09-2349-ag

United States Court Of Appeals

for the

Second Circuit

ROBERTO CARDENAS ABREU,

Petitioner,

v.

ERIC H. HOLDER, ATTORNEY GENERAL,

Respondent.

A46-046-300

PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF OF AMICI CURIAE NEW YORK STATE DEFENDERS ASSOCIATION AND THE IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER ROBERTO CARDENAS ABREU

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the New York State Defenders Association ("NYSDA") and the Immigrant Defense Project ("IDP") submit this brief as amici curiae in support of Petitioner Roberto Cardenas Abreu's petition for review.

STATEMENT OF INTEREST

Amicus **NYSDA** is a not-for-profit membership association of more than 1,600 public defenders, legal aid attorneys, 18-B counsel, private practitioners and others throughout the state. With funds provided by the State of New York, NYSDA operates the Public Defense Backup Center, which offers legal consultation, research, and training to more than 5,000 lawyers who serve as public defense counsel in criminal cases in New York. The Backup Center also provides technical assistance to counties that are considering changes and improvements in their public defense systems and is contractually obligated by New York State "to review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." In this capacity, the association has issued numerous reports identifying trends and problems in the state's public defense system.

Amicus **IDP** is a not for-profit legal resource and training center dedicated to defending the legal, constitutional and human rights of immigrants. A

national 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 immigration consequences of criminal convictions. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizen defendants the benefit of their constitutional right to due process in state criminal proceedings.

This Court, as well as the United States Supreme Court, has accepted and relied on amicus curiae briefs prepared and submitted by NYSDA and the IDP in many of the key cases involving the intersection of immigration and criminal laws. (See Declaration of Julia J. Peck in Support of Motion of NYSDA and IDP for Leave to Appear as Amici Curiae (collecting cases).)

NYSDA and IDP offer this brief both to apprise this Court of important legal, 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), and to direct the Court to similar considerations which support the application of the "finality" rule to late-filed appeals, brought within article 460 of New York's direct appeals statute.

NYSDA and IDP further submit that interpreting the finality rule to encompass both timely-filed and late-filed appeals is proper as a means of statutory

interpretation, consistent with the policies underlying the finality rule, and vital to promoting New York's long-standing interest in protecting criminal defendants, who, through prosecutorial abuse or faulty representation by their own counsel, and through no fault of their own, have missed New York's ordinary appellate filing deadline, from forfeiting important and constitutionally-protected appellate rights.

SUMMARY OF THE ARGUMENT

For 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 direct appellate review of the conviction (as contrasted with collateral attack) has been exhausted or waived. Marino v. INS, 537 F.2d 686, 691-92 (2d Cir. 1976) (citing Pino).

As Petitioner demonstrated in his principal brief, and as 12 of 14 Board of Immigration Appeals ("BIA") members now appear to explicitly endorse or assume, in enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 ("IIRIRA"), Congress signaled no intent to disturb this long-standing rule which, for over forty years, had served to protect both the state's and individuals' interests

in ensuring that the consequences of deportation are not visited upon immigrants on the basis of convictions that lack a sound legal basis.

However, although the BIA correctly assumed that the finality rule remains in effect, the BIA's majority opinion below erred in holding that the finality rule does not apply with equal force to both timely-filed and late-filed appeals arising under article 460 of New York's Criminal Procedure Law. NYSDA and IDP submit that the BIA's majority rule reflects a serious misapprehension of New York law – which considers late-filed appeals as a central part of New York's direct appeal statute – and is contrary to federal law, including its long tradition of interpreting the finality rule in a manner that affords deference to, and encompasses the entirety of, a state's direct appeal process. Further, as an examination of late-appeals practice in New York demonstrates, application of the finality rule to the late-appeals process in New York will not add significant delay or uncertainty to the immigration process, as the BIA speculatively asserts, and will instead, help promote the very fairness, due process, error-correcting and legitimizing interests the finality rule exists to protect.

