[3] Counsel for defendants Fernandes and Read has provided a signed letter attesting to the accuracy of the description of their cases. This document is on file with counsel for *amici* and is available at the Court's request.

II. Denial of Post-Conviction Relief to Deported Defendants Erroneously Presumes That a Deported Defendant Would Not Be Able to Resolve the Pending Criminal Case.

The trial court dismissed the appellant's 440 motion without reaching the merits, based on *People v. Diaz*, 7 N.Y.3d 831 (2006), because the appellant was "not within the court's jurisdiction." This assertion is most reasonably understood to mean that the appellant would not be able to submit to re-prosecution on the open criminal case because his deportation would make him unable to return to New York. However, as Judge Smith persuasively argued in his *Diaz* dissent, a deported defendant-appellant "is entitled to have us assume, absent contrary evidence, that he in fact wants a retrial, and will cooperate in any way necessary if his conviction is reversed and the People seek to retry him." 7 N.Y.3d at 834. The post-conviction relief movant is entitled to the same assumption. Judge Smith's conclusion that re-prosecution cannot be presumed to be impossible is supported by immigration law. For many categories of immigrant defendants who have been deported, the vacatur of a conviction removes the legal obstacles to returning to the United States. Immigrants who achieve vacatur of a conviction from abroad can, and do, re-enter the United States for further criminal proceedings.

A. The INA definition of a "conviction" does not include convictions vacated for procedural or substantive defect in the underlying criminal proceedings.

The Immigration and Nationality Act (INA) defines a "conviction" in relevant part as a "formal judgment of guilt of the alien entered by a court." 8 U.S.C. § 1101(a)(48)(A). The Board of Immigration Appeals (BIA) has held that "if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the [immigrant] no longer has a 'conviction' within the meaning of section [1101(a)(48)(A).]" *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), *rev'd on other grounds sub nom. Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006); *see also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) (holding that a conviction vacated pursuant to Article 440 of the New York Criminal Procedure Law is no longer a "conviction" within the meaning of the INA). The Department of State, which is responsible for adjudicating requests for visas to enter the United States filed at U.S. consulates abroad, follows the same rule. 9 Foreign Affairs Manual § 40.21(a) N3.8 ("When a court acts within its jurisdiction and vacates its own original judgment of conviction, no conviction for the purposes of the immigration laws will exist.").

The published decisions of the BIA are binding precedent on all immigration judges and officers of the Department of Homeland Security. 8 C.F.R. § 1003.1(g). The State Department's Foreign Affairs Manual similarly binds all U.S.

consular officials. 2 Foreign Affairs Manual § 1111.4. Therefore, except where a federal appeals court decision holds to the contrary,[4] federal immigration and consular authorities cannot deport a noncitizen or deny admission to the United States on the basis of a "conviction" when a defendant has achieved vacatur on a claim of substantive or procedural defect.[5]

B. The Vacatur of a Conviction On Appeal Removes the Legal Obstacles to Returning to the United States.

Noncitizens who have been "convicted" of certain specified classes of offenses are barred from being lawfully admitted to the United States. 8 U.S.C. § 1182(a)(2)(A),(B). Some noncitizens are eligible to seek a discretionary waiver

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[4] The Second Circuit has affirmed the BIA's position that a conviction vacated for legal defect does not trigger immigration consequences. *Saleh v. Gonzales*, 495 F.3d 17, 24 (2d Cir. 2007). The Fifth Circuit, alone among the federal circuit courts, does not recognize the vacatur of a conviction for procedural or substantive defect. *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002). Immigration authorities operating within that circuit are therefore arguably not bound by the BIA's *Pickering* rule. Nonetheless, that court's outlier position is so extreme that the government has determined as a matter of policy not to enforce it. *See Gaona-Romero v. Gonzales*, 497 F.3d 694 (5th Cir. 2007) (per curiam) (noting that the government undertook a policy review to determine how removal cases arising in the Fifth Circuit that involve vacated convictions should be treated" and "concluded that it would not seek that removal decisions be upheld pursuant to *Renteria*, but would rather request remand to the BIA so that the government could take action in accord with *Pickering*"); *see also, e.g., Discipio v. Ashcroft*, 417 F.3d 448, 449 (5th Cir. 2005) (vacating earlier decision in the same case applying *Renteria* because the government "wishes to apply to Petitioner's case the Board's opinion in *In re Pickering*").

[5] Immigration authorities may continue to attach consequences to convictions that have been vacated pursuant to state actions "purport[ing] to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a ... conviction by operation of a state rehabilitative statute." *Matter of Pickering*, 23 I&N Dec. at 622; *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Vacaturs pursuant to *Padilla*, however, do not result in such "rehabilitative" vacaturs, but rather in the determination that "the judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States." N.Y. Crim. Proc. L. § 440.10(1)(h).

of this bar, although in the case of controlled substance offenses other than a single possessory marijuana offense, no waiver exists that permits an immigration official, even if favorably disposed, to lawfully re-admit the convicted immigrant on a permanent basis. *See generally* 8 U.S.C. § 1182 (providing no waiver of inadmissibility for controlled substance offenses); § 1182(h) (providing a limited exception for a single possessory marijuana offense, upon a showing of "extreme hardship" to a relative or that the criminal conduct is more than 15 years in the past); § 1182(d)(3) (providing for waiver of criminal inadmissibility grounds for the limited purpose of temporary admission as a "nonimmigrant").[6] However, when the relevant conviction has been vacated through post-conviction relief, the immigrant has not been "convicted" within the meaning of the immigration law, and these bars no longer serve to prevent the immigrant's return to the United States. *See Point* II.A, *supra.*

In addition, immigrants who have been ordered deported or removed from the United States face a separate bar on returning, either for a term of years or indefinitely, depending on whether they were convicted of certain classes of

[6] If the defendant in the instant case prevails on this and his other 440 motion, that will remove the controlled substance offense bar to his lawful re-admission. However, even if he does not prevail on the other 440 motion, he is eligible for a temporary non-immigrant visa which could be issued for the purpose of resolving the open criminal case. Statistics from fiscal year 2010 show that approximately 59 percent of controlled substance violators overcame their ineligibility for such visas. *See* Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act) Fiscal Year 2010, *available at* http://www.travel.state.gov/pdf/FY10AnnualReport-TableXX.pdf (last visited Nov. 6, 2012).

