09-2349-ag

United States Court of Appeals
for the
Second Circuit

ROBERTO CARDENAS ABREU,

Petitioner

- against -

ERIC HOLDER

Respondent.

ON PETITION FOR REVIEW FROM DECISION
OF THE BOARD OF IMMIGRATION APPEALS

BRIEF ON BEHALF OF PETITIONER

Darius Charney, Esq.
Rachel Meeropol, Esq.
Sunita Patel, Esq.
Attorneys for Petitioner
The Center for Constitutional Rights
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6439

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Board of Immigration Appeals Cases

Federal Statutes

State Statutes

Federal Regulations

State Regulations

Other Authorities

PRELIMINARY STATEMENT

In an 8-6 *en banc* decision, the Board of Immigration Appeals ("BIA" or "Board") decided that Petitioner Roberto Cardenas-Abreu's criminal case—though pending on direct appeal—provided a basis for his removal from the United States. The Board did so despite the U.S. Supreme Court's decision in *Pino v. Landon*, 349 U.S. 901 (1955), *rev'g Pino v. Nicolls*, 215 F.2d 237 (1st Cir. 1954), that only final convictions can constitute removable offenses. A final conviction is an offense where direct appellate review is exhausted or waived. *Id. See also Marino v. INS*, 537 F.2d 686 (2d Cir. 1976); *Matter of O---*, 7 I. & N. Dec. 539 (BIA 1957).

Congress adopted a two-pronged approach for the definition of "conviction" in the 1996 immigration reforms—one analysis for "formal judgments of guilt . . . entered by a court" and a second "if adjudication of guilt has been withheld." 8 U.S.C. 1101 § (a)(48)(A). In Mr. Cardenas' case, the Board correctly determined that his offense involved a "formal judgment of guilt" but erred in analogizing late-filed notices of appeal under New York Criminal Procedure Law section 460.30(1) to collateral attacks or rehabilitative deferred adjudications. (McKinney 2005). This approach is incorrect. The late-notice procedure is not akin to a collateral attack or a deferred adjudication. Once the Petitioner's late-filed appeal was accepted by the intermediate New York appellate court (the Appellate Division), it

became identical to a direct appeal of right filed within 30 days of entry of judgment.

Not only is the Board's ruling legally incorrect, but the Board's policy concerns are also unfounded. The Board's conjecture that New York's late-appeal notification process could cause delay and uncertainty is wholly unsubstantiated. The Board failed to recognize the strict application of the statute's one-year limit to filing late appeals; its application by New York courts; and its significant function to ensure the fundamental rights of criminal defendants. Rather, it is the Board's decision—authorizing the removal of a lawful permanent resident who may succeed at defeating the Government's sole basis of removal— which creates uncertainty and administrative waste.

The Board's decision is contrary to settled law in this Circuit establishing the fundamental rights of criminal defendants on direct appeal.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 8 U.S.C. § 1252(a)(2)(D), which permits an appellate court to review "questions of law raised upon a petition for review [of a final order of removal]." The question of law here is whether Petitioner's criminal case, while *pending* on direct appeal, provides a valid basis for his removal order.

The Board had jurisdiction in this case pursuant to 8 C.F.R. §§ 1003.1(b), 1003.2(c), 1003.38(a), and 1240.15. The BIA's May 4, 2009 decision affirmed an Immigration Judge's decision to deny Petitioner's timely filed motion to re-open his removal proceedings, though it did not adopt the majority's reasoning. (JA-00106-113.) The BIA's decision, designated as a precedent decision, is a final order of removal. 8 C.F.R. § 1003.1(g). On June 3, 2009, Petitioner filed a timely petition for review of the BIA's decision to this Court pursuant to 8 U.S.C. §§ 1252(a)(1) and 1252(b)(1). (JA-00272.)

Venue is proper in this Court because the Immigration Judge completed proceedings in Marcy, New York. 8 U.S.C. § 1252(b)(2).

QUESTIONS PRESENTED

1. Did the Board of Immigration Appeals err in deciding a pending direct appeal of Petitioner's criminal offense (accepted pursuant to New York Criminal Procedure Law § 460.30(1)) is analogous to a collateral attack or rehabilitative vacatur?

