Court of Appeals

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARLOS VENTURA, A/K/A JOSE MENDEZ,

Defendant-Appellant.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

DAMIAN GARDNER,

Defendant-Appellant.

BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT, POST-DEPORTATION HUMAN RIGHTS PROJECT IN SUPPORT OF DEFENDANTS-APPELLANTS VENTURA AND GARDNER

S. ISAAC WHEELER, ESQ.
IMMIGRANT DEFENSE PROJECT
3 West 29th Street, Suite 803
New York, New York 10001
Telephone: (212) 725-6421
Facsimile: (800) 391-5713

Attorney for Amici Curiae Immigrant Defense Project, Post-Deportation Human Rights Project in Support of Defendants-Appellants Ventura and Gardner

July 22, 2011

CORPORATE DISCLOSURE STATEMENTS

Pursuant to 22 NYCRR Part 500.1(f), *amicus* Immigrant Defense Project (IDP) states that it is a nonprofit organization whose parent corporation is the Fund for the City of New York, a nonprofit corporation operating under section 501(c)(3) of the Internal Revenue Code. IDP has no other affiliates, subsidiaries or parents.

Pursuant to 22 NYCRR Part 500.1(f), *amicus* Post-Deportation Human Rights Project, Center for Human Rights and International Justice (PDHRP) is a nonprofit organization whose parent corporation is Boston College, a nonprofit educational institution operating under section 501(c)(3) of the Internal Revenue Code. PDHRP has no other affiliates, subsidiaries or parents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ADMINISTRATIVE DECISIONS

STATUTES

REGULATIONS

OTHER AUTHORITIES

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-Appellants Ventura and Gardner ("Defendant-Appellants") to apprise the Court of significant fairness and due process concerns raised by the dismissal of Defendant-Appellants' appeals 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 these appeals. In addition to supporting and offering additional context for the arguments advanced by Defendant-Appellants, *amici* respectfully urge the Court to reconsider its decision in *People v. Diaz*, 7 N.Y. 3d 831 (2006), and preclude the dismissal of appeals as of right even when the relief sought requires further criminal proceedings.

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 immigration law is correctly interpreted to give noncitizen defendants the benefit of their constitutional right to due process in state criminal proceedings.

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, 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 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*, 130 S. Ct. 1473 (2010); Brief of *Amici Curiae* IDP et al. in support of Petitioner in *Nijhawan v. Holder*, 129 S. Ct. 2294 (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 *Amici Curiae* NYSDA Immigrant Defense Project in support of Petitioner in *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008); 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 in support of Petitioner in *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003).

SUMMARY OF ARGUMENT

"[T]he central aim of our entire judicial system [is that] all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court." *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (plurality opinion) (internal quotation and citation omitted). The dismissal of Defendant-Appellants Ventura's and Gardner's appeals in reliance on this Court's decision in *People v. Diaz*, 7 N.Y.3d 831 (2006), is symptomatic of a widespread practice in the intermediate courts of dismissing the appeals of involuntarily deported noncitizens, a practice that threatens to undermine the fundamental goal of equal justice under law. As a result, both fairness to individual litigants and public confidence in the integrity of the criminal justice system are compromised. Because changes in immigration law in the last two decades have "dramatically raised the stakes of a noncitizen's criminal conviction," *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010), appellate review of convictions is at least as important to noncitizen defendants as to citizens.

Recent developments regarding the "finality rule," which traditionally prevented a conviction from triggering immigration consequences until direct

appeals from that conviction have been exhausted or waived, have made the intermediate courts' application of *Diaz* to appeals of right even more problematic from the standpoint of fairness and legitimacy of the criminal justice system. New Yorkers (including Defendant-Appellant Gardner) have been taken into ICE custody and transferred to detention centers under the jurisdiction of courts that no longer recognize this finality principle, and as a result immigrants are being deported notwithstanding pending appeals of convictions that bear on their removability. The status of the finality rule in the Second Circuit, whose law is controlling on immigration judges in New York, remains uncertain; the government continues to litigate its position that the rule has been abrogated by legislation. The unfairness to immigrants of the resulting situation—in which the government seeks the removal of immigrants with pending appeals, and the intermediate New York courts then dismiss the appeals upon the defendants' deportation—is compounded by the State's active participation in the Institutional Removal Program, under which it identifies deportable noncitizens in its custody and makes them available to DHS for removal proceedings while serving their sentences. Although this Court does not have authority or responsibility to control how or when federal authorities deport New York residents, it need not ignore these realities in deciding whether the intermediate courts' routine dismissal of the appeals of deported defendants is lawful or a sound exercise of discretion.

Defendant-Appellants have demonstrated the illogic of applying *Diaz* to dismiss the appeals of defendants whose appeals, if successful, would result in no further proceedings in the trial court. But the practice is also illogical if the relief sought is a new trial. Immigration law confirms the wisdom of Judge Smith's assertion in his dissent in *Diaz* that an involuntarily deported defendant "is entitled to have [the appellate court] assume . . . that he in fact wants a retrial." 7 N.Y.3d at 834 (R.S. Smith, J., dissenting). As explained in detail *infra*, immigration law also belies the apparent assumption of the intermediate courts that a deported defendant lacks any mechanism to return for such a proceeding following the vacatur of his or her conviction. Once a conviction is vacated, it no longer creates disabilities under the Immigration and Nationality Act. Vacatur of the conviction thus removes obstacles to the immigrant's return. Such deported defendants can, and do, re-enter through mechanisms including re-opening of the removal proceeding; "parole" under the immigration law; or re-immigration through a visa petition filed by a qualifying family member.

Respondent concedes that it is unfair to deny appellate review to a defendant who is deported because of the conviction being appealed. Tasking state courts with making such a causal determination, however, would be extremely ill-advised. First, the inquiry would require appellate courts to make highly complex legal and factual determinations based on materials outside the appellate record

and without the benefit of expert counsel. Second, the paucity of written records of immigration court proceedings will frequently make the task all but impossible; neither immigration judges nor the Board of Immigration Appeals that hears appeals of removal orders is required to issue written explanations of their legal conclusions.