The finality rule – including its application to late-filed direct appeals – 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 attaching

immigration consequences to a conviction only when it is "final," the finality rule provides confidence to the individual immigrant and to society that the legal process has been fair. Because immigrants who have been deported often find their pending state law appeals mooted and any corresponding avenues to reopen their removal proceedings extinguished, the finality rule also helps ensure that immigrants are not denied an opportunity to overturn wrongful convictions or undo erroneous deportation orders. Further, in many states, including New York, state law enshrines the right to a direct appeal. Thus, the finality rule – both generally, and with respect to late-filed appeals – also respects the integrity of states' criminal justice process and avoids serious due process problems that would be implicated by depriving immigrants of the ability to pursue established appellate rights.

ARGUMENT

I. THE BOARD OF IMMIGRATION APPEALS ERRED IN FINDING THAT THE FINALITY RULE DOES NOT APPLY WITH EQUAL FORCE TO LATE-FILED APPEALS, WHICH FALL SQUARELY WITHIN NEW YORK'S DIRECT APPEALS STATUTE

In its majority opinion below, although properly assuming that the finality rule remains in effect, see In re Cardenas Abreu, 24 I. & N. Dec. 795, 798 (B.I.A. 2009), the BIA held, based largely on unfounded speculation about the operation of New York's late appeals statute, that Petitioner's accepted late-filed appeal under New York Criminal Procedure Law ("CPL") section 460.30 was "not a direct appeal," and therefore would not fall within the finality rule's traditional

and "well-established" protection for direct appeals. In re Cardenas Abreu, 24 I. & N. Dec. at 798. This decision, to which this Court owes no deference,[1] reflects a serious misunderstanding of both the structure and practice of New York's late-appeal law, which, as shown below, falls squarely within and is an integral part of New York's direct appeal statute.

Under New York law, a defendant ordinarily has 30 days from entry of judgment in a criminal proceeding to file a notice of appeal.[2] However, under CPL section 460.30, if a defendant can show that the inability to communicate with or the improper conduct of his counsel or that the misconduct of a public official resulted in missing the initial deadline to file a notice of appeal, and that the defendant exercised "due diligence" in seeking an extension, a defendant who has missed his appeal filing deadline by less than one year may, by motion, seek leave to file a late notice of appeal.[3] If leave is granted, the appellate division may then

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[1] See, e.g., Sutherland v. Reno, 228 F.3d 171, 174 (2d Cir. 2000) ("In contrast to situations where a federal agency is interpreting a statute it is charged with administering, 'courts owe no deference to an agency's interpretations of state or federal criminal laws, because the agency is not charged with the administration of such laws.'" (quoting Michel v. INS, 206 F.3d 253, 262 (2d Cir. 2000))).

[2] N.Y. Crim. Proc. Law § 460.10(1)(a) (McKinney 2005).

[3] N.Y. Crim. Proc. Law § 460.30(1) (McKinney 2005).

order that the initial time period for taking an appeal be extended to not more than 30 days subsequent to the determination of its motion.[4]

In its opinion, the BIA majority sought to distinguish late-filed appeals, brought under section 460.30, from timely-filed appeals, on the alleged basis that late-filed appeals, which may take longer to adjudicate and require leave of court, are more akin to mechanisms for "collateral attack," "deferred adjudication," or other ameliorative remedies, that traditionally were not encompassed within the finality rule. In re Cardenas Abreu, 24 I. & N. Dec. at 798-802 & n.8. Indeed, prior to the passage of IIRIRA, the federal courts had consistently and uniformly held that the finality rule barred deportation until all "direct appellate review of the conviction (as contrasted with collateral attack) ha[d] been exhausted or waived." Marino, 537 F.2d at 691-92; accord Montilla v. INS, 926 F.2d 162, 164 (2d Cir. 1991). However, although this Court never had occasion to speak to the specific question of whether the finality rule would encompass late-filed direct appeals – the fact that section 460.30 motions fall squarely within the procedures for direct appeals under New York law should leave no doubts.

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[4] Id.

Articles 450, 460 and 470 of New York's Criminal Procedure Law govern the taking of appeals from judgments issued in the lower courts and thereby define the direct appeal process in New York courts. See N.Y. Crim. Proc. Law § 450.10 practice commentaries (McKinney 2005). As set forth above, section 460.10, for example, delineates the procedures for taking and perfecting an appeal to an intermediate appellate court from a judgment or order in a criminal court. N.Y. Crim. Proc. Law § 460.10 (McKinney 2005). Section 460.30, which obviously falls within article 460, sets forth criteria and procedures that govern rights to seek an enlargement of the ordinary 30-day window for seeking direct appeal of a state criminal conviction. See N.Y. Crim. Proc. Law § 460.30 (McKinney 2005).