2. Does the U.S. Supreme Court's, this Court's and the Board of Immigration Appeals' undisturbed rule of finality in "formal judgment of guilt" cases apply to accepted late-noticed appeals under New York Criminal Procedure Law § 460.30(1)?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Mr. Roberto Cardenas-Abreu, Petitioner, ("Petitioner" or "Mr. Cardenas") was born in the Dominican Republic on February 17, 1979. (JA-00258.) He entered the United States as a lawful permanent resident at age 16, on or about

June 26, 1996. (JA-00258; 0002.) On October 11, 2007, Petitioner was convicted of first degree burglary in violation of section 140.30 of the New York Penal Law. (JA-00002; 00256.) This is his only criminal conviction. (JA-0003.) Mr. Cardenas was served with a Notice to Appear initiating removal proceedings on January 14, 2008. (JA-00270-71.) On July 22, 2008, Mr. Cardenas appeared *pro se* before an Immigration Judge by video hearing, and was ordered removed from the United States. (JA-00254.)

Mr. Cardenas' criminal defense attorney did not file a notice of appeal within 30 days of his guilty plea, despite Mr. Cardenas's request. (JA-00086-87.) As Mr. Cardenas alleged in his motion to the Second Judicial Department of the Appellate Division of New York ("Second Department"), "The failure to file a notice of appeal in timely fashion resulted from the improper conduct of defendant's counsel and defendant's assumption that counsel had filed a timely notice of appeal as defendant had requested." (JA-00087.) Mr. Cardenas filed a motion for leave to file a late appeal on or about August 15, 2008. (JA-00083-94.) On September 26, 2008, the Second Department granted Petitioner's motion to file a late notice of appeal of his criminal conviction under New York Criminal Procedure Law section 460.30(1) based on this fact. (JA-00103-105) (Decision and Order granting Petitioner's Motion for Leave to Serve Late Notice of Appeal, Poor

Person's Relief and Assignment of Counsel)). Petitioner's criminal conviction is now pending on direct appeal. (JA-00103.)

On October 14, 2008, the Petitioner filed a timely *pro se* motion to reopen and terminate his removal proceedings because his conviction was not final as required by *Pino v. Landon* and Congress's definition of "conviction." (JA-00106-113.)

On October 30, 2008, the Immigration Judge ("IJ") denied the Petitioner's motion, deciding that his conviction remained a valid predicate for the charge of removability despite his pending appeal. (JA-00125-126.) The IJ agreed with the Department of Homeland Security ("DHS") that the 1996 enactment of the definition of "conviction" eliminated the finality requirement established in *Pino v. Landon*, even for cases involving a "formal judgment of guilt." (JA-00126.)

The Board disagreed with the Immigration Judge's legal analysis. On May 4, 2009 the Board issued a divided *en banc* decision. (JA-00001-30.) A narrow majority of eight members adopted neither the IJ nor the Petitioner's interpretation—instead it analogized a late-noticed appeal under New York's criminal procedure law to a collateral attack or deferred adjudication. (JA-00002-9.) On this basis the Board held that Petitioner's offense, although pending on direct appeal, remained a valid "conviction" for removal purposes and dismissed his appeal. (JA-00008-9.)

The Board incorrectly distinguished Mr. Cardenas' late-noticed direct appeal from any other direct appeal. (JA-00008-9.) Because Petitioner's case involved a late-noticed appeal, the majority did not agree with the IJ analysis that Congress meant to disturb the long-standing principle of finality. (JA-00006-7.)

Although the majority opinion did not decide the issue of finality, it strongly suggested it would not disturb the finality requirement. (JA-00005) ("The legislative history of the IIRIRA accompanying the adoption of the definition of a 'conviction' gave no indication of an intent to disturb this principle that an alien must waive or exhaust his direct appeal rights to have a final conviction. . . . A forceful argument can be made that Congress intended to preserve the long-standing requirement of finality for direct appeal as of right in immigration law.") (internal citations omitted)). Only two Board members expressed the view that finality was eliminated, (JA-00010-18) (Pauley, Member, concurring, joined by Cole, Member), while half of the Board's members expressly stated that finality is still required in separate decisions, (JA-00009-10) (Grant, Member, concurring) ("I would find that the 'finality' requirement does still apply to cases where a direct appeal is pending or direct appeal rights have not been exhausted."), (JA-00018-30) (Greer, Member, dissenting for six Board members).