This Court should reexamine the faulty assumptions underlying its decision in *Diaz* and join other state courts of ultimate jurisdiction that have instructed lower courts to hear the appeals of deported defendants without reference to whether the conviction *sub judice* was a sole or but-for cause of removal.

STATEMENT OF FACTS

Except as noted *infra* at Point III (discussing the effect of Defendant-Appellant Gardner's conviction on his immigration situation), *amici* have no independent view of the relevant facts.

ARGUMENT

I. The Routine Dismissal of Appeals In Reliance on *People v Diaz* Critically Undervalues the Importance of Intermediate Appellate Review for Noncitizen Defendants

In *People v. Diaz*, 7 N.Y. 3d 831 (2006) (mem.), this Court reasoned that, although the fact of the appellant's deportation did not "mandate dismissal," the appellant's "unavailab[ility] to obey the mandate" of the court militated against deciding his case. As Defendant-Appellants demonstrate, the Appellate Division's

invocation of the *Diaz* rule to dismiss their first appeals of right is typical of the intermediate courts' practice in numerous other cases. (Brief for Defendant-Appellant Ventura (hereinafter "Ventura Br."), at 20-21; Brief for Defendant-Appellant Gardner (hereinafter "Gardner Br."), at 38-41). The reflexive dismissal of the appeals of deported criminal defendants by these courts fundamentally undervalues the critical functions played by intermediate appellate review in the criminal justice system. Not only is appellate review an important check on faulty convictions, *see Evitts v. Lucey*, 469 U.S. 387, 393 (1985), it is essential to maintain both individual and societal confidence in the fairness and integrity of the system. These error-correcting and legitimizing functions are especially critical in a system, like New York's, in which both the trial courts and the indigent representation system are operating under severe strain. [1]

At least as troubling, the routine application of *Diaz* by the intermediate courts to dismiss appeals of right conveys the unmistakable message that this layer of review is somehow less necessary when the defendant is a deported noncitizen. This assumption undermines "the central aim of our entire judicial system [that] . . . all people charged with crime must, so far as the law is concerned, stand on an

[1] As this Court is aware, New York trial courts strain to dispense justice under an "unbearable caseload." 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 162 (2006) (hereinafter IDS Study). The error potential in the crowded trial courts is compounded by the similarly overwhelming caseloads of providers of indigent defense. COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 18 (2006), at 15.

equality before the bar of justice in every American court," *Griffin* , 351 U.S. at 17. It also fundamentally misapprehends the realities of immigration law. Indeed, because of profound entanglement between federal immigration law and state criminal law, intermediate appellate review takes on a heightened importance, both in terms of the individual interest of noncitizens and public confidence.

In the past two decades, immigration law and criminal law have become ever more closely intertwined. "While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The drastic measure of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010) (internal quotation and citation omitted). Even a seemingly trivial offense like turnstile jumping may subject a longtime legal permanent resident to removal.[2] *See Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997). As the U.S. Supreme Court recently noted, these provisions,

[2] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") §§ 304, 306, 308(c)(1)(K), 309(d), Pub.L. No. 104-208, 110 Stat. 3009, 3009-546 (1996), amended the immigration laws to replace the formerly distinct concepts of "deportation" and "exclusion" from the U.S. with the concept of "removal," though it also retained some references to "deportab[ility.]" *See United States v. Pantin*, 155 F.3d 91, 92 (2d Cir.1998). The terms "deportation" and "removal" are used interchangeably in this brief to refer to the involuntary expulsion of a noncitizen from the United States, and "removable" and "deportable" are used interchangeably to indicate susceptibility to such expulsion.

together with new restrictions on the ability of immigration judges to grant discretionary relief from removal and the elimination in 1990 of criminal judges' longstanding authority to make binding "judicial recommendation[s] against deportation" in certain cases, "have dramatically raised the stakes of a noncitizen's criminal conviction." *Padilla*, 130 S. Ct. at 1479, 1480. Because of these consequences, the error-correcting and legitimating role that intermediate appellate review plays is at least as important for noncitizen defendants as it is for citizens.

Recent developments in immigration law have made the Appellate Division's application of *Diaz* to appeals of right even more problematic from the standpoint of fairness and legitimacy of the criminal system. For decades, immigration courts and federal courts agreed that immigration consequences would not attach to a conviction until direct appeals from that conviction had been exhausted or waived. *See, e.g.*, *Pino v. Landon*, 349 U.S. 901 (1955); *Marino v. INS*, 537 F.2d 686 (2d Cir. 1976); *Matter of Ozkok*, 19 I.&N. Dec. 546, 552 n.7 (BIA 1988). Under this "finality rule," immigrant defendants who sought appellate review of their convictions could not be removed, or be denied relief from removal, on the basis of those convictions until that review had run its course, guaranteeing such defendants a critical protection against removal on the basis of an erroneous conviction.

Yet after a 1996 amendment to the Immigration and Nationality Act, the status of the longstanding finality rule has been called into question. In that year, Congress for the first time added a statutory definition of the term "conviction," defining it to include a "formal judgment of guilt of the alien entered by a court" and also specifying when a deferred adjudication of guilt could nonetheless be considered a "conviction." *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") § 332, Pub. L. No. 104-208, 110 Stat. 3009, codified at 8 U.S.C. § 1101(a)(48)(A). As discussed *infra* at Point II.A, the agency and virtually every federal circuit court agrees that a conviction that has been vacated for substantive or procedural defect does not qualify as a "conviction" under this definition. Recently, however, the government has argued that the 1996 definition of "conviction" abrogated the traditional finality requirement, such that a conviction that is the subject of a *pending* appeal may serve as a basis for deportation or a bar to relief unless and until vacated. *See, e.g.*, *Matter of Cardenas-Abreu*, 24 I.&N. Dec. 795, 797 (BIA 2009) (noting that the Department of Homeland Security argued that immigration consequences attach to a conviction notwithstanding a pending appeal), *rev'd on other grounds sub nom. Abreu v. Holder*, 378 F. App'x 59 (2d Cir. 2010). The Board of Immigration Appeals ("BIA" or "the Board"), an administrative tribunal that exercises the Attorney General's statutory authority to interpret the immigration laws through

the adjudication of appeals in deportation proceedings and certain other matters, *see* 8 C.F.R. § 1003.1, has yet to issue a precedential decision on this issue. However, the Ninth, Fifth and Tenth Circuits have agreed with the government that IIRIRA eliminated the traditional requirement of finality. *See Planes v. Holder*, --- F.3d ---, 2011 WL 2619105 (9th Cir. July 5, 2011); *Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007); *United States v. Saenz-Gomez*, 472 F.3d 791 (10th Cir. 2007).