In contrast, entirely different rules govern collateral post-conviction relief under New York law. Article 440 (titled "Post-Judgment Motions") of the Criminal Procedure Law contains New York's collateral attack statute. See, e.g., N.Y. Crim. Proc. Law § 440.10 practice commentaries (McKinney 2005) (noting that this section "was designed to encompass all extant non-appellate post-judgment remedies and motions to challenge the validity of a judgment of conviction" (emphasis added)). Collateral attacks commence in the trial court – rather than in the appellate division. See, e.g., N.Y. Crim. Proc. Law §§ 440.10(1), .20(1) (McKinney 2005).

The threshold for bringing a collateral attack is also different and higher than that for bringing a direct appeal: compare subsections (1) and (2) of section 440.10 of New York's Criminal Procedure Law with the same section's (i.e., 450.10) provisions for seeking direct appeal as of right. Further, unlike article 460 motions which, as shown above, are governed by strict time limitations, article 440 post-conviction motions may be brought at any time.

New York's late appeal statute is also entirely separate and distinct from the procedures for deferred adjudication of criminal proceedings which the Board, below, improperly analogized to section 460.30 proceedings. In re Cardenas Abreu, 24 I. & N. Dec. at 799-800. Various New York trial courts, particularly problem-solving courts, offer deferred adjudication programs to eligible defendants (usually first time offenders) often as a means of expediting dispute resolution, promoting drug or alcohol treatment, or for other rehabilitative purposes.[5] To participate in these programs, defendants are typically required to

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[5] See, e.g., Comm. on Criminal Justice Operations, Ass'n of the Bar of the City of N.Y., The Immigration Consequences of Deferred Adjudication Programs in New York, at 2 (2007), available at http://www.nycbar.org/pdf/report/Immigration.pdf (hereinafter, "Deferred Adjudications"); see also N.Y. Div. of Probation & Correctional Alternatives, Directory of Alternatives to Incarceration (ATI) Programs, http://www.dpca.state.ny.us/ati_directory.htm (last visited Sept. 28, 2009) (listing various deferred adjudication programs by county). Newly-enacted CPL article 216, which takes effect in October 2009, also provides a deferred

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plead guilty to the charges against them. Rather than adjudicating guilt, however, courts that participate in these programs will instead defer adjudication while the defendant completes certain requirements, such as drug treatment or special classes combined with community service. "The purpose of these programs is to provide the defendant with an alternative to incarceration through which he or she can seek rehabilitation and/or redress his or her wrongdoing, and thus break the cycle of recidivism."[6] Successful participation in these programs often results in a reduction or dismissal of the charges and, in some cases, the sealing of the record. However, if the terms of a program are violated, an adjudication of guilt may be entered at some indeterminate time in the future.[7] Further distinguishing deferred adjudication programs from the appellate process, as a tradeoff for admission into these programs, defendants typically waive all rights of direct appeal.

As this shows, the New York procedure for late appeals is entirely separate both from New York's collateral attack statute found in article 440, and state law deferred adjudication mechanisms. Unlike the direct appeal process embodied in article 460 of the New York CPL, article 440 and deferred adjudi-

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adjudication mechanism for certain felony offenders statewide. Act of April 7, ch. 56, pt. AAA, § 4, 2009 N.Y. Laws No. 2, 163 (McKinney) (to be codified at N.Y. Crim. Proc. Law art. 216) (effective Oct. 7, 2009).

6 Deferred Adjudications, supra note 5, at 2.

7 Id. at 3.

cation proceedings are administered by the trial courts and are not time-bound. Further, deferred adjudications are diversionary or rehabilitative in nature, and do not seek to challenge the underlying determination of guilt. The BIA was therefore wrong to conclude that late appeals that are accepted under section 460.30, and which fall squarely within the New York State scheme for direct appeals, are not fully entitled to all the protections historically afforded by the finality rule to the direct appeal process.