Petitioner, through counsel, filed a timely Petition for Review to this Court. (JA-00272.)

SUMMARY OF ARGUMENT

Contrary to the established precedent of the U.S. Supreme Court and this Court, the Board determined that Petitioner's offense, pending on direct appeal, was a valid basis for a removal order. The Board erroneously distinguished an accepted (and therefore pending) late-noticed appeal from one timely noticed. It incorrectly compared the late notification procedure to a collateral attack or rehabilitative vacatur. *See supra*, Part I.

The Board erred in several respects. First, the Board's reasoning is inconsistent with New York courts' treatment of late noticed appeals; once accepted, they are treated the same as timely noticed appeals. *See supra,* Part I.A.

Second, the late notification procedure (under section 460.30(1) of the New York Criminal Procedure Law) is not a rehabilitative statute, nor does it provide for any form of collateral attack. It applies only to cases on direct appeal. *See supra*, Part I.B.

Third, the primary case the Board relies on, *Matter of Polanco*, is legally and factually inapposite. *See supra*, Part I.C.

Fourth, the policy concerns raised by the Board are based on complete conjecture. The Board's rule, not the Supreme Court's rule in *Pino*, would increase administrative waste and judicial resources. *See supra,* Part I.D.

Finally, the Board's analysis raises serious constitutional concerns. *See supra*, Part I.E.

Additionally, the Board did not determine Congress eliminated the rule of finality in 1996. Indeed, seven of 14 Board members wrote separately to emphasize that the finality requirement still exists; an additional five members of the majority provided strong support for the proposition. This Court must continue to recognize the finality rule. *See supra*, Part II.

Finally, any ambiguity should be interpreted in favor of the Petitioner under the rule of lenity. *See supra*, Part III.

Because Petitioner's sole offense establishing a ground for removal is now pending on direct appeal, this Court must reverse and vacate the Board's decision and terminate his removal proceedings.

STANDARD OF REVIEW

Questions of law presented in petitions for review of BIA decisions are reviewed *de novo*. *See Yi Long Yang v. Gonzales*, 478 F.3d 133, 141 (2d Cir. 2007). This Court reviews *de novo* the BIA's interpretation of state criminal statutes. *Wala v. Mukasey*, 511 F.3d 102, 105 (2d Cir. 2007); *Dickson v. Ashcroft*, 346 F.3d 44, 48 (2d Cir. 2003).

ARGUMENT

I. PETITIONER'S PENDING DIRECT APPEAL RENDERS HIS CRIMINAL CASE AN INADEQATE BASIS FOR REMOVAL.

In a divided decision, a narrow majority of the Board misinterpreted Petitioner's offense to be an adequate predicate for removal despite his pending direct appeal, pursuant to New York's late-notification procedure. *Matter of Cardenas*, 24 I. & N. Dec. 795, 798 (BIA 2009).

In reaching this erroneous conclusion, Board members ignored the fact that that a court accepted Petitioner's late-noticed appeal. The Board further ignored that under New York law, once accepted, a late direct appeal noticed pursuant to section 460.30 within a year and 30 days of judgment is identical to a direct appeal noticed within 30 days under section 460.10. Instead, the Board treated this direct appeal like a deferred adjudication—which it is not—and relied upon *Matter of Polanco*, 20 I. & N. Dec. 894 (BIA 1994), a case that is factually and legally inapposite.

The second prong of the statutory definition of "conviction" at 8 U.S.C. §1101(a)(48)(A) establishes a distinct two-step analysis for determining whether a given criminal proceeding involving a deferred adjudication will constitute a "conviction" triggering removal. New York Criminal Procedure Law section 460.30 does not address or contemplate such a proceeding. Unlike deferred adjudications, section 460.30 does not defer a resolution of guilt.