Contrary to the People's assertion (Brief for Respondent in *People v. Ventura* (hereinafter "Ventura Resp. Br."), at 32 n.10; Brief for Respondent in People v. Gardner (hereinafter "Gardner Resp. Br."), at 40 n.7), this erosion of the finality rule has already had a real effect on New Yorkers. Because DHS may institute proceedings against an immigrant anywhere in the United States, and immigration judges apply the law of the federal circuit with jurisdiction over the state where they sit, the law of virtually any circuit may control the removal proceedings of an immigrant convicted in New York. *See* 8 C.F.R. § 1003.14 (location of proceedings determined by where DHS elects to file charging document); *Matter of Rivera*, 19 I.&N. Dec. 688 (BIA 1988) (immigration judge does not abuse discretion in declining to transfer venue to state of noncitizen's residence where government asserts compelling interest in conducting proceedings

elsewhere); *Matter of Anselmo*, 20 I.&N. Dec. 25 (BIA 1989) (immigration courts follow law of the circuit where court located).

As Appellant Gardner's own case illustrates, New York residents are frequently transferred to detention centers under the jurisdiction of federal courts that have rejected the finality rule, where they can be deported despite their pending direct appeal under the relevant circuit precedent. *See* Sam Dolnick, *As Barriers to Lawyers Persist, Immigrant Advocates Ponder Solutions*, The New York Times May 4, 2011 at A24 (reporting that nearly two-thirds of immigrants taken into DHS custody in New York are transferred to Texas or Louisiana, within the Fifth Circuit);[3] *see also* Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, 37 tbl.11 (2009) (noting that from 1998 to 2008 over 25,000 DHS detainees were transferred out of the Second Circuit and over 250,000 detainees were transferred into the Fifth Circuit).[4] As defendant-appellant Ventura demonstrated (Reply Brief for Defendant Appellant Ventura, hereinafter Ventura Reply Br., at 14 n.2), New Yorkers transferred to these circuits have in fact been ordered removed based on convictions still pending on direct appeal. *See also, e.g.*, *In re Morel*, No. A043-

[3] *Available at* http://www.nytimes.com/2011/05/04/nyregion/barriers-to-lawyers-persist-for-immigrants.html.
[4] *Available at* http://www.hrw.org/en/node/86789.

327-197, 2010 WL 4822993 (BIA Nov. 3, 2010); *In re Castillo*, No. A055-219-779, 2009 WL 888510 (B.I.A. Mar. 16, 2009) (federal conviction in S.D.N.Y.).

Further, while *amici* hope the parties' accord that the Second Circuit "adheres to the finality rule" proves correct and agree with their view (Ventura Br. at 27 n.4; Ventura Resp. Br. at 32 n.10; Gardner Br. at 44 n.9; Gardner Resp. Br. 40 n.7), some courts have not. In *Puello v. Bureau of Citizenship and Immigration Services*, 511 F.3d 324, 332 (2d Cir. 2007), the Second Circuit stated in *dicta* that IIRIRA eliminated the finality rule. A later case found that a conviction did not trigger removability until the state appeals process had concluded. *Walcott v. Chertoff*, 517 F.3d 149, 154 (2d Cir. 2008). This situation has engendered confusion and uncertainty. *See, e.g., Planes*, --- F.3d at---, 2011 WL 2619105 at *3 (indicating the Ninth Circuit's understanding that the Second Circuit no longer applies the finality rule, citing *Puello*). Most recently, the Second Circuit remanded a case directly presenting this issue to the Board of Immigration Appeals for it to consider the question in the first instance. *Abreu v. Holder*, 378 F. App'x 59 (2d Cir. 2010). The BIA recently dismissed the remanded case as moot after the immigrant's criminal appeal was rejected.[5] *In re Cardenas-Abreu*, No.A046-046-300 (BIA June 10, 2011) (mem.) (attached).

[5] *Amicus* IDP co-filed *amicus curiae* briefs in the Second Circuit and on remand to the BIA in this case. In *Cardenas-Abreu*, the immigrant had been granted leave to file a late appeal pursuant to Criminal Procedure Law § 460.30 and, upon its acceptance by the Appellate

Amici are aware of no other pending case that may lead to clarification of this unsettled state of affairs in the Second Circuit. The government may therefore be expected to continue to seek to remove defendants whose appeals are pending in the Appellate Division or before this Court (and of course can continue their routine practice of transferring immigrants convicted in New York to jurisdictions where the finality rule has been eliminated, as discussed *supra*). In light of this, New York's active cooperation in the Institutional Removal Program, a "joint DOCS and ICE initiative established in 1995 to process convicted criminal aliens for deportation while they are serving prison sentences" under which "DOCS identifies potential criminal aliens under custody" and refers them to ICE for removal proceedings conducted within DOCS facilities, such that "they go directly