II. AN EXAMINATION OF THE OPERATION OF NEW YORK'S LATE APPEAL PROCEDURE REVEALS THAT THE BOARD'S SPECULATIVE CONCERNS ABOUT THE ALLEGED "DELAY" AND "UNCERTAINTY" OF SECTION 460.30 PROCEEDINGS ARE NOT BORNE OUT IN PRACTICE

The BIA also sought to point to the allegedly "indeterminate" nature of section 460.30 proceedings to distinguish New York's late-filed appeals mechanism from what it termed the "typical" direct appeal of right. In re Cardenas Abreu, 24 I. & N. Dec. at 799-801.

First, because the Board (and this Court) are, at this time, presented only with the question of whether Petitioner's accepted late-filed appeal is entitled to finality rule protection, the Board's concerns about the theoretical time and

discretion that could conceivably be involved in adjudicating a pending 460.30 *application*, should not impact the question at hand. [8]

Nevertheless, an examination of section 460.30 law and practice demonstrates that the Board's speculative concerns about the "unpredictable" and "indeterminate" nature of section 460.30 proceedings are simply not borne out in either the law or practice. As shown above, New York's late appeals statute requires that defendants seeking leave to file a late appeal move with "due diligence" and no more than one year following the expiration of the ordinary appeal filing deadline. And as shown by Petitioner in his principal brief, New York courts have strictly enforced this time limit. (See Principal Brief at 18-19.)

In fact, actual practice under the New York late appeals statute demonstrates that the Board's concerns are unfounded. A recent examination by NSYDA of late appeals filings in the First and Second Departments of the New York Supreme Court confirms that this one-year filing deadline is strictly enforced and belies the BIA's other unsubstantiated assumptions about the operation of New

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[8] While amici curaie believe that there are sound legal and policy reasons why deportation consequences should not attach to a New York conviction until the one year statutory time period for late-filed appeals in New York has been exhausted, see, e.g., Smith v. Gonzalez, 468 F.3d 272, 277-78 (5th Cir. 2006), because Petitioner's 460.30 application has already been accepted by the appellate division here, this Court does not need to reach that question in this case.

York's late appeals statute. In an advisory on section 460.30 law and practice, NYSDA reports on interviews of lawyers at three of New York's leading appellate defender organizations and a review of all section 460.30 orders decided in the First or Second Departments between January and July 2009.[9] Consistent with the 460.30 statute, and its history of strict construction, NYSDA found that the appellate divisions categorically rejected all 460.30 applications brought outside the one-year late filing deadline.[10]

Both the interview and survey results also indicated that in spite of the BIA's concerns about potentially lengthy delays and "indefinite" resolution times, section 460.30 motions are brought on average within six months or less of the missed deadline, and are adjudicated on average within just two months thereafter.[11] In other words, the vast majority of section 460.30 applications are brought and decided well within one year of judgment on the underlying criminal convictions.

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[9] NYSDA Advisory, Missed Deadlines for Filing a Notice of Appeal – CPL section 460.30 to the Rescue, available at http://www.nysda.org/09_Missed_Deadlines_for_Filing_a_Notice_of_Appeal.pdf (hereinafter "Advisory").

[10] Id. at 5.

[11] Id. at 4-5.

Further, undermining the BIA's concerns of potentially "fact-based" and "judgment-laden" inquiries, In re Cardenas Abreu, 24 I. & N. Dec. at 801, both the appellate defender interviews and the case files demonstrate that section 460.30 motions are *not* the subject of intensive fact-finding. To the contrary, although the section 460.30 statute contemplates procedures whereby the appellate division can remand an application to the trial court for additional fact-finding, in practice, 460.30 applications are decided purely by the appellate division on the papers – with no fact-finding hearings and no remands.[12] Additionally, although the BIA likewise expressed concern that section 460.30 motions could be further delayed through subsequent appeal, In re Cardenas Abreu, 24 I. & N. Dec. at 800-01, there was no record in the files reviewed of any appeals of section 460.30 applications to the New York Court of Appeals, and the organizations interviewed could not recall any instance of this being done.[13]

NYSDA's examination also confirmed that the appellate division regards late-filed appeals under section 460.30 as a regular part of the New York direct appeals process. In fact, each 460.30 order reviewed in which an application

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[12] Id. at 5.