Additionally, *Matter of Polanco*, upon which the Board's majority relied, does not suggest otherwise. Unlike Petitioner, whose motion for late appeal was accepted, the respondent in *Polanco* filed a request with a New Jersey court to permit him to appeal his conviction, but the motion had not been accepted at the time of the Board's decision. Thus, a pending direct appeal was not before the Board. Additionally, in stark contrast to New York's strict deadline to seek a late appeal, the New Jersey scheme at issue in *Polanco* provided no limit to when a defendant could seek such relief. *Id.* Because the New Jersey statute lacked a time limitation and no late appeal had been accepted, the Board decided that the theoretical "potential for review" in such circumstances should be categorized as a collateral attack or ameliorative procedure rather than a request for direct appellate review. *Id.* Petitioner's offense is on direct review; his appeal is no longer "potential."

Moreover, the Board's policy concerns are based solely on conjecture. Finally, the New York statute at issue here is a procedural mechanism enacted to ensure a criminal defendant's constitutionally protected rights to a direct appeal and effective appellate counsel.

A. Under New York Law, An *Accepted* Late-Noticed Direct Appeal is Legally Indistinguishable From a Direct Appeal Noticed Within 30 Days.

Once a late-noticed appeal is accepted, pursuant to New York law, it is indistinguishable from an appeal of right. A criminal defendant has a right to appeal "[a] judgment other than one including a sentence of death" to an intermediate appellate court. N.Y. Crim. Proc. Law § 450.10 (McKinney 2005). The appeal, generally, must be taken within thirty days after the imposition of the sentence. *Id.* "Upon filing and service of the notice of appeal [upon the district attorney] . . . the appeal is deemed to have been taken." N.Y. Crim. Proc. Law §§ 460.10(b), (d) (McKinney 2005).

The statute at issue here, New York Criminal Procedure Law section 460.30(1), provides that an intermediate appellate court may grant an additional 30 days from the date the motion is decided to file a notice of appeal where:

> [F]ailure to so file [a notice of appeal] or make application in timely fashion resulted from (a) improper conduct of a public servant or improper conduct, death or disability of the defendant's attorney, or (b) inability of the defendant and his attorney to have communicated, in person or by mail, concerning whether an appeal should be taken, prior to the expiration of the time within which to take an appeal due to defendant's incarceration in an institution and through no lack of due diligence or fault of the attorney or defendant. Such motion must be made with due diligence after the time for the taking of such appeal has expired, and in any case not more than one year thereafter.

Notably, section 460.30 proscribes a strict time frame within which defendants must bring motions to accept late-noticed appeals— one year from the 30 day deadline— and places a due diligence requirement upon the movant. N.Y.

Crim. Proc. Law § 460.30(1) (McKinney 2005). *See also People v. Corso*, 40 N.Y.2d 578 (1976) (reversing an intermediate appellate court's decision to accept a late-noticed appeal filed beyond 1 year and 30 days). If a defendant meets the statutory requirements, "such intermediate appellate court . . . may order that the time for the taking of such appeal or applying for leave to appeal be extended to a date not more than thirty days subsequent to the determination of such motion." N.Y. Crim. Proc. Law § 460.30(1).

Once accepted by an intermediate appellate court, the same procedures under Articles 450, 460 and 470 of the Criminal Procedure Law that govern appeals noticed within 30 days apply. Nothing in the case law, statutes, or Appellate Division rules indicates otherwise. *See* N.Y. Crim. Proc. Law § 460.70 (McKinney 2005) ("[T]he mode of and time for perfecting an appeal which has been taken to an intermediate appellate court from a judgment, sentence or order of a criminal court are determined by rules of the appellate division of the department in which such appellate court is located."); *see also e.g.,* 22 N.Y.C.R.R. §§ 600.8; 699.11 (1st Dep't.); §§ 670.3; 670.6; 670.12(b)-(d) (2nd Dep't.) (governing the procedures for appeals generally).

In Petitioner's case, when the Appellate Division for the Second Department accepted his motion for a late-noticed appeal, it "[o]rdered that the appellant's moving papers are deemed to constitute a timely notice of appeal." (JA-00103.)