---

Division, moved to terminate his removal proceeding on the ground that his conviction was no longer final. 24 I.&N. Dec. at 796. In its original opinion, the BIA did not reach the question of whether the finality rule survived IIRIRA, holding instead that his accepted but late-filed appeal was the equivalent of a collateral attack, such as a 440 motion, which had long been understood not to affect the finality of a conviction. *Id.* at 797, 801-02. The Second Circuit found that the BIA had misconstrued New York law in drawing a distinction between timely-filed direct appeals and appeals that were filed late but accepted by the state court. *See Abreu*, 378 F. App'x at 61 ("[A]n appeal reinstated pursuant to N.Y. Crim. Proc. Law § 460.30 is equivalent to any other direct appeal for the purposes of finality. . . . The government has not demonstrated that New York courts treat appeals reinstated pursuant to § 460.30 any differently than appeals as-of-right filed within thirty days pursuant to § 460.10."). This determination, in turn, called for resolution of the broader issue of whether a conviction subject to a pending direct appeal counts for immigration purposes, a question that now remains unresolved following the BIA's dismissal of the case. Disturbingly, however, the circuit's reversal of the BIA's erroneous parsing of New York law came in a non-precedential summary order that arguably does not bind the BIA in the cases of other litigants, *id.*, and the circuit denied a motion by *amici* to publish the summary order with precedential effect, *Abreu v. Holder*, No. 09-2349-ag (2d Cir. Aug. 31, 2010) (mem.) (attached). As a result, even if the BIA or Second Circuit re-affirm the finality rule in a future case, the government may seek to remove other individuals with pending appeals that were filed late but accepted under § 460.30, reviving an arbitrary distinction with no basis in the law of this State.

to ICE custody for deportation" upon completion of their sentences, New York Division of Criminal Justice Services, 2009 Crimestat Report 76 (2010), *available at* http://criminaljustice.state.ny.us/pio/annualreport/2009-crimestat-report.pdf, greatly compounds the potential unfairness to immigrant defendants.

This Court obviously has no authority or responsibility to control how or when federal officials deport noncitizen New Yorkers, or how the Department of Correctional Services assists in those efforts. But the Court need not ignore these realities when it decides whether the State's courts should reflexively dismiss appeals by deported defendants. If the routine practice of the Appellate Divisions to dismiss deported defendants' appeals in reliance on *Diaz* continues unchecked, the resulting catch-22—the state's potential cooperation in the removal of immigrants with pending appeals[6] and the dismissal of their appeals by the Appellate Division upon their removal—can only undermine public confidence in "equality before the bar of justice" in New York courts, *Griffin*, 351 U.S. at 17. To deny review of a conviction to an individual whose ability to contest removal or

[6] It bears repeating that although *amici* and the parties agree that this situation should be deemed unlawful under *Walcott*, 517 F.3d at 154, it is not conjectural. The DHS successfully argued before the Immigration Judge who first ordered Mr. Cardenas-Abreu removed (while he was in state custody, in proceedings under the Institutional Removal Program) that any direct appeal of a conviction is irrelevant after IIRIRA and made the same argument before the BIA. *Cardenas-Abreu*, 24 I.&N. Dec. at 796. They pressed the same argument in the Second Circuit, *Abreu*, 378 F. App'x at 61. In subsequent cases the Justice Department's Office of Immigration litigation, which represents the agency before the federal courts, has continued to maintain the litigation posture that IIRIRA eliminated the finality rule. *See* Transcript of Oral Argument at 7-9, *Planes v. Holder*, No. 07-70730, 2011 WL 2619105, (9th Cir. July 5, 2011).

return in the future may hinge on that conviction would be to endorse the systematic denial of due process by foreclosing any hope of vindication for those erroneously convicted and wrongfully deported. By curbing the practice of denial of appellate review, this Court would both preserve the opportunity for the wrongfully convicted and wrongfully deported to vindicate their record and return to their families and restore public confidence in the New York courts' commitment to the rights of all members of the community.

II. Denial of Intermediate Appellate Review to Defendants Seeking a New Trial Erroneously Presumes That a Deported Defendant Would Not Be Able to Re-enter the Country for a New Trial

In *Diaz*, this Court reasoned that, although the fact of appellant's deportation did not "mandate dismissal," the appellant's "unavailab[ility] to obey the mandate" of the court militated against deciding his case. 7 N.Y.3d at 832. The assertion in *Diaz* that the appellant was "unavailable to obey the mandate of the court" is most reasonably understood to mean that Diaz would not be able to gain the relief he sought—a new trial—because his deportation would make him unable return to New York to stand trial. *See id.*; *see also id.* at 834 (R.S. Smith, J., dissenting) ("[T]he majority is apparently concerned about compliance with our 'mandate' if we should reverse defendant's conviction and order a new trial."). The Appellate Divisions have transformed the *Diaz* Court's exercise of discretion to dismiss a discretionary appeal into a reflexive, routine practice of dismissing appeals as of

right, apparently grounded in the notion that no deported defendant would ever be able to "obey the mandate" of the appellate court reviewing his or her conviction, no matter what relief is sought. *See, e.g.*, *People v. Rosario*, 26 A.D.3d 212 (1st Dept. 2006) (dismissing appeal because deported defendant is "unavailable to obey the mandate of the court"); *People v. Zapata*, 31 A.D.3d 1047 (3d Dept. 2006) (same).

Defendant-Appellants have demonstrated the illogic of this conclusion when dismissal of charges is the only relief sought. (Ventura Br. at 34-35; Gardner Br. at 58). But the lower courts' practice is also erroneous if the relief sought is a new trial. As Judge Smith persuasively argued in his *Diaz* dissent, a deported defendant "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.

Judge Smith's conclusion that a retrial 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 on appeal removes the legal obstacles to returning to the United States. Immigrants who prevail on criminal appeals 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 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 not 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) N3.7 ("A conviction does not exist when the ruling of a lower court has been overturned on appeal to a higher court.").

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,[7] 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 prevailed on appeal on a claim of substantive or procedural defect.[8]

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

[7] 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*"). As a result, it cannot be assumed that the vacatur of a conviction on appeal will be irrelevant to the deported defendant's ability to return to the U.S., even within the Fifth Circuit.