criminal conduct. *See* 8 U.S.C. § 1182(a)(9)(A). But this provision also does not prevent a successful post-conviction relief litigant from returning. The Ninth Circuit has held that where a given conviction played a "key part" in an immigrant's removal, the vacatur of that conviction entails that the removal was not "legally executed" and that such a deported immigrant "'is entitled to a new deportation hearing.'" *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1106 (9th Cir. 2006) (quoting *Estrada-Rosales v. INS*, 645 F.2d 819, 821 (9th Cir. 1981)); *see also Wiedersperg v. INS, 896* F.2d 1179 (9th Cir. 1990). Similarly, the Second Circuit has held that re-opening a removal proceeding before the agency is "more than appropriate" where the vacated conviction gave rise to the basis for removability, citing as support the Ninth Circuit's finding in *Wiedersperg* that the failure to do so amounts to an abuse of discretion. *Johnson v. Ashcroft*, 378 F.3d 164, 171 (2d Cir. 2004) (citing *Wiedersperg*, 896 F.2d at 1182-83). Thus a defendant who has been deported but who prevails on post-conviction relief may move the agency to re-open his or her removal case, vitiating the bar on re-entry that attached to the prior deportation.[7]

[7] Although there has been some controversy over the extent of the agency's authority to entertain motions to re-open brought by defendants after they have been deported, the Second Circuit and eight other courts of appeals have found that the BIA has jurisdiction to grant such motions, at least when timely filed under the statute. *Luna v. Holder*, 637 F.3d 85, 102 (2d. Cir. 2011); *see also Garcia-Carias v. Holder*, ___ F.3d ___, 2012 WL 4458228 (5th Cir. Sep. 27, 2012); *Lin v. U.S. Att'y Gen.*, 681 F.3d 1236 (11th Cir. 2012); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Prestol Espinal v. Att'y Gen.*, 653 F.3d 213 (3d Cir. 2011); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010);

Thirdly, even where a motion to re-open is unavailing because the vacated conviction did not directly affect the removal proceedings, a deported defendant who prevails on post-conviction relief can pursue administrative parole into the United States under 8 U.S.C. § 1182(d)(5). That provision permits immigration authorities to allow any individual to enter the United States on a "case-by-case basis for urgent humanitarian reasons or significant public benefit," *id.* The USCIS Adjudicator's Field Manual specifically includes parole for prosecution purposes as a significant public benefit ground:

> Significant public benefit reasons - This type of parole (which is normally referred to by its initials, SPBP) is authorized for an alien who is needed to participate in a law enforcement investigation, prosecution, or other legal proceedings. The initial authorization must be made by the Immigration and Customs Enforcement Parole and Humanitarian Assistance Branch (PHAB) upon a request from a recognized law enforcement entity.

USCIS Adjudicator's Field Manual § 54.1(b), *available at* http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?CH=afm&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD (last visited Nov. 5, 2012). And indeed, significant public benefit parole has been and continues to be used to bring defendants into the country to stand trial. *See, e.g., Matter of Tomas-Gostas*, 2010

Coyt v. Holder, 593 F.3d 902 (9th Cir. 2010); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007).

WL 1284458 (BIA Mar. 16, 2010) ("[Respondent] was paroled in the United States at Tampa, Florida, for criminal prosecution pursuant to section 212(d)(5)"); *Hernandez-Almanza v. U.S D.O.J*, 547 F.2d 100, 102 (9th Cir. 1976) ("Pursuant to Section 212(d)(5) of the Immigration and Nationality Act, appellant was temporarily paroled into the United States for criminal prosecution.").

Finally, U.S. citizens and lawful permanent residents may petition for visas to allow family members who have been deported to re-immigrate to the United States as permanent residents. *See generally* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a) (describing qualifying family relationships); § 1154 (describing petition process). As discussed *supra*, such visas are unavailable to noncitizens who have been convicted of offenses that fall within the criminal grounds of inadmissibility. 8 U.S.C. § 1182(a)(2)(A),(B). But upon vacatur of the conviction, a deported defendant would not face this obstacle and could re-immigrate through the petition of a U.S. resident or citizen relative, subject to waivers of other grounds of inadmissibility. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(A)(iii) (providing that the Attorney General may waive the ten-year bar on readmission for noncitizens who have been deported).

As a result, there is no basis for any categorical presumption that a defendant who achieves vacatur will face insurmountable legal obstacles to re-entering the United States for purposes of further criminal proceedings. In fact, the government

has recently reiterated that it will actively facilitate the return of deported noncitizens who prevail on challenges to their removal orders. *See* U.S. Dep't of Homeland Security Immigration and Customs Enforcement Policy Directive 11061.1 (Feb. 24, 2012), *available at* http://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf (last visited Nov. 6, 2012).

Nor is there any reason to assume that criminal defendants who have been involuntarily deported will elect to stay outside of this jurisdiction if given the chance to return. Deportation is not a benefit to the immigrant defendant but a "forfeiture for [asserted] misconduct of a residence in this country." *Fong Haw Tan v. Phelan*, 333 U.S. 6,10 (1948). It is a "drastic measure," *id.*, that often results "in loss... of all that makes life worth living," *Ng Fung Ho. v. White*, 259 U.S. 276, 284 (1922). As the Supreme Court recently reaffirmed, and as *amici* know first-hand from their work with immigrants accused or convicted of crimes, when an immigrant faces charges which may lead to permanent exile, "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *Padilla v. Kentucky*, 559 U.S. __, __, 130 S. Ct. 1473, 1483 (2010) (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (1999) (alteration in original) (further internal quotation marks and citation omitted)). It is simply not logical to presume that immigrants who have not consented to removal, and who have litigated a 440 motion following their

deportation in order to achieve the opportunity to bring their criminal case to a favorable resolution, will not cooperate in taking the necessary steps to make themselves available to return to New York—and to the families and communities from which they were involuntarily separated—to do so. *See Diaz*, 7 N.Y.3d at 834 (R.S. Smith, J., dissenting) ("Defendant has asked us for a new trial, and has not by any voluntary act made a retrial difficult or impossible. He is entitled to have us assume, absent contrary evidence, that he in fact wants a retrial....").