The appeal's acceptance triggered the same procedures in any other timely filed appeal—including an order for briefing, appointment of counsel and order for production of the record below. (JA-00104-105.) The Second Department will treat the Petitioner's pending direct appeal as if it were filed within 30 days—using the same standard of review; applying the same burden of proof; and providing the same right to oral argument.

The Board's decision to treat Petitioner's appeal as somehow different from a timely direct appeal is inexplicable given the statutory scheme and the Second Department's treatment of the Petitioner's accepted late-appeal.

B. Section 460.30 Enforces the Right to Direct Appeal of a Criminal Conviction; It Is Not an Ameliorative Or Deferred Adjudication Statute Serving only to Mitigate the Effects of a Conviction.

The Board and DHS below agreed that Petitioner's offense falls within the "formal judgment of guilt" prong of analysis. The Board, however, incorrectly analogized the New York late-noticed appeal procedure to deferred adjudications or ameliorative procedures. *Cardenas*, 24 I. & N. Dec. at 799-800 ("Congress's treatment of deferred adjudication proceedings in the IIRIRA informs our approach to late-reinstated appeals"). This analogy is not supported by the statute or relevant precedent.

When Congress enacted the definition of the term "conviction" in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of

Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"), it sought to distinguish between convictions derived from a "formal judgment of guilt" and those in which "adjudication of guilt is withheld." 8 U.S.C. § 1101(a)(48)(A).[1] The Conference Report for IIRIRA defined the types of criminal cases Congress meant to encompass as "deferred adjudications." "In some States, adjudication may be 'deferred' upon a finding or confession of guilt, and a final judgment of guilt may not be imposed if the alien violates probation until there is an additional proceeding regarding the alien's guilt or innocence . . . . In cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of immigration laws." H.R. Rep. No. 104-828, at 224 (1996) (Conf. Rep.). *See also Matter of Punu,* 22 I. & N. Dec 224, 227-28 (BIA 1988).

Nothing in the language or implementation of the New York's late noticed appeal procedure demonstrates any ameliorative or deferred adjudication purpose. *See* N.Y. Crim. Proc. Law § 470.15 (McKinney 2005) (outlining scope of review

---

[1] The statutory definition of a conviction at 8 U.S.C. § 1101(a)(48)(A) provides:

> The term 'conviction' means. . . a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

for intermediate appellate court review). Its plain language provides a procedural mechanism for intermediate appellate courts to extend the time for accepting a notice of appeal under certain proscribed circumstances. N.Y. Crim. Proc. Law § 460.30(1).

Once accepted, the appeal is adjudicated in the same manner as any other appeal of right pursuant to Articles 450, 460 and 470 of the New York Criminal Procedure Law. *See supra*, I.A. In contrast, New York provides for various ameliorative or rehabilitative procedures and collateral attacks that this Court has determined fall within the second prong analysis of 8 U.S.C. § 1101(a)(48)(A). *See e.g. Mugalli v. Ashcroft*, 258 F.3d 52, 61-62 (2d. Cir. 2001) (expungment under New York Law through Certificate of Relief designed to mitigate consequences of a conviction remains a "conviction" for immigration purposes). *See generally* N.Y. Crim. Proc. Law § 440.10 (McKinney 2005).

The Board's incorrect analogy of section 460.30 to deferred adjudications or collateral attacks is contrary to this Court's understanding of convictions under the "formal judgment of guilt" prong.

C. The Board Erred in Relying Upon *Matter of Polanco*; The Facts and Reasoning Do Not Apply to Petitioner's Situation.

The Board's decision relied heavily upon a case entirely distinguishable from Petitioner's. *Cardenas*, 24 I. & N. Dec. at 800. In *Matter of Polanco*, 20 I. & N. Dec. 894 (BIA 1994), the Board was asked whether a respondent's offense

could provide a basis for his removal, though an application to consider his appeal was before an appellate court in New Jersey. The application was pending; the appeal was not. And the New Jersey statute permitting the appeal had no filing deadline. In *Polanco*, the Board held that the *potential* for discretionary review on direct appeal did not disturb the finality of a conviction for immigration purposes. *Id.* at 895-96.