[8] 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). Appeals to this Court, of course, do not result in such "rehabilitative" vacaturs, but rather in determination of "question[s] of law involving alleged or possible error or defect in the criminal court proceedings." N.Y. Crim. Proc. L. § 470.35(2)(b). Similarly, vacaturs stemming from appeals to the intermediate courts concerning "question[s] of law or issue[s] of fact involving error or defect in the criminal court proceeding which may have adversely affected the appellant," N.Y. Crim. Proc. L. § 470.15(1), by definition satisfy the BIA's definition of a vacatur that cancels the "conviction" for immigration purposes.

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 anything but a transient 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"). However, when the relevant conviction has been vacated on appeal by a state court, 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 criminal conduct. 8 U.S.C. § 1182(a)(9)(A). But this provision also does not prevent a successful appellant 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 prevails on criminal appeal may move the agency to re-open his or her removal case, vitiating the bar on re-entry that attached to the prior deportation.[9]

[9] 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 four other courts of appeals have found that the BIA does not lack jurisdiction over such motions. *Luna v. Holder*, 637 F.3d 85, 102 (2d. Cir. 2011); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007). *But see Contreras-Bocanegra v. Holder*, 629 F.3d 1170 (10th Cir.), *pet'n for reh'g en banc filed* (Mar. 8, 2011); *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009); *Pena-Muriel v. Gonzales*, 489 F.3d 438 (1st Cir. 2007). Significantly, the five courts that have found that the agency has jurisdiction over such motions control a large portion of the removal proceedings conducted nationally. Collectively, they reviewed 72% of all of the petitions for review of removal orders brought in federal court in 2010, the most recent year for which such figures are available. Administrative Office of the U.S. Courts, Judicial Business of the United States Courts: Annual Report of the Director 96 tbl.B-3 (2010), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/B03Sep10.pdf (showing that the Second, Fourth, Sixth, Seventh and Ninth Circuits together received 5,109 petitions for review from decisions of BIA, out of a total 7,058 petitions filed in all federal circuits).

Thirdly, even where a motion to re-open is unavailing because the appealed conviction did not directly affect the removal proceedings, a deported defendant who prevailed on a criminal appeal 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.* Paroling a defendant into the country to stand trial has long been recognized as having a "significant public benefit" within the meaning of the statute. *See Accardi*, 14 I.&N. Dec. 367, 368 (BIA 1973) (noting that the legislative history of the INA reveals that Congress intended administrative parole to be used to bring in noncitizens for the "purposes of prosecution" (quoting S. Rep. No. 1137, 82d Cong., 2d sess. 12-13)); *see also* 28 U.S.C. § 1821 (declaring "aliens who have been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. § 1182(d)(5))" ineligible for certain benefits). And indeed, the statute has been and continues to be used to bring defendants into the country to stand trial. *See, e.g.*, *Matter of Tomas-Gostas*, 2010 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* Point II.B, 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 appealed 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, while immigration law is somewhat unsettled in this area, *see supra* note 9, there is no basis for any categorical presumption that a defendant who prevails in his appeal will face insurmountable legal obstacles to re-entering the United States for purposes of further criminal proceedings. Nor is there any reason to suppose, as the *Diaz* majority implicitly did and as the Appellate Divisions appear to continue to do, 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*, 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 prosecuted an appeal 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 . . . .").

Indeed, immigrant defendants in these situations actually do return to the United States. For example, Ayman Mohammad Fat Salama was convicted of an Indiana fraud offense in 1997 and ordered removed in 2006. In post-conviction proceedings in 2007, an Indiana court ordered Mr. Salama's conviction to be vacated based on ineffective assistance of counsel. Citing evidence of the vacatur of his conviction, he filed a motion to re-open his immigration proceedings, and the Board found that the Immigration Judge was required to vacate the removal order and re-open his removal proceedings. *See Matter of Salama*, No. A043 503 083, 2010 WL 5559194 (BIA Dec. 17, 2010). *See also*, *e.g.*, Brian Patrick Conry, Wins, http://www.brianpatrickconry.com/wins.php (last visited July 21, 2011) (attorney website describing representative victory in which counsel was able to secure his deported client's re-entry in 2007 after the Oregon Supreme Court vacated his client's conviction).

Thus, both law and experience show that any categorical judgment that a deported defendant would not be able to return to the country to stand trial is unfounded. Determining the likelihood of return in any given case—which might depend on the appellant's criminal record in this and other jurisdictions, the federal circuit law that controls the appellant's removal case, and the timing of the conviction, deportation, and any post-deportation filings, among other factors—is a difficult task for an intermediate appellate court, which is ill-suited to resolving

complex and disputed factual questions outside the appellate record. *See infra* Point III (discussing the practical difficulties in determining the reasons underlying a past removal order). This is true whether an appellant requests dismissal of charges or a new trial. Instead, New York courts should assume that a deported defendant seeking a new trial can and will return to enjoy the relief he or she seeks.

III. The Complexities of Immigration Law and the Paucity of Records Of Immigration Court Proceedings Counsel Against a Rule Requiring the Intermediate Courts To Determine Whether a Conviction Was a But-For Cause of the Appellant's Removal

The People concede that if Defendant-Appellant Gardner were deported "based on" his conviction, the values of fairness and due process could not countenance the reflexive dismissal of his appeal. (Gardner Resp. Br. at 27 n.4 (conceding that dismissals of an appeal from a conviction that was the "sole and direct cause" of the defendant's removal would create an "undesirable Catch-22 situation") (internal quotations omitted)). As Gardner has correctly explained (Reply Brief for Defendant-Appellant Gardner, hereinafter Gardner Reply Br., at 9 & n.4), his conviction, which disqualified him from relief for which he would otherwise have been eligible, did cause his removal from the United States. Indeed, Gardner has been caught in the very "undesirable Catch-22 situation"—unable to appeal the dubious conviction that kept him from being able to remain in the U.S. with his family—envisioned by the People's hypothetical.