[13] Id. at 4, 5-6. As the defender organizations observed, to appeal a denial of a Section 460.30 application to the Court of Appeals, the appellate division order must state that the decision was based "on the law alone." The interviewees could not recall ever having seen an order stating this. Similarly, none of the files reviewed contained such language. Id. at 4, 5-6.

for a late-filed appeal was granted, contained language stating that the "notice of appeal is deemed to have been timely filed." The appellate defender organizations likewise could not recall the courts observing any distinction between timely-filed appeals and accepted late-filed appeals, and deemed the latter to be an "indistinguishable" part of the direct appeal process.

In essence, undercutting the BIA's predictions of an open-ended and indefinite process, examination of the actual operation of New York's late-appeals statute demonstrates that, in fact, section 460.30 applications are a strictly constructed, time-bound, and expeditiously adjudicated aspect of New York's direct appeal process.

III. APPLICATION OF THE FINALITY RULE TO ACCEPTED LATE-FILED APPEALS HELPS PROTECT ESTABLISHED APPELLATE REMEDIES AND PROMOTES CONFIDENCE IN THE FAIRNESS AND INTEGRITY OF THE CRIMINAL JUSTICE AND IMMIGRATION SYSTEMS

As shown above, section 460.30 of the New York CPL plainly falls squarely within New York's direct appeals process – and, as such, an accepted late filed appeal, like Petitioner's, is entitled to the full protections traditionally offered by the finality rule for exhaustion of the direct appeal process. In addition, important due process and fairness considerations also counsel strongly in favor, both of continued recognition of the finality rule, and of its application to accepted late-filed appeals.

A. Interpreting IIRIRA to have Eliminated the Finality Rule – Even if Only With Respect to Late Appeals – is Likely to Seriously Impair, if Not Entirely Extinguish, Many Immigrants' Ability to Pursue Established Appellate Remedies and to Challenge Erroneous Deportation Orders

As shown by Petitioner in his principal brief, New York law provides a constitutional right to a direct appeal from a criminal conviction, and ensures both the effective provision of and effective assistance of counsel on that appeal. (See Petitioner Brief at 23-26 (citing cases).)[14] 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. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 n.5 (1982). Such deprivation, in and of itself, risks constituting a violation of due process.

Continued recognition of the finality rule, including its application to late-filed direct appeals, is therefore necessary to protect these established appellate rights and to avoid depriving immigrants both of the ability to overturn wrongful convictions and to contest erroneous deportation orders.

As noted by Petitioner in his principal brief, in recent years, several states, including New York, have begun routinely dismissing the appeals of

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[14] A number of other states likewise recognize the right to appeal a criminal conviction as a constitutional matter. See, e.g., Ashwin Gokhale, Note, 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, 264 n.154 (2005) (collecting cases).

deportees on the grounds of mootness – effectively eliminating any further opportunity to challenge a wrongful conviction. See, e.g., Labe M. Richman, Deported Defendants: Challenging Convictions From Outside U.S?, N.Y.L.J., June 14, 2006, at 4 (citing numerous New York appellate division decisions mooting criminal appeals following deportation); see also Gokhale, supra note 11, at 264 (collecting similar examples from other states).[15]

Additionally, as courts have recognized, even if an immigrant is permitted to maintain an appeal from outside the United States, his ability to litigate from abroad is likely to be substantially impaired. See, e.g., Thapa v. Gonzales, 460 F.3d 323, 331 (2d Cir. 2006).

Further, as the dissenting opinion below correctly observed, even if Petitioner were able to overturn his state law criminal conviction from outside the United States, thus eliminating the underlying predicate for removal, he and others like him may, nevertheless, be barred from reopening their removal proceedings after having been deported. See In re Cardenas Abreu, 24 I. & N. Dec. at 817 n.8 (Greer, Member, dissenting) (citing In re Armendarez-Mendez, 24 I. & N. Dec.