This Court should not repeat the Board's mistaken reliance on *Polanco*. First, Mr. Polanco had not shown, nor even alleged, that the New Jersey appellate court had entered an order granting the respondent permission to file a late appeal or that his appeal was under consideration by the New Jersey Appellate Division. *Id.* at 898. Second, the New Jersey Court Rule 2.4-4, which authorized defendants to file appeals beyond the statutorily prescribed period, lacked an outside time limit for leave to file such an appeal. *Id.* at 897. As a result of the lack of *any* time bar, the Board viewed the procedure as akin to a collateral post-conviction attack or discretionary direct appeal to a state's highest court. *Id.* at 895-96.

Finally, underlying the reasoning in *Polanco* was a concern that by delaying the initiation of proceedings "simply because an alien retains the right to apply for a late appeal, his deportation proceedings could be postponed indefinitely by the

mere existence of the *nunc pro tunc* appeal procedure."[2] *Id.* at 898. The case before this Court is very different—Petitioner's appeal is currently pending before the Appellate Division; New York has a clear time frame for filing late-notices for appeal; and section 460.30 does not cause an indefinite delay of removal proceedings.

1. Acceptance of Late-Noticed Appeal

Unlike the respondent in *Polanco*, Petitioner's late-noticed appeal has been accepted by the Second Department of the Appellate Division and his criminal case is pending on direct appeal. (JA-00103-105.)

In light of the Second Department's acceptance of Petitioner's late notice of appeal, the policy considerations addressed in *Polanco*—that a respondent could delay removal proceedings indefinitely simply because a procedure was available—are not relevant here. Petitioner's case may have been similar to the one before the Board in *Polanco* before his late-notice appeal was accepted by the Second Department. But Petitioner's appeal is no longer a potential, theoretical or prospective one; it is a realized pending direct appeal of right to an intermediary appellate court and therefore falls outside the scope of *Polanco* 20 I. & N. Dec. 894. *See Griffiths v. INS*, 243 F.3d 45, 54 (1st Cir. 2001) ("There are substantial

[2] The immigration consequences resulting from a non-citizen's right to direct appellate review under a State procedure that involves no outside time limit is not before this Court and Petitioner takes no position on whether *Polanco* was correctly decided.

practical differences between the situation faced by a defendant currently exercising a direct appellate right and that faced by a defendant with a theoretically available right to appeal[.]").

There is no question that Petitioner's appeal is pending and therefore beyond the scope of *Polanco*.

2. Deadlines for Filing Late Notices of Appeal

In *Polanco,* the Board considered a state court rule which "permit[ed] the defendant to take a *nunc pro tunc* appeal 'irrespective of the lateness of the hour.'" 20 I. & N. Dec. at 897 (citing *State v. Altman*, 438 A.2d 576, 577 (N.J. Super. Ct. App. Div. 1981). The Board "consider[ed] it significant that the New Jersey Rules of Court contain no time constraints whatsoever to limit the period during which a defendant can request permission to take a *nunc pro tunc* appeal." *Polanco* 20 I. & N. Dec. at 897.

Unlike the New Jersey statute the Board examined in *Polanco*, section 460.30 includes a deadline of one year, after the initial 30 day deadline, to file a notice of appeal. *See* N.Y. Crim. Pro. Law § 460.30(1) ("Such motion must be made . . . in any case not more than one year thereafter."). The New York Court of Appeals and intermediate appellate courts have strictly construed the one year deadline. *See e.g. Corso*, 40 N.Y.2d at 581 (motions made pursuant to section 460.30 "may not be made more than one year after the time for taking an appeal

has expired"); *People v. Thomas*, 47 N.Y.2d 37, 43 (1979) ("[S]trict construction is appropriate since the time limits within which appeals must be taken are jurisdictional in nature and courts lack inherent power to modify or extend them.") (citations omitted).

New York courts will not accept late-noticed appeals when filed beyond one year and thirty days. *See e.g., People v. Peguero*, 265 A.D.2d 941 (4th Dep't. 1999) (where the 460.30 motion was dismissed as untimely since it was made "more than one year and 30 days from the date of sentencing"); *People v Lard*, 45 A.D.3d 1331 (4th Dep't. 2007) (same).[3] Thus, the Board's comparison to *Polanco* is inapposite.