More generally, the People's proposed rule—on which intermediate appellate courts or this Court would be required to engage in a factual and legal inquiry into the cause of an appellant's removal—is extremely ill-advised. Determining the effect of a conviction on a noncitizen's ability to remain in or return to the United States would require the state courts to reach complex conclusions that bedevil the federal courts that are routinely called upon to make such determinations upon a full agency record and with the benefit of specialized counsel. *See, e.g.*, *Drax v. Reno*, 338 F.3d 98, 99-100 (2d Cir. 2003) (noting the "the labyrinthine character of modern immigration law---a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion" and finding "[w]ith regret and astonishment" that the case at bar "still cannot be decided definitively" following multiple decisions by the circuit and district courts).

A criminal conviction may interact with a removal proceeding in numerous ways. As discussed *supra* Point II.B, certain categories of conviction serve as triggers for removability. *See* 8 U.S.C. § 1182(a)(2)(A); § 1227(a)(2) (premising removability on, *inter alia*, "crimes involving moral turpitude," offenses relating to controlled substances, "aggravated felonies," domestic violence offenses, crimes of child abuse or neglect, and firearms offenses). In any given case, there may be multiple independently sufficient bases to find a noncitizen removable from the United States, including grounds that have nothing to do with a conviction. *See*,

e.g., 8 U.S.C. § 1182(a)(6)(A)(i) (presence in the United States without having been lawfully admitted or paroled); § 1227(a)(1)(B) (present in violation of law following lawful admission, including continued presence after the expiration of an authorized period of stay).

Once a noncitizen placed in removal proceedings (a "respondent" in immigration parlance) is determined to be deportable, the immigration court considers whether she or he qualifies for any form of relief from removal. Eligibility for most of these forms of relief is restricted based on a wide range of factors particular to the respondent. *See, e.g.*, 8 U.S.C. § 1158(a) ("asylum" available only to respondents who have applied within one year of entry to the United States, subject to enumerated exceptions); § 1229b(a)(1),(2) ("cancellation of removal" available only to lawful residents who have held that status for five years and who have continuously resided in the United states for seven years pursuant to a lawful admission). Conviction of certain kinds of criminal conduct may serve to automatically bar respondents who otherwise meet these criteria from seeking these forms of relief. *See, e.g.*, 8 U.S.C. §§ 1158(b)(2)(B)(i) (bar to asylum upon conviction of "aggravated felony"); 1229b(a)(3) (same for cancellation of removal for permanent residents);1229b(d) (commission of criminal conduct leading to certain categories of conviction stops the required accrual of seven years of continuous residence for purposes of cancellation of

removal for permanent residents); 1229b(b)(1)(C) (bar to cancellation of removal for non-permanent residents who have been convicted of any criminal conduct triggering removability).

Even where a conviction does not serve as a *per se* bar to applying for relief under the statute, it may have a strong or even conclusive effect on the immigration court's exercise of discretion in deciding whether or not to grant that relief under governing agency precedent or regulation. *See, e.g.*, *Matter of C-V-T-*, 22 I.&N. Dec. 7, 11 (BIA 1998) (describing the factors immigration judges must consider in deciding whether to grant discretionary relief from removal, including "the existence of a criminal record and, if so, its nature, recency, and seriousness"); *Matter of Y-L-*, 23 I.&N. Dec. 270 (A.G. 2002) (instructing immigration judges that they must deny "withholding of removal" to noncitizens convicted of drug trafficking offenses and that "[o]nly under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible"), *overruled on other grounds*, *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004) ; 8 C.F.R. § 212.7(d) (providing that "[t]he Attorney General, in general, will not favorably exercise discretion under . . . 8 U.S.C. 1182(h)(2) . . . in cases involving violent or dangerous crimes, except in extraordinary circumstances" and that " a showing of extraordinary circumstances

might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act").

Each of these issues requires detailed analysis. To take one example, the "aggravated felony" ground of removal consists of twenty-one separately defined categories of offense conduct. 8 U.S.C. § 1101(a)(43). A given state's designation of an offense as a "felony" or "misdemeanor" is irrelevant to the inquiry of whether it is an "aggravated felony" under immigration law. *United States v. Pacheco*, 225 F.3d 148, 149 (2d Cir. 2000). The federal circuits frequently diverge in their interpretation of whether a given state offense constitutes an aggravated felony and even on how this determination is made. *Compare, e.g.*, *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008) (criminal sale of marijuana under N.Y. Penal Law § 221.40 conclusively presumed not to be a "drug trafficking" aggravated felony because it *may* punish noncommercial transfer, regardless of actual conduct), *with Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011) (similar offense presumed to be an aggravated felony unless the immigrant can affirmatively prove such noncommercial transfer).

Moreover, even where it is clear that a given conviction is deemed an aggravated felony under the relevant circuit's law, it is impossible to determine what role conviction of an aggravated felony played in a given respondent's removal without an accurate understanding of the appellant's immigration status,

personal history, and potential claims to relief from removal. For instance, an aggravated felony conviction serves as a bar to a discretionary waiver of inadmissibility under 8 U.S.C. § 1182(h)(2) for lawful permanent residents who were convicted after "admi[ssion] for permanent residence" to the United States. "Admission" is a legal term of art with its own complex definition, *see* 8 U.S.C. § 1101(a)(13), and determining whether an aggravated felony barred a given immigrant's eligibility for this waiver may require knowing how the immigrant originally entered, how she or he obtained lawful residence and whether that process is considered an "admission" under the law of the relevant jurisdiction, a subject that has divided courts. *Compare, e.g.*, *Martinez v. Mukasey*, 519 F.3d 532, 542-46 (5th Cir. 2008) (holding that a noncitizen convicted of an aggravated felony after being admitted on a temporary basis and then adjusting to lawful permanent resident status under 8 U.S.C. § 1255(a) is eligible for a § 1182(h) waiver because he has not been "admitted for permanent residence") *with Matter of Koljenovic*, 25 I.&N. Dec. 219 (BIA 2010) (holding that a lawful permanent resident who adjusted to that status under exactly the same mechanism, but following an initial entry without inspection, was constructively "admitted for permanent residence" for purposes of § 1182(h)(2); distinguishing and expressing disagreement with *Martinez*); *cf. Matter of Alyazji*, 25 I.&N. Dec. 397 (BIA 2011)

(discussing and departing from the agency's own past precedent regarding what constitutes an "admission" for permanent residence in a related context).