C. In practice, deported defendants do submit to re-prosecution in the U.S.

Deported defendants whose convictions are vacated have in fact made use of the mechanisms described above to re-enter the United States to submit to re-prosecution. Others resolve the pending criminal case without making a personal appearance. For instance, in *Cardoso-Tlaseca v. Gonzalez*, 460 F.3d 1102 (9th Cir. 2006), the defendant was removed to Mexico while his post-conviction relief case was pending in state court. *See id.* at 1104. Subsequently, the defendant achieved vacatur of the conviction for cultivating marijuana for personal use that had served as one of the bases for the removal order. *See id.* While the defendant remained in Mexico, the prosecutor amended the complaint to charge the defendant with simple possession of marijuana. *See id.* The defendant then entered a guilty plea and

completed probation successfully, after which the court expunged the conviction.[8] *See id.* at 1105. In New York, non-felony pleas may similarly be entered by counsel without the requirement of the defendant's personal appearance. *See* N.Y. Crim. Proc. L. § 220.50(1). Thus, deportation does not operate as a bar to post-vacatur resolution of a criminal case.

Ayman Salama was ordered deported in 2006 based on a 1997 conviction for felony Welfare Fraud.[9] *See In re Ayman Salama*, 2010 WL 5559194 (BIA Dec. 17, 2010). He filed a post-conviction relief petition in May 2008, which was granted in December 2008. *See* Findings of Fact, Conclusions of Law, and Judgment Vacating Conviction, Marion Superior Court, Cause No. 49G05-9506-PC-081518 (Dec. 30, 2008).[10] Post-vacatur, the defendant moved to re-open his deportation case, which he accomplished in December 2010. *See In re Salama*, 2010 WL 5559194 at *2. Upon his return to the United States, in February 2012, the defendant re-pled to a non-deportable offense, misdemeanor Conversion, in return for the dismissal of the Welfare Fraud charge. *See* Abstract of Judgment, Plea Agreement, and Order Granting State's Motion to Dismiss, Marion Superior Court, Cause No. 49G05-9506-PC-081518. Thus, for some deported defendants,

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[8] Undersigned counsel confirmed with Mr. Cardoso-Tlaseca's attorney that Mr. Cardoso-Tlaseca was granted cancellation of removal on April 21, 2010, and allowed to remain in the United States as a Lawful Permanent Resident.

[9] The defendant was ordered deported *in absentia* while outside of the United States; he was denied admission in 2007 when he attempted to return to the United States. *See id.*

[10] The criminal court documents are on file with counsel for *amici* and are available at the Court's request.

vacatur will pave the way for the defendant to return in person to resolve the open criminal case.

Similarly, the defendant in *Pruidze v. Holder*, 632 F.3d 234, 235 (6th Cir. 2011), a lawful permanent resident deported to Russia for a controlled substance violation, regained his LPR status by achieving post-deportation vacatur of the conviction. As a result of the successful post-conviction relief petition, the Michigan trial court re-opened the criminal case. *See People v. Pruidze*, 16th Judicial District Court (Wayne County), No. 01LO6300CM, Tr. of May 12, 2009 Hr'g 3.[11] Subsequently, the BIA re-opened and terminated the removal proceedings, which allowed the defendant to lawfully return to the United States for re-prosecution. *See In re Vakhtang Pruidze*, No. A77-434-982 (BIA Sept. 22, 2011) (attached as Appendix B).

Likewise, an Australian woman who had been deported based on a conviction for theft successfully petitioned for post-conviction relief in Oregon state court.[12] Subsequent to the vacatur of the theft conviction, she achieved the re-opening and dismissal of her removal proceeding, paving the way for her return to the United States in her previous status as a lawful permanent resident. Significantly, this was possible despite the fact that she had other convictions for

[11] The transcript is on file with counsel for *amici* and is available at the Court's request.

[12] The immigration and criminal court records detailing this case are attached as Appendix C. At the request of counsel for the defendant the defendant's name and docket numbers have been redacted.

"crimes involving moral turpitude" which rendered her inadmissible to the United States (though the same convictions would not have made her deportable from within the U.S.). *See* 8 U.S.C. § 1182(a)(2)(A)(i) (providing that conviction of a crime involving moral turpitude renders noncitizen inadmissible, unless it falls within "petty offense" exception); *compare* 8 U.S.C. § 1227(a)(2)(A)(i) (providing that a single crime involving moral turpitude must be committed within five years of lawful admission in order to render a noncitizen deportable from within the U.S.); 1227(a)(2)(A)(ii) (providing that multiple crimes involving moral turpitude do not render a noncitizen deportable if they arise from a single scheme of criminal conduct). However, because she returned to the United States in the lawful resident status that had been wrongfully stripped from her on the basis of an invalid conviction, she was assimilated to the status of a lawful resident who had never departed the U.S, and was not prevented from re-entering the Unites States even though as an applicant for admission she would have been deemed inadmissible.

Thus, both law and experience show that any categorical judgment that a deported defendant would not be able to submit to re-prosecution is unfounded. Other state and federal courts reject such a categorical judgment. *See Reyes-Torres v. Holder*, 645 F.3d 1073, 1075 (9th Cir. 2011) (California court vacated conviction despite defendant's deportation to Mexico); *Pruidze*, 632 F.3d at 235

(Michigan court vacated conviction despite defendant's deportation to Russia); *Wiedersperg v. INS*, 896 F.2d 1179, 1180 (9th Cir. 1990) (California court vacated conviction despite defendant's deportation to Austria); *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981) (federal court vacated conviction despite defendant's deportation to Mexico); *People v. Guzman*, 962 N.E.2d 1182 (Ill. App. Ct. 2011), *appeal allowed*, 968 N.E.2d 85 (Ill. 2012) (conviction vacated despite defendant's deportation); *Ex Parte Olvera*, __ S.W.3d __, 2012 WL 2336240 (Tex. App.-Dallas 2012) (conviction vacated despite defendant's deportation to Mexico). New York courts should likewise assume that a deported defendant seeking to re-open his criminal case can and will return to his family and friends in the United States to resolve the legal issues barring his permanent lawful re-settlement in the United States.