3. Discretionary Direct Appeals and Policy Considerations

The BIA incorrectly reasoned, based in part on *Polanco,* that late-reinstated appeals in New York are "discretionary in nature." *Cardenas,* 24 I. & N. Dec. at 800 (citing *Polanco*, 20 I. & N. Dec. at 897). The meaning of the "potential for discretionary review" language used in *Polanco* does not support the Board's analysis in this case.

---

[3] *See also e.g*. *People v. Artusa*, 2005KN003209, 824 N.Y.S.2d 769 (N.Y. Crim. Ct. Aug. 16, 2006) (same); *People v. Morales*, Ind. No. 2094/99, 2003 WL 1093005 (Sup. Ct. N. Y. Cty. Jan. 21, 2003) (same); *People v. Smith*, 265 A.D.2d 941 (4th Dep't. 1999) (same); *People v. McDonough*, 87 A.D.2d 727 (3rd Dep't. 1982) (same). The only exception Petitioner has uncovered involved extraordinary evidence of prosecutorial misconduct, as a result of which the State was estopped from raising the one-year statutory bar. *Thomas*, 47 N.Y.2d at 44-45.

In *Polanco*, the Board distinguished between collateral attacks and direct appeals of right. 20 I. & N. Dec. at 895-96. It followed the Ninth Circuit's decision in *Morales-Alvarado v. INS*, 655 F.2d 172, 174 (9th Cir. 1981), addressing the question of whether immigration authorities can consider a conviction final despite an appeal pending to the highest court of a three-tiered state system. *Polanco*, 20 I. & N. Dec. at 896. The Board agreed with the Ninth Circuit that the distinguishing line for finality purposes is between direct appeals of right and other appeals (e.g. appeals to the highest court of a state or for writ of certiorari to the U.S. Supreme Court). *Id.* at 896 (citing *Morales*, 655 F.2d at 175). Because the New Jersey *nunc pro tunc* procedure had no outside time frame, the Board in *Polanco* treated it as a collateral attack, reasoning that the "potential" for appellate review did not disturb finality for immigration purposes. *Id.* at 897. In making the distinction, the Board upheld a non-citizen's right to exhaust all direct appeals as of right before immigration authorities could use a conviction as a basis for removal. *Id*. at 896.

The Board in the case before this Court ignored its own distinction between direct appeals of right and collateral attacks. *Cf. Id.* at 896; *Matter of Shah*, 2008 WL 5181786 (BIA Nov. 21, 2008) (respondent's appeal of trial court's denial of motion to vacate is not a direct appeal negating finality of a conviction); *Matter of Johnson*, 2008 WL 2400962 (BIA May 30, 2008) (motion to vacate and other

collateral attacks do not disturb finality for immigration purposes) (citing *Polanco,* 20 I.&N. Dec. at 896).

D. The Board's Policy Analysis Was Not Supported by New York Caselaw and Failed to Consider the Petitioner's Situation.

The Board's majority decision raised several unsupported policy concerns. The Board held the New York criminal court's determination of whether to grant or deny a request to file a late-reinstated appeal may result in an "unpredictable and indeterminate delay in removal proceedings" because "the *resolution* of such motions have no time limit." *Id.* (emphasis in original). This, the Board explained, "introduce[s] a layer of uncertainty and delay" to removal proceedings. *Id.* at 801.

These concerns about New York procedure are devoid of any precedential or factual support. First, Petitioner's motions for a late appeal, appointment of counsel and to proceed as a poor person display exactly the opposite. Mr. Cardenas filed his motions on or about August 15, 2008, (JA-00084-0094), and it was decided on September 26, 2008—a little over a month later, (JA-00103) Second, the strict construction and uniform application of the one year and 30 day time bar, *see supra,* Part I.A.2, results in minimal delay, and is far from indeterminate. The Board's failure to cite to any case law or empirical data supporting its policy arguments is noteworthy. *Id*. at 800-801.