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[15] Indeed, in its recent examination of section 460.30 applications in the First and Second Departments of the New York Supreme Court, NYSDA identified five examples in just the last six months in which a motion for a late appeal was denied on the grounds that the court found an appellant's deportation order to have mooted further state law appellate review. Advisory at 6.

646 (B.I.A. 2008) as "construing 8 C.F.R § 1003.2(d) (2008) to mean that the Board and immigration courts lack jurisdiction to reopen the proceedings of aliens that have been removed").

Thus, failure to uphold the finality rule generally, or through application to late-filed appeals, would likely result in many immigrants permanently losing these important and established appellate rights. Such an outcome would not only pose serious due process problems, but, by depriving potentially innocent people of any opportunity to challenge wrongful convictions or undo erroneous deportation orders, would raise serious fairness and justice concerns about the administration of the immigration laws.

B. Continued Recognition of the Finality Rule, Including its Application to Late-Filed Appeals, Helps Promote the Important Error-Correcting and Legitimizing Functions of the Appellate Process

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 – which the finality rule, by deferring deportation until the appellate system has run its course, promotes – 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. These considerations obtain special prominence in the section 460.30 setting, where

defendants who have been prevented from timely-appealing their criminal convictions as a result of faulty representation or prosecutorial misconduct, seek to avoid forfeiture of established appellate rights.

Recent studies of New York's state court and indigent defense systems have shown both to be under major pressure. For instance, in 2007, criminal case filings in the New York trial courts totaled 1,870,378.[16] Not surprisingly, a study commissioned by former Chief Judge Kaye's Commission on Indigent Defense Services, found that criminal court judges in New York are suffering under an "unbearable caseload."[17] To put matters into perspective, the 982,105 criminal case filings in the Criminal Court of the City of New York in 2008 would ultimately have to be disposed of by just 61 sitting New York City Criminal Court judges.[18] One criminal court judge in Manhattan, who sits primarily in an all purpose part, but who sits in the arraignment part eight weeks

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[16] See State of New York, Thirtieth Annual Report of the Chief Administrator of the Courts for Calendar Year 2007, at 21, available at http://www.courts.state.ny.us/reports/annual/pdfs/2007AnnualReport.pdf.

[17] 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, at 162 (June 16, 2006) (hereinafter, the "IDS Study"), available at http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf.

[18] See Criminal Court of the City of New York 2008 Annual Report, at 6, 13 (Aug. 2009), available at http://www.courts.state.ny.us/courts/nyc/criminal/AnnualReport2008.pdf.

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.[19]

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. Like the criminal part judges, indigent defense providers in New York frequently maintain extreme case loads, often handling "1,000, 1,200, or 1,600 cases" per year.[20]

These tremendous burdens harbor the potential for significantly compromising the quality of representation. According to the IDS Study's data, approximately 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. See IDS Study, supra note 14, at 143. This brief availability of criminal defense counsel in the criminal courts of New York City, together with the high rates of criminal convictions, raises serious

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[19] IDS Study, supra note 14, at 143.

[20] See Standing Comm. On Legal Aid & Indigent Defendants, Am. Bar Ass'n, *Gideon*'s Broken Promise: America's Continuing Quest for Equal Justice, at 17 (Dec. 2004), available at http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

questions about both the effectiveness of counsel and the potential for unfair convictions. See id. at 153.

In light of these significant strains and pressures, the appellate process assumes an especially vital role – both as a mechanism for potential error-correction, and as a means of instilling confidence in the fairness and integrity of a system that otherwise, in many instances, rushes to judgment, often without meaningful representation. In these circumstances, the finality rule, by preventing removal until an immigrant has had the opportunity to exhaust or waive his direct appeals, helps promote and support these important error-correcting and legitimizing functions.

These considerations are further heightened in the section 460.30 context, which specifically aims to provide a remedy to criminal defendants, who, through no fault of their own (and, as experience shows, often through fault of their trial counsel), have been unable to bring a timely notice of appeal. See, e.g., Advisory at 6 (detailing representative types of successful section 460.30 applications, including instances of prosecutorial misconduct, and numerous instances where assigned counsel either never informed a defendant of his right to appeal, or failed to heed express instructions to file a timely appeal). In fact, given that so many section 460.30 motions appear to be brought pro se by defendants alleging failings by their trial counsel (id. at 4), those bringing 460.30 motions may

be among the defendants most likely to have been the victim of inadequate representation at the trial court level. Whether or not this translates into higher error correction rates on appeal, at the very least, this would appear to suggest that the section 460.30 process is a necessary element in promoting confidence in the integrity of a judicial and indigent defense system operating under severe stress, and is a process which the finality rule should be interpreted to protect.