III. Discouraging the filing of a 440 motion prior to the commencement of removal proceedings, then dismissing the motion because the defendant is unable to resolve the Sixth Amendment claim prior to being removed, leaves the defendant with no meaningful remedy for a *Padilla* violation.

Two emergent lines of trial court cases in New York have placed defendants in an unacceptable Catch-22 by discouraging the filing of 440 motions prior to the commencement of deportation proceedings and yet dismissing such motions when the defendant is deported prior to final resolution of the motion. *Compare People v. Rodriguez*, 2012 NY Slip Op 32584(u) (Sup. Ct., Kings County 2012) (holding

that 440 motion is premature when filed prior to commencement of removal proceedings); *People v. Marsh*, 2012 NY Slip Op 32321(u) (Sup. Ct., Kings County 2012) (similar); *People v. Floyd*, 2012 NY Slip Op 50713(u) (Crim. Ct., Kings County 2012 (similar); *People v. Delacruz*, 2011 WL 7403312 (Sup. Ct., Kings County Dec. 5, 2011) (similar); *People v. Guerrero*, 2011 NY Slip Op 33582(u) (Sup. Ct., Kings County 2011) (similar) *with People v. Williams*, 2012 N.Y. Slip Op. 32281(U) (Sup Ct, N.Y. County 2012) (440 dismissed because defendant not available to obey the mandate of the court); *People v. Hidalgo*, 13 Misc.3d 1203(A) (Sup. Ct., N.Y. County 2006) (same) and *People v. Busgith*, 36 Misc.3d 1211(A) (Sup Ct, N.Y. County 2012) (440 dismissed as moot due to defendant's deportation); *People v. Worklis*, 2011 WL 7402818 (Sup. Ct., Kings County 2011) (same). Some courts have suggested or even explicitly acknowledged that the 440 filing merits a hearing yet refused to hold that hearing because the defendant had been deported. *See People v. Reid*, 2012 N.Y. Slip Op. 50371(u) (Crim. Ct., Queens County 2012) (ordering hearing but subsequently dismissing 440 motion due to defendant's deportation); *People v. Casada*, 2010 N.Y. Slip Op. 52245(U) (Sup Ct, Kings County 2010) (suggesting that hearing may be necessary but dismissing 440 motion due to defendant's deportation).

The deportation proceeding is on a separate schedule from the 440 motion, and there is no right to a stay in immigration court to pursue post-conviction relief.

A *pending* post-conviction relief case does not affect the finality of the conviction for immigration purposes, and so the immigration judge can order the defendant removed, and removal can be effected, during the pendency of a 440 motion. Therefore, the trial courts' emerging practices of preferring or even requiring the initiation of removal proceedings to grant relief on a claim under *Padilla v. Kentucky*, and yet refusing to consider the merits of such motions post-deportation, threatens to leave defendants with no meaningful remedy for pleas entered in violation of *Padilla*.

A. Trial courts have issued opinions explicitly preferring or requiring that defendants wait to file a Padilla claim until removal proceedings have commenced.

Trial courts have issued opinions explicitly preferring or even requiring that defendants delay the filing of a *Padilla* 440 motion until they are placed in removal proceedings. *See Rodriguez*, 2012 NY Slip Op 32584(u); *Marsh*, 2012 NY Slip Op 32321(u); *Floyd*, 2012 NY Slip Op 50713(u); *Delacruz*, 2011 WL 7403312; *People v. Guerrero*, 2011 NY Slip Op 33582(u).

In *People v. Guerrero*, the defendant filed a 440 motion seeking to vacate her felony conviction for criminal sale of a controlled substance, which rendered her deportable as an aggravated felon. 2011 NY Slip Op 33582(u) at *1; *see also* 8 U.S.C. §§§ 1101 (a)(43)(B) (drug trafficking crime is an aggravated felony), 1227(a)(2)(a)(iii) (any alien convicted of a single aggravated felony at any time is

deportable). As part of its prejudice analysis, the court noted that "although defendant contends that she is facing deportation, . . . defendant is not currently under removal proceedings." *Guerrero*, 2011 NY Slip Op 33582(u) at *4. The court then concluded, assuming that counsel had failed to advise her about the immigration consequences, that the defendant had "failed to establish that she suffered any prejudice as a result." *Id.* at *5.

The *Marsh* defendant filed a 440 motion to vacate a misdemeanor controlled substance conviction that rendered him deportable. *See Marsh*, 2012 NY Slip Op 32321(u) at * 1; *see also* 8 U.S.C. § 1227(a)(2)(B)(i) ("any alien convicted of a violation of . . . any law . . . relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable"). Included in the trial court's analysis of the Sixth Amendment claim is the observation that "undercutting defendant's contention of his deportability based on the present conviction, is the fact that he is not currently subject to an order of deportation." *Marsh*, 2012 NY Slip Op 32321(u) at *3. The trial court ultimately denied the motion for failure to establish ineffective assistance of counsel. *See id.*

People v. Floyd goes even further than *Guerrero* and *Marsh*, stating that it is unclear whether the "'possibility of deportation,' as a matter of law, falls within the type of prejudice addressed in *Padilla v. Kentucky*." *Floyd*, 2012 NY Slip Op

50713(u) at *12. The *Floyd* defendant moved to vacate his conviction for sexual abuse in the third degree under *Padilla v. Kentucky*, asserting that it rendered him deportable as an aggravated felon. *See id.* at *5; *see also* 8 U.S.C. § 1101(a)(43)(A) (defining "aggravated felony" to include "sexual abuse of a minor"). In its prejudice analysis, the *Floyd* court noted that "potential deportation" does not "clearly fall within the scope of *Padilla v. Kentucky*." *Floyd*, 2012 NY Slip Op 50713(u) at *9. The court further noted that "the lack of any removal proceedings previously or currently pending against [the defendant] significantly distinguishes him from the petitioner in *Padilla v. Kentucky*." *Id.*[13] The *Floyd* court then surveyed *Padilla* 440 decisions, observed that "multiple courts within this county have decided against the defendants on 440.10 motions where deportation proceedings had not been commenced," and concluded that "courts have found that the lack of active deportation proceedings puts into question whether or not a defendant has shown 'prejudice' sufficient to meet the second prong of the *Strickland* standard." *Id.* at *10-11. Despite the defendant's