Further, because the aggravated felony removal ground applies only to respondents convicted of aggravated felonies "at any time after admission," 8 U.S.C. § 1227(a)(2)(iii), a defendant who has not been "admitted" would not be deported "because of" an aggravated felony conviction, in the sense that he or she would not have been susceptible to a charge of removability for conviction of an aggravated felony "after admission." But such an individual may have sought a form of relief for which an aggravated felony conviction served as either an automatic or a discretionary bar. *Compare, e.g.*, 8 U.S.C. § 1158(b)(2)(B)(i) (aggravated felony conviction bars grant of asylum) *with* § 1231(b)(3)(B) (aggravated felony conviction bars withholding of removal, a related form of relief, only when it has been determined to be a "particularly serious crime"); *Matter of N-A-M-*, 24 I.&N. Dec. 336, 342 (BIA 2007) (explaining that the determination of whether an offense is "particularly serious" so as to bar withholding of removal turns on "a variety of factors" including "the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction").

In addition, a rule that requires litigants to obtain and introduce evidence of the cause of the defendant's deportation—likely resulting in disputed issues of fact requiring resolution—imposes a significant and unwelcome burden on appellate

courts whose review is generally confined to the state court record below. This is all the more true in the immigration context because the agency's records are frequently insufficient to determine with certainty why a defendant was removed. Immigration judges do not have to produce written opinions. 8 C.F.R. § 1240.50(a). Oral remarks of the Immigration Judge are recorded on tape, but are not transcribed unless and until a party appeals the decision to the BIA (in which case they are of limited relevance because they no longer represent the agency's final view). 8 C.F.R. § 1003.5(a). A large number of appeals to the BIA similarly do not result in detailed opinions setting forth the basis for removal. *See* 8 C.F.R. § 1003.1(e)(4) (requiring Board members to affirm decisions of the immigration judge "without opinion" in various circumstances). Immigration prosecutors are required to lodge a charging document, known as a Notice to Appear, listing the asserted grounds for *commencing* a removal proceeding. 8 U.S.C. § 1229(a)(1) (listing requirements for a Notice to Appear). But these documents can be amended throughout the proceedings and in any event do not indicate on their face whether or not the Immigration Judge sustained any given charge or set of charges as a basis for removal, any more than complaints or informations establish the offenses of which defendants are ultimately convicted. 8 C.F.R. § 1003.30 (allowing additional charges of deportability to be brought "at any time"); 8 C.F.R. §§ 1240.48(b), 1240.50(a) (requiring the Immigration Judge to make a decision as

to each asserted ground of removal, but not requiring formal enumeration of findings). Nor does the Notice to Appear shed any light on whether a given conviction served as an automatic bar to relief for which the immigrant was otherwise eligible. A conviction may be found to bar relief as an "aggravated felony" or otherwise even though the government lodged no such charge on the Notice to Appear. *See Brown v. Ashcroft*, 360 F.3d 346 (2d Cir. 2004).

Finally, even in a case where available evidence established that a conviction was not a cause of an individual's removal—for example, where an immigrant lacked any valid immigration status and the conviction *sub judice* did not serve as a bar to relief for which the immigrant was otherwise eligible—an appellate criminal court remains ill-equipped to determine that the conviction does not create an immigration disability preventing the immigrant's return to the United States. As Defendant-Appellants note (Ventura Br. at 31-32; Gardner Br. at 51-52) the existence *vel non* of a conviction and the length of a sentence are both relevant to the immigration authorities' exercise of discretion in deciding whether to allow a deportee to temporarily return to the United States for a specific purpose, notwithstanding his or her inadmissibility on criminal grounds. *See United States v. Hamdi*, 432 F.3d 115 (2d Cir. 2005). A deportee whose removal was not caused by the conviction on appeal may therefore retain a vital interest in

vacating the conviction at bar (and may, as described *supra* in Point II, be able to return for purposes of re-prosecution).

To take a far more common example, U.S. citizens can petition for a visa for a noncitizen spouse that allows the spouse to reside permanently in the United States, as discussed *supra* Point II. B. However, when the noncitizen spouse is present in the U.S. in violation of law and was never lawfully admitted at some point in the past, the law does not permit the noncitizen spouse to adjust to that lawful resident status while inside the United States, either affirmatively or as a defense to removal. 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(b)(3). Instead, the immigrant spouse must apply for that status at a U.S. consulate abroad. 8 U.S.C. §§ 1201, 1202; 22 C.F.R. § 42.61(a).

Suppose that a noncitizen entered the United States without inspection, married a U.S. citizen, and was subsequently wrongfully convicted of possession of a controlled substance in New York. As discussed *supra* Point II.B, most convictions for possession of a controlled substance operate as unwaivable bars to permanent lawful admission. 8 U.S.C. § 1182(a)(2)(A)(i)(II). If this defendant were placed in removal proceedings during the pendency of his appeal, the drug conviction would not serve as the sole cause of his removal, because his lack of valid status is itself a sufficient cause for removal. 8 U.S.C. § 1182(a)(6)(A)(i). Nor would the conviction serve as a "but-for" cause of his removal—although it

operates as an insuperable bar to obtaining lawful permanent resident status through his spouse, he is already independently ineligible for such relief in the context of his deportation case because he does not meet the eligibility requirement of having been previously lawfully admitted. 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(b)(3). Nonetheless, the conviction would bar his re-immigration to the United States via the consulate abroad, and the dismissal of his appeal, even without prejudice, of his wrongful conviction would forever deprive him of the privilege he would otherwise enjoy of seeking to return lawfully to his family in this country.