Notably, the other states within the Second Circuit also recognize the importance of a late-filed appeal procedure to correct serious errors and safeguard the integrity of their criminal justice systems. See Vt. R. App. P. 4(d); Conn. R. App. P. 60-2 and 66-1(a); see also In re Gould, 177 Vt. 7, 852 A.2d 632, 2004 VT 46 (2004) (permitting late filed appeal where incarcerated defendant had been prevented from timely filing by being denied access to prison law library). Like New York, both states cabin the use of this procedure so as not to unduly burden courts or undermine the finality of criminal prosecutions by imposing time limitations on motions for late appeals (30 days past the ordinary filing deadline in Vermont and 20 days in Connecticut (although the Connecticut Supreme Court may authorize further limited extensions in exceptional circumstances[21])) and

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[21] State v. Stead, 186 Conn. 222, 228, 440 A.2d 299, 301 (1982) (granting late appeal filed 15 days after Rule 66-1(a) deadline; "[i]t is clear that the defendant

(cont'd)

require applicants to set forth grounds for their delay ("good cause" in Connecticut and "excusable neglect or good cause" in Vermont). Conn. R. App. P. 66-1(a); Vt. R. App. P. 4(d).[22] As further testament to the importance of the late-appeal function within criminal law, the Federal Rules of Appellate Procedure also allow the district court to grant extensions of the time to file notices of appeal in criminal matters upon a finding of "excusable neglect or good cause." Fed. R. App. P. 4(b)(4).

IV. AS A MAJORITY OF THE BOARD RECOGNIZED, THERE IS NO INDICATION IN THE LANGUAGE, STRUCTURE OR HISTORY OF IIRIRA THAT CONGRESS INTENDED TO ABROGATE THE LONGSTANDING FINALITY RULE, AND IMPORTANT DUE PROCESS, INTERPRETATIVE, AND FAIRNESS CONSIDERATIONS SUPPORT ITS CONTINUED RECOGNITION

For nearly four decades following the Supreme Court's 1955 decision in Pino v. Landon, 349 U.S. 901 (1955), the "finality rule" has consistently provided that an order of deportation based on an underlying conviction may not be entered unless and until the criminal defendant's direct appeals have been exhausted or waived. See Marino v. INS, 537 F.2d 686, 691-92 (2d Cir. 1976). As Petitioner demonstrated in his brief, and as correctly recognized by the BIA in both

(cont'd from previous page)
never waived his right of appeal and has become mired in a procedural bog largely created by his own counsel").

[22] Further like New York, both Vermont and Connecticut view late-filed appeals, once accepted, as an indistinguishable part of those states' direct appeal process.

its majority and dissenting opinions below, and in one of its concurring opinions, neither the text of IIRIRA itself, nor the legislative history accompanying the adoption of the definition of a "conviction" gave any indication of an intent to disturb this important and long-established requirement. (See Petitioner's Br. at 29-31); In re Cardenas Abreu, 24 I. & N. Dec. at 798; see also id. at 802 (Grant, Member, concurring); id. 813, 814-15 (Greer, Member, dissenting).

A. In Basing IIRIRA's Determination of Conviction on the Ozkok Test, Congress Gave No Indication that it Intended to Abandon the Well-Established Finality Rule

As the Board recognized in its majority opinion below, at the time IIRIRA was enacted in 1996, it was "well established in immigration law that a criminal conviction attains finality for immigration purposes when procedures for direct appeal have been exhausted or waived." In re Cardenas Abreu 24 I. & N. Dec. at 798. Indeed, in enacting its own statutory definition of a conviction in IIRIRA, Congress largely adopted a prior administrative test for a conviction set forth in the BIA's 1988 opinion in In re Ozkok, 19 I. & N. Dec. 546 (B.I.A. 1988), which by its own terms, and as interpreted for nearly a decade by both the BIA and the federal courts, had uniformly been understood to have preserved the independent and overarching requirement of finality. See id. at 553 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."); see also 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"); accord In re Thomas; 21 I. & N. Dec. 20, 26 n.1 (B.I.A. 1995).