[13] The *Floyd* court also deemed important the length of time since the conviction (17 years) without the commencement of removal proceedings. *See id.* at *9. However, it is not unusual for ICE to commence removal proceedings many years after a deportable conviction. *See People v. Alegria*, 2012 NY Slip Op 30562(u) (Sup. Ct., Kings County 2012) (removal proceedings commenced in 2011 based on 1986 conviction); *People v. Mercado*, 934 N.Y.S.2d 36 (Sup. Ct., Bronx County 2011) (removal proceedings commenced in 2010 based on 2004 conviction); *People v. De Jesus*, 2012 NY Slip Op 52259(u) (Sup. Ct., NY County 2010) (removal proceedings commenced in 2009 based on 1999 conviction, despite defendant's frequent travel outside the U.S. and contact with ICE upon return); *In re Miguel Heredia*, No. A-074-194-050 (BIA Feb. 6, 2012) (attached as Appendix D) (removal proceedings commenced in 2011 based on 1997 conviction). Thus, even if many years have elapsed after a deportable conviction, ICE may initiate removal proceedings at any time.

clear statutory deportability, the court required the defendant to provide "evidentiary proof that he is currently subject to deportation." *Id.* at *12. Lacking such proof, the court held that the defendant had failed to establish prejudice. *See id.*

The foregoing cases demonstrate an emerging trend in the trial courts to prefer or require that the defendant wait until the commencement of removal proceedings to file a 440 motion. Some of these same courts, and even the same justices, hold that dismissal is required if a 440 motion is not resolved prior to deportation. *See, e.g., Rodriguez*, 2012 NY Slip Op 32584(u) (Sup. Ct., Kings County 2012, Dimango, J.) (holding that 440 motion is premature when filed prior to commencement of removal proceedings); *Guerrero*, 2011 NY Slip Op 33582(u) (Sup. Ct., Kings County 2011, Dwyer, J.) (same); *Williams*, 2012 N.Y. Slip Op. 32281(U) (Sup Ct, N.Y. County 2012, Dwyer, J.) (440 dismissed because defendant not available to obey the mandate of the court); *Worklis*, 2011 WL 7402818 (Sup. Ct., Kings County Dec. 6, 2011) (Dimango, J.) (440 motion dismissed as moot due to defendant's deportation). The combination of these trends is especially problematic because immigration judges need not stay removal proceedings during the pendency of post-conviction relief.

B. The pendency of a post-conviction relief case is irrelevant to the removal proceeding, even though the relief is crucially relevant.

A pending post-conviction relief challenge is legally irrelevant to the removal proceeding, even when the ultimate vacatur of the conviction would remove the basis for deportation. *See Matter of Polanco*, 20 I&N Dec. 894 (BIA 1994). In practice, immigration proceedings for detained noncitizens are frequently completed in significantly less time than it takes to litigate a 440 motion, and a great many noncitizens convicted of crimes are detained during the pendency of their proceedings. *See* 8 U.S.C. § 1226(c) (providing for the mandatory detention of noncitizens deportable on the majority of criminal removal grounds during the pendency of removal proceedings); *see also Demore v. Kim*, 538 U.S. 510, 529 (2003) (reciting Department of Justice statistics indicating that in 85% of removal proceedings involving detained respondents, proceedings were completed in an average time of 47 days and a median of 30 days, and that in the remaining cases involving an administrative appeal, such appeal took an average of four months with a median of slightly less than four months).

Immigration judges have wide discretion to deny a continuance to pursue post-conviction relief. *See Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1997); *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983); 8 C.F.R. § 1003.29. Continuances to pursue post-conviction relief are commonly denied, as exemplified by the case of New York defendant Miguel Heredia. Only two weeks

elapsed between Mr. Heredia's initial immigration court hearing and the issuance of a removal order, despite his request to pursue post-conviction relief. *See In re Miguel Heredia*, No. A-074-194-050 (BIA Feb. 6, 2012) (attached as Appendix D). At the first hearing in the removal proceeding on October 7, 2011, counsel requested a continuance to pursue post-conviction relief, seeking to vacate the only conviction that supported the removal proceeding. *See* Tr. of Oct. 7, 2011 H'rg 6.[14] The Immigration Judge (IJ) refused to grant a continuance to pursue post-conviction relief, stating "public policy says these cases are to go forward, but with the caveat, obviously, that if it becomes vacated at some time in the future it is the basis for a reopening." *Id.* at 7-8. At the next hearing on October 21, 2011, counsel asserted that he had requested the court file and plea minutes necessary to the preparation of the 440. Tr. of Oct. 21, 2011 H'rg 12. Counsel submitted a letter from the court reporter "indicating that there has been received an order for those plea minutes" and that the request would take two to four weeks to be processed. *Id.* at 13. Counsel also stated that defense counsel for Mr. Heredia had affirmatively misadvised him that the misdemeanor conviction would not have immigration consequences, and assured the IJ that the post-conviction relief motion would be "ready to go as soon as those minutes come in." *Id.* at 13, 15.

[14] The transcripts of the immigration court hearings are on file with counsel for *amici*, and are available at the Court's request.

The IJ nevertheless denied a continuance, and ordered Mr. Heredia's removal. *See id.* at 15.

The reality of ICE's disregard of pending post-conviction relief matters renders the availability of 440 relief after deportation crucially important to the vindication of a defendant's Sixth Amendment right to effective assistance of counsel.

CONCLUSION

For the foregoing reasons the trial court erred in dismissing appellant's 440 motion solely based on his deportation. Thus, *amici* respectfully request that this Court vacate the Supreme Court's order dismissing Defendant-Appellant's petition for post-conviction relief.

Dated:

Respectfully Submitted,

By: _____

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(A)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 23

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
IND.# 1104/04

- against -

ISIDRO PAREDES,

Defendant.

----------x

Laura A. Ward, J.:

On September 21, 2010, this court found that the Supreme Court's decision, *Padilla v. Kentucky*, ___ U.S. ___, 130 S.Ct. 1473 (2010), is retroactive, mandates a finding of ineffective assistance counsel in this case and a hearing is required to determine whether the defendant was prejudiced by the failure to provide effective counsel. The burden is on the defendant to show that he was prejudiced. Familiarity with the prior decision is assumed.