Tellingly—and contrary to the People's erroneous suggestion (Gardner Resp. Br. at 43)—other state courts faced with this question have declined to inquire into the causal relationship between conviction and removal. *See People v. Puluc-Sique*, 182 Cal. App. 4th 894 (2010); *Cuellar v. State*, 13 S.W.3d 449, 451 (Tex. Ct. App. 2000); *State v. Ortiz*, 113 Wash.2d 32, 34 (1989). New York should follow the sensible example of its sister states and decline to expend scarce judicial resources on a causal inquiry that requires both a specialized knowledge of immigration law and the parsing of extrinsic evidence wholly unrelated to the underlying criminal proceeding. Instead, judicial pragmatism and due process strongly suggest that this Court should guarantee the right of intermediate appellate review to all New Yorkers.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reinstate the appeals of Defendant-Appellants and hold that courts of this State should hear the appeals of deported defendants without reference to the relief sought or to whether the conviction *sub judice* was a sole or but-for cause of removal.

Respectfully submitted,

/s/ S. Isaac Wheeler
S. ISAAC WHEELER
Counsel for *amici curiae*

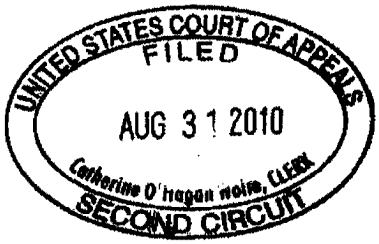
Dated: New York, NY
July 21, 2011

ADDENDUM OF UNPUBLISHED CASES

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of August, two thousand ten.

Before: José A. Cabranes,
Barrington D. Parker,
Circuit Judges,
Stefan R. Underhill,
District Judge.*



Roberto Cardenas Abreu,

Petitioner,

v.

Eric H. Holder Jr., United States Attorney General,

Respondent.

ORDER
Docket No. 09-2349-ag

IT IS HEREBY ORDERED that the motion by *Amici Curiae*, Immigrant Defense Project and New York State Defenders' Association, for publication of the summary order dated May 24, 2010 is DENIED.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk

Joy Fallek, Administrative Attorney

---

* The Honorable Stefan R. Underhill of the United States District Court for the District of Connecticut, sitting by designation.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Meeropol Rachel
Center For Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

USICE/DHS Litigation/ULS
P.O. Box 606
Castle Point, NY 12511

Name: CARDENAS ABREU, ROBERTO **A046-046-300**

Date of this notice: 6/10/2011

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Pauley, Roger
Wendtland, Linda S.

trane

File: A046 046 300 - Napanoch, NY Date: JUN 10 2011

In re: ROBERTO CARDENAS ABREU

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rachel Meeropol, Esquire

ON BEHALF OF DHS: Laura A. Michalec
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination of proceedings

This case is before us pursuant to a remand issued by the United States Court of Appeals for the Second Circuit ("Second Circuit"). *Abreu v. Holder*, 378 Fed.Appx. 59 (2d Cir. 2010), *rev'g Matter of Cardenas Abreu*, 24 I&N Dec. 795 (BIA 2009). The Second Circuit has asked this Board to address the question of whether the definition of conviction created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA") is ambiguous with respect to the finality requirement. *See Abreu v. Holder*, *supra*, at 62.

Significantly, however, the parties recently submitted copies of a decision from the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, affirming the respondent's criminal sentence. *People v. Cardenas*, 918 N.Y.S.2d 48 (N.Y.App. Div. 2011). Although the respondent has also provided a document indicating that he is presently seeking permission to appeal his sentence to the New York Court of Appeals, he has no further appeal of right available. *See* N.Y. Crim. Proc. L. § 460.20; *Chalk v. Kuhlmann*, 311 F.3d 525, 528 (2d Cir. 2002). The respondent's conviction is, therefore, final for immigration purposes. *Matter of Polanco*, 20 I&N Dec. 894, 896 (BIA 1994). The question of finality is now moot and, as such, the respondent's appeal will again be dismissed.[1]

In view of the foregoing, the following order will be entered.

[1] Inasmuch as we have concluded that this case does not meet the criteria for reconsideration through the *en banc* process, the Board declines to rehear this case. 8 C.F.R. § 1003.1(a)(5).

ORDER: The appeal is dismissed.

Patricia A. Cole

FOR THE BOARD

RECORD PRESS INC.
Decades of Experience Cutting Edge Technology
Since 1945

229 West 36th Street, New York, N.Y. 10018 • Tel: (212) 619-4949 • Fax: (212) 608-3141

29550

STATE OF NEW YORK,)
SS:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE

Daniel Vinci being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on the 22nd day of July 2011 deponent served 3 copies of the within

BRIEF OF AMICI CURIAE IMMIGRANT DEFENSE PROJECT, POST-DEPORTATION HUMAN RIGHTS PROJECT IN SUPPORT OF DEFENDANTS-APPELLANTS VENTURA AND GARDNER

upon the attorneys at the addresses below, and by the following method:

BY HAND DELIVERY

Richard A. Brown, District Attorney
John M. Castellano
Karen Wigle Weiss
Assistant District Attorneys
Of Counsel
Queens County
125-01 Queens Boulevard
Kew Gardens, New York 11415
Attorneys for Respondent

Lynn W. L. Fahey
Erin R. Collins
2 Rector Street, 10th Floor
New York, New York 10006
Attorneys for Defendant-Appellant
Carlos Ventura

Lynn W. L. Fahey
Erica Horwitz
Appellate Advocates
2 Rector Street, 10th Floor
New York, New York 10006
Attorneys for Defendant-Appellant
Damian Gardner

/s/ Ramiro A. Honeywell

/s/ Daniel Vinci

Sworn to me this

July 22, 2011

RAMIRO A. HONEYWELL
Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2012

Case Name: People of the State of New York v. Carlos Ventura and People of the State of New York v. Damian Gardner

CERTIFICATE FOR IDENTICAL COMPLIANCE

I, Ramiro A. Honeywell, certify that this electronic BRIEF OF AMICI CURIAE IMMIGRANT DEFENSE PROJECT, POST-DEPORTATION HUMAN RIGHTS PROJECT IN SUPPORT OF DEFENDANTS-APPELLANTS VENTURA AND GARDNER is identical to the filed original printed materials, except that they need not contain an original signature.

Dated: July 22, 2011

/s/ Ramiro A. Honeywell
Ramiro A. Honeywell