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 N.Y. Council, Ass'n of Civilian Technicians v. FLRA, 757 F.2d 502, 509 (2d Cir. 1985); Lorillard, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575, 580-83 (1978). Because the specific language of Congress' definition of a conviction under IIRIRA 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 Petitioner's (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 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. Rep. No. 104-828, at 224 (1996) (Conf. Rep.); 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. Rep. No. 104-828, at 224 (1996) (Conf. Rep.); 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 as an additional and essential requirement for a conviction to trigger negative immigration consequences in both the formal adjudication and deferred adjudication settings. With the focus of IIRIRA strictly on the deferred adjudication prong of the definition of "conviction," and with no alteration to the formal adjudication prong, or any reference to the concept of finality, there can be no inference that Congress intended to extinguish the judicially recognized finality requirement. Cf. Monessen Sw. Ry. v. Morgan, 486 U.S. 330, 336-39 (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, 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).[23]

B. Abrogation of the Finality Rule Would Present Serious Due Process and Fairness Problems and Create Doctrinal Incoherence

A conclusion that IIRIRA has abolished the finality rule would also run counter to other established interpretative norms and pose serious due process and fairness problems.

As noted by Petitioner, a long line of cases, which have extended post-IIRIRA, recognize that vacatur of a conviction on the ground of a procedural or substantive defect (as opposed to for rehabilitative or hardship reasons) defeats grounds for deportability. In re Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003) ("[I]f a court with jurisdiction vacates a conviction based on a defect in the

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[23] In Board Member Pauley's concurring opinion below, he referenced post-IIRIRA decisions from other jurisdictions as supposed authority for the extinguishment of the finality rule. See In re Cardenas Abreu, 24 I. & N. Dec. at 807-08 (Pauley, Member, concurring). 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 . . . .").

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 for substantive or procedural defects, and convictions vacated for rehabilitative reasons or to avoid immigration consequences). 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 on direct appeal, cannot be reconciled with the case law establishing that a conviction that has been vacated on the merits defeats deportation.

Further, as described in Section III(A) above, because state courts will often moot pending criminal appeals upon deportation, and because the BIA, itself, has indicated an unwillingness to allow reopening of deportation orders from abroad, extinguishing the finality rule is likely not only to severely compromise immigrants' ability to appeal erroneous convictions (thus, threatening a right that, as shown above, is otherwise firmly protected under many state's constitutions), but may also effectively deprive aliens of the ability to overturn erroneous

deportation orders altogether. Abrogation of the finality rule would thus not only present serious due process problems, a course which, as a matter of constitutional interpretation, is best avoided,[24] but in allowing for the deportation – and effectively preventing the reentry of – potentially innocent persons, would also undermine confidence in the fairness and integrity of the criminal justice and immigration systems, and lead to unusually harsh and severe results.[25] Any perceived gains from abolishing the finality rule in order to expedite deportations would hardly compensate for compromising these important due process and fairness interests.

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[24] See, e.g., Empire HealthChoice Assurance, Inc. v. McVeigh, 396 F.3d 136, 144 (2d Cir. 2005), aff'd, 547 U.S. 677 (2006).

[25] As Petitioner noted in his principal brief, courts have traditionally construed the immigration laws to avoid visiting the "harsh" penalty of deportation on the undeserving. Principal Brief at 36. This principle of interpreting immigration statutes in a manner to avoid harsh results remains firmly in place under IIRIRA. See, e.g., INS v. St. Cyr, 533 U.S. 289, 320 (2001).

CONCLUSION

For the foregoing reasons, amici curiae respectfully submits that this Court should hold that the Board of Immigration Appeals erred in finding that the finality rule does not apply with equal force to late-filed appeals under section 460.30 of New York's Criminal Procedure Law, at least where the late filed appeal has been accepted by the appellate court as in this case.

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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 6995 words 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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