A hearing was held on November 16, 2010. The sole witness for the defense was Isidro Paredes. The defendant, who is currently in federal custody in a facility in upstate New York, was produced via closed circuit television.[1] Paredes testified that in 2004, he was in the United States legally, having received his "green card" in 2000. Parades had arrived in the United States on January 8, 2000, from the Dominican Republic. He testified that when he was arrested in the underlying case, in 2004, his entire family was in the United States and he had no relatives remaining in the Dominican Republic. After his arrest he met with his attorney, Steven Hornstein who argued for his release at arraignment. The defendant was released on his own recognizance. Thereafter, the defendant met with Mr. Hornstein to discuss the strengths and weaknesses of his case. According to the defendant, Mr. Hornstein told him that if he was found guilty, he could receive a sentence of between ten and fifteen years, but on a plea of guilty he would receive a sentence of five years probation. The defendant testified that he had had enough time to discuss his plea with his attorney. According to the defendant, he pleaded guilty because he was guilty and would receive a probationary sentence rather than an incarceratory sentence.[2]

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[1] The defendant testified with the assistance of the court's official Spanish interpreter.

[2] The defendant successfully completed five years of probation. He was rearrested in 2009 and charged with federal narcotics violations. He was placed in the custody of the United States Immigration and Customs Enforcement based upon both his 2004 and 2009 arrests. The court was informed that the plea taken in the underlying 2004 case would result in mandatory deportation. The plea taken in the defendant's subsequent 2009 case may result in the

The defendant claimed that his attorney never told him that with a sentence of probation he would avoid being detected by the immigration authorities. He said he would not have pleaded guilty to the crime of criminal possession of a controlled substance in the fourth degree, in violation of Penal Law § 220.09, if he had know that he would have been deported.

The People called, Steven Hornstein, the defendant's attorney in the 2004 case. Mr. Hornstein testified that he was admitted to the bar in 1982 and worked as an Assistant District Attorney in the Bronx, rising to a supervisory position before leaving for private practice in 1992. Ninety-nine percent of his practice deals with criminal cases. Although he did not have an independent recollection of the defendant's case, he did have his file. Mr. Hornstein was contacted by a member of the defendant's family to represent the defendant. He first met the defendant in the holding cells behind the arraignment court. There Mr. Hornstein learned from the defendant that he was born in the Dominican Republic, but had a green card. At arraignment, Mr. Hornstein argued for, and gained, the defendant's release on his own recognizance. Mr. Hornstein filed cross grand jury notice and the case was adjourned for grand jury action. Mr. Hornstein testified that although he had no independent recollection of his meetings with the defendant, it was his practice to discuss the strengths and weaknesses of a client's case with his clients. Mr. Hornstein's notes indicated that the defendant gave two different versions of what occurred at the time of his arrest. The first version, given by the defendant at arraignment was inconsistent with the facts set forth in the complaint. At a subsequent meeting the defendant indicated that the facts as set forth in the complaint were accurate. Mr. Hornstein testified that it was his practice to advise clients who were not United States citizens of the potential consequences of taking a plea, including the possibility of deportation. He would also advise clients that based upon his experience, the client was "less likely" to be deported when the sentence was probation rather than incarceration, but he has no independent recollection of what he told the defendant in this case.[3]

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defendant's deportation, but deportation is not mandatory in the latter case.

[3] The only independent recollections Mr. Hornstein had of this case was that during the plea, the court asked if the defendant was in the country legally. Mr. Hornstein remembered verifying with his client that his client had an alien registration card, a fact Mr. Hornstein originally learned at the defendant's arraignment. Mr. Hornstein also had an independent recollection that he was on vacation in February 2004, and had to ask that the defendant's case be adjourned to a date in March 2004.

Although Mr. Hornstein's statement regarding the immigration consequences was the general practice in 2004, in New York State, it was not an accurate statement of the law. Thus, if the court were to determine that Mr. Hornstein had advised the defendant, as was his practice, such advice would have constituted a finding of ineffective assistance of counsel pursuant to pursuant to *People v. McDonald*, 1 N.Y.3d 109 (2003), and this court would not have had to decide the issue of whether or not the Supreme Court's decision in *Padilla v. Kentucky*, ____ U.S. ____, 130 S.Ct. 1473 (2010), was retroactive. The issue remains, however, did the

Unfortunately, Mr. Hornstein had no independent recollection of what immigration advise he actually gave the defendant in 2004. Even if the court accepts that Mr. Hornstein followed his general practice regarding advise given to non-citizen defendants' the court must still decide if the defendant was prejudiced.

An argument could be made that in 2004 all the defendant wanted was to remain at liberty and thus understanding the strength of the People's case chose to plead guilty and receive a probationary sentence. However, the defendant, now facing deportation, claims had he known the plea would cause him to be deported he would have fought the case. Although this court feels that a defendant who was initially given the benefit of a non-incarceratory sentence and proceeds to violate the law again does not deserve to benefit from the Supreme Court decision, which changed the law in New York State, based upon the defendant's claim and the testimony of his then counsel as to what the defendant may have been told, this court feels constrained to grant the defendant's motion.

For the reasons set forth above the defendant's motion to withdraw his plea is granted. The criminal court complaint is reinstated and the case is adjourned to criminal court for grand jury action.

The foregoing is the decision and order of the court.

Dated: New York, New York
November 22 , 2010

Laura A. Ward
Acting Justice Supreme Court

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defendant establish that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *People v. McDonald,* 1 N.Y.3d at 114 (citation omitted).

(B)

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A077 434 982 - Detroit, MI Date: SEP 22 2011

In re: VAKHTANG PRUIDZE

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Herman S. Dhade, Esquire

ON BEHALF OF DHS: Michael B. Dobson
Senior Attorney

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] - Controlled substance violation

APPLICATION: Reopening

This case was last before us on June 29, 2009, when we concluded that we lacked jurisdiction over the respondent's motion to reopen his proceedings because the respondent was no longer in the United States. On February 3, 2011, the United States Court of Appeals for the Sixth Circuit, the circuit in which this case arises, vacated our ruling and remanded the respondent's case for consideration of his motion on its merits. *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011).[1] The Department of Homeland Security (DHS) continues to oppose the respondent's motion due to the respondent's criminal history and the untimeliness of the motion. The motion, however, will be granted pursuant to our *sua sponte* authority, and the proceedings against the respondent will be terminated.

The respondent is a native and citizen of Russia. In his untimely motion, he claims that a Michigan court has vacated the conviction that provided the basis for his order of removal, and he asks that his proceedings be reopened in light of this event. In support of his motion, he has provided a copy of the motion he submitted to the Michigan court, a copy of the court's order, and a copy of the transcript of the hearing on his motion. *See* Respondent's Motion to Reopen, Tabs B, C, and D.

The respondent's evidence establishes that the Michigan court vacated the respondent's conviction due to legal defects in his criminal proceedings rather than immigration hardship or rehabilitation. *See Matter of Chavez-Martinez*, 24 I&N Dec. 272, 274 (BIA 2007) (stating that an

[1] In *Pruidze v. Holder, supra*, the Sixth Circuit ruled that we had no authority to rule that we lacked jurisdiction over Pruidze's motion simply because he had departed from the United States. *Pruidze v. Holder, supra*, at 235, 237-40.

alien seeking to reopen proceedings to establish that a conviction has been vacated bears the burden of proving that the conviction was not vacated solely for immigration purposes). Accordingly, the sole charge of removability in the respondent's case is no longer valid. Given this fact and the totality of the circumstances in the respondent's case, we find that *sua sponte* reopening is warranted. *See* 8 C.F.R. § 1003.2(a).[2] Accordingly, we grant the respondent's motion to reopen. Moreover, because the sole charge of removability against the respondent is no longer valid, we terminate the removal proceedings against the respondent.

ORDER: The respondent's motion to reopen is granted, and the proceedings against the respondent are terminated.

FOR THE BOARD

[2] The respondent's motion to reopen is untimely, and the respondent has not established that his motion fits within any of the exceptions to the time limit for filing a motion to reopen. Section 240(c)(7)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C) (stating that motions to reopen "shall be filed within 90 days of the date of entry of a final administrative order of removal" and listing certain exceptions). To obtain reopening, therefore, the respondent must establish that *sua sponte* reopening is appropriate.

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ENTERED
APR 27 2007
Marion County Circuit Court

STATE OF OREGON
Marion County Circuit Courts
APR 26 2007
FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

[redacted] Petitioner,

v.

STATE OF OREGON Respondent.

Post-Conviction Case No. [redacted]

Marion County Case No. [redacted]

GENERAL JUDGEMENT

This case came before the above entitled court on May 15, 2006, before the Honorable Joseph C. Guimond for a Post-Conviction Relief Hearing. Following that session, the PCR court accepted further factual submissions of the parties up until March 27, 2007, at which time the record was fully submitted by the parties. The Petitioner appearing by counsel, Brian Patrick Conry, and Defendant State of Oregon appearing by Susan Gerber, AAG State of Oregon; based on the arguments of counsel, and the records and files herein and the Court being fully advised in the premises;

THE COURT HEREBY FINDS that inasmuch as Petitioner's constitutional rights were violated in the prior proceedings, in that criminal defense counsel admits that she did not consider her client's immigration status before the entry of the guilty plea and only learned that her client was not a US citizen from the pre-sentence investigative report. Petitioner has been

deported as a result of her conviction. Criminal defense counsel's representation of the petitioner fell below constitutionally accepted standards.

Accordingly, based upon Article 1 §11 of the Oregon Constitution (adequate assistance of counsel clause), and the Sixth (effective assistance of counsel clause) and Fourteenth Amendments of the United States Constitution;

IT IS THEREFORE ADJUDGED, that the Petition for Post-Conviction Relief challenging Petitioner's conviction for Aggravated Theft in the First Degree, Case Number [redacted], Circuit Court for Marion County, is hereby granted due to the constitutionally ineffective assistance of criminal defense counsel, Suzanne Taylor.

It is THEREFORE ORDERED that Petitioner's Petition for Post-Conviction Relief is hereby GRANTED and her conviction in Marion County Circuit Court Case Number [redacted] is hereby VACATED.

DATED this 26 day of April, 2007

HON. Joseph C. Guimond
Circuit Court Judge

SUBMITTED BY: Brian Patrick Conry, OSB # 82224
534 SW Third Ave #711, Portland, OR 97204

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

In the Matter of:

[redacted]
RESPONDENT

Case No.: [redacted]

Docket: PORTLAND OR
IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

After considering the facts and circumstances of this case and as there is no opposition from the parties, it is HEREBY ORDERED that these proceedings be dismissed pursuant to 8 CFR § 239.2(a)(7) and § 1239.2(c).

Immigration Judge

Date: July 31, 2007

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [✓] ALIEN's ATT/REP [ ] INS
DATE: 7/31/07 BY: COURT STAFF NLZ
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Dismissal

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

In the Matter of: [redacted]

Case No.: [redacted]

[redacted]

Docket: PORTLAND, OR

RESPONDENT

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of respondent's / applicant's

_____ Motion to Reconsider an Immigration Judge's decision

__✓__ Motion to Reopen proceedings

filed in the above entitled matter, it is HEREBY ORDERED that the motion

__✓__ be granted.

_____ be denied for the reasons indicated in the attached decision.

Immigration Judge

Date: July 31, 2007

U.S. Department of Justice

Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

In the Matter of: File No [redacted]

Respondent: [redacted] currently residing at:

C/o Shutter Creek Correctional Inst., 2000 Shutters Landing Rd., North Bend, OR 97459
(Number, street, city state and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.

☐ 2. You are an alien present in the United States who has not been admitted or paroled.

☒ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of Australia and a citizen of Australia.
3. You entered the United States at or near Honolulu, HI on or about February 10, 1970 as a Lawful Permanent Resident.
4. On March 7, [redacted] you were convicted in the Circuit Court of Multnomah County, State of Oregon, for the offense of Count 1 - Theft in the First Degree and Count 3 - Forgery in the First Degree in violation of ORS 164.005 and 165.013. Case No. [redacted].
5. On October 29, [redacted] you were convicted in the Circuit Court of Marion County, State of Oregon for the offense of Aggravated Theft I, in violation of ORS 164.057. Case No [redacted]

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, as amended, in that, at any time after admission, you have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: _____
(Complete address of immigration court, including room number, if any)

on _____ at _____ to show why you should not be removed from the United States based on the charge(s) set forth above.
(Date) (Time)

[signature] ADDS
(Signature and title of issuing officer)

Date: August 29, 2000

Portland, Oregon
(City and state)

See reverse for important information

Form I-862 (Rev. 3-22-99)

[redacted]

C0001

(D)

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A074 194 050 - New York, NY

Date: FEB - 6 2012

In re: MIGUEL ANGEL HEREDIA a.k.a. Miguel Heredia a.k.a. Angel Heredia a.k.a. Miguel Hereida a.k.a. Miguel A. Hereida

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: George A. Terezakis, Esquire

In an oral decision dated October 21, 2011, an Immigration Judge denied the respondent's request for a continuance; found him removable; determined that he did not apply for, and did not demonstrate eligibility for, any relief from removal; and ordered him removed from the United States to the Dominican Republic. The respondent appealed from that decision. The appeal will be dismissed.

The respondent was found removable as charged, as convicted of a crime involving moral turpitude under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i), and as convicted of a crime of domestic violence under section 237(a)(2)(E)(i) of the Act.[1] As substantiated by conviction documents, he has a February 1997 New York conviction upon a guilty plea for endangering the welfare of a child. For that crime, he was sentenced to probation of 3 years. *See* Ex. 2. The record reflects that his status was adjusted to that of lawful permanent resident on or about December 14, 1995. Upon our de novo review, we find correct the Immigration Judge's conclusions concerning the respondent's removability and ineligibility for removal relief.

On appeal, the respondent argues that the Immigration Judge should have granted his request for an additional continuance of his removal hearings, so that he could pursue post-conviction relief concerning his conviction based on *Padilla v. Kentucky*, 559 U.S. __, 130 S.Ct. 1473, 2010 WL 1222274 (March 31, 2010).

The decision to grant or deny a continuance is within the discretion of the Immigration Judge, and good cause must be shown for a continuance. *See Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1997); *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983); 8 C.F.R. § 1003.29. In this case, the Immigration Judge afforded the respondent a prior continuance, from October 7, 2011, until October 21, 2011. This continuance was given for the purpose of case preparation by the attorneys for both parties. At the initial hearing on October 7, 2011, the respondent's lawyer informed the Immigration Judge that the respondent was exploring the possibility of post-conviction relief in criminal court. The Immigration Judge instructed the respondent that no further continuance would be granted solely for the pursuit of post-conviction relief. *See* Tr. at 6. We agree with the Immigration Judge's determination not to allow a second continuance.

[1] The Immigration Judge did not sustain the third removability charge pursuant to section 237(a)(2)(A)(iii) of the Act, in conjunction with section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A).

Concerning the validity of a conviction, the fact that the respondent may be pursuing post-conviction relief in the form of a collateral attack on a conviction in state criminal court does not affect its finality for federal immigration purposes. *See Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992). The respondent has presented no evidence that any attack on his conviction has resulted in any vacatur or has even been filed. In *Padilla v. Kentucky*, *supra*, the United States Supreme Court ruled that a lawyer representing an alien in connection with a guilty plea to a criminal offense has a constitutional duty to advise the alien about the risk of deportation arising from the conviction. However, the respondent's speculation that his conviction might be invalid, including in light of *Padilla v. Kentucky*, *supra*, does not change the finality for immigration purposes of that conviction, unless and until it were to be overturned by a criminal court. *See Matter of Ponce de Leon*, 21 I&N Dec. 154 (A.G. 1997; BIA 1997, 1996). The respondent thus stands convicted of the 1997 crime.

Next on appeal, the respondent asks that the Board defer adjudication of his appeal for at least 60 days. We deny such request. To the extent that the respondent asks for his case to be administratively closed, we note that administrative closure is used to temporarily remove a case from an Immigration Judge's calendar or from the Board's docket. *See Matter of Gutierrez-Lopez*, 21 I&N Dec. 479 (BIA 1996). We do not find that this case is appropriate for administrative closure. To the extent that he asks for his case to be held in abeyance, we note that the Board generally does not hold cases in abeyance while other matters are pending. *See* Chapter 5.9(i) of the Board's Practice Manual.

To the extent that the respondent alleges that he received ineffective assistance of counsel from the attorney who previously represented him in his removal proceedings, the respondent has failed to offer any evidence that substantially complies with *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), and he further has failed to demonstrate that he suffered the requisite prejudice from counsel's alleged action or inaction such that a remand for consideration of his claim would be warranted, based on his cursory and unsupported appellate allegations in this regard. *See Matter of Compean, Bangaly & J-E-C-*, 25 I&N Dec. 1 (A.G. 2009) (directing the Board and Immigration Judges to apply "the *Lozada* framework" to claims of ineffective assistance of counsel "pending the issuance of a final rule"), *vacating* 24 I&N Dec. 710 (A.G. 2009). The respondent has not demonstrated eligibility for any relief from removal, either before the Immigration Judge or on appeal.

Regarding the alleged unfairness of the removal proceedings, we find that the respondent has not demonstrated any error by the Immigration Judge in handling his hearings, under the circumstances of this case. We also find that he has not demonstrated any resultant prejudice such as would affect the outcome of his case and would amount to a due process violation. *See Waldron v. INS*, 17 F.3d 511 (2d Cir. 1994), *cert. denied*, 513 U.S. 1014 (1994).

The respondent states that he has four United States citizen offspring and a lawful permanent resident wife in this county. To the extent that the respondent seeks humanitarian relief to enable him to remain with his family members in the United States, this Board and the Immigration Judges have limited jurisdiction and can grant only those forms of relief from removal that are expressly authorized by Congress. *See Matter of Medina*, 19 I&N Dec. 734 (BIA 1988). We have no power to grant equitable remedies or to confer general humanitarian relief on aliens. If the respondent wishes to obtain relief on humanitarian grounds, he must pursue such relief with the Department of Homeland Security.

Finally, the respondent has asked for a remand of his case to the Immigration Court. *See* Br. at 7. We do not find that a remand is warranted in this case, and we deny the remand request.

Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.

FOR THE BOARD