In contrast, the Board's rule—permitting removal in cases where pending appeals of right are correctly before state appellate courts—presents a far greater

risk of uncertainty, delay, and unpredictability. The regime created by the Board contemplates the institution of removal proceedings (and perhaps the execution of removal itself) followed by additional administrative or federal court review even as non-citizens successfully challenge a criminal conviction under direct appellate review. *Cardenas*, 24 I. & N. Dec. at 802 n.8 ("If the [Petitioner's] conviction is ultimately vacated, however, he would be able to seek reopening in the same extent as an alien with a vacated conviction resulting from a successful collateral attack.").

This rule is inefficient, a waste of judicial resources, and has the serious consequence of curtailing defendants' constitutional rights, *see infra*, Part.I.E. First, non-citizens like Mr. Cardenas face substantial hardship in prosecuting direct appeals if removed. Second, New York courts have begun to dismiss appeals filed by non-citizens after removal from the United States. *See People v. Del Rio*, 14 N.Y.2d 165 (1964) (comparing deportee to escaped felon and thereby dismissing appeal because the appellant's deportation rendered him unable to return to the state and thus moot); *see also People v. Shaw*, 237 A.D.2d 995 (N.Y. App. Div. 4th Dep't. 1997) (same). *See also* Labe M. Richman, *Deported Defendants: Challenging Convictions From Outside U.S?* N.Y.L.J. (June 14, 2006) (col. 4) (citing numerous New York appellate division decisions mooting criminal appeals following deportation). If the Board's decision is allowed to stand, the Second

Department may lose jurisdiction of the Petitioner's challenge to his wrongful conviction—without ever considering the merits.

Moreover, if a removed non-citizen were able to obtain successful appellate review of his or her wrongful conviction, the law is unclear on whether the Board has authority to review the removal order. *See Matter of Cardenas*, 24 I. & N. Dec. at 817 n.8 (citing *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008) (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)). The Board's dissent points out this contradiction in the majority's observation, *Cardenas,* 24 I. & N. Dec. at 802 n.8, that if Petitioner's criminal case was vacated, he could seek a motion to reopen, *Cardenas,* 24 I. & N. Dec. at 817 n.8 (Greer, Member, dissenting).

E. The Board's Action Raises Serious Constitutional Concerns.

The Board's misinterpretation of New York's late appeal process raises serious constitutional concerns regarding the due process and equal protection guarantees the Supreme Court and this Court have recognized for criminal defendants, as well as the full faith and credit given to state judicial determinations. *See Evitts v. Lucy*, 469 U.S. 387, 396 (1985) (recognizing the "vital interests at stake" in a criminal appeal). The New York statute at issue here enforces a

defendant's right to a direct appeal, right to counsel on appeal and right to effective counsel.

This Court recognizes a New York criminal defendant's fundamental right to first-tier appellate review by the Appellate Division.[4] *See Taveras v. Smith*, 463 F.3d 141, 150 (2d Cir. 2006) (citing N.Y. Crim. Proc. Law § 450.10). *See also People v. Harrison*, 85 N.Y. 2d 794, 796 (1995) (recognizing that "a defendant has a fundamental right to appeal a criminal conviction" under N.Y. Crim. Proc. Law § 450.10); *People v. Yavru-Sakuk*, 98 N.Y.2d 56, 59 (2002) (same). Once a state creates the right to a direct appeal, the due process clause forbids any rule curtailing a defendant's fair opportunity to properly and fully pursue that appeal. *Taveras*, 463 F.3d at 148 (citing *Evitts*, 469 U.S. at 404-405). Deprivation of an appellate safeguard under state law may violate due process. *See Logan v. Zimmerman Brush Co*., 455 U.S. 422, 430 n.5 (1982).

Moreover, the Board's decision may contravene the right to access to counsel when a state creates a right to direct appeal. This law is well settled under the United States and New York constitutions.[5] *See Penson v. Ohio*, 488 U.S. 75,

[4] The Court of Appeals recognizes Section 4(k) of Article VI of the New York Constitution as prohibiting legislative curtailment of Appellate Division jurisdiction over appeals from final judgments. *People v. Pollenz*, 67 N.Y.2d 264, 267 (1986).

[5] This Court recognized these important constitutional protections:

84-85 (1988) (holding that the representation on direct appeal as well as at trial "is among the most fundamental of rights"); *Evitts*, 469 U.S. at 393-94, 396 (holding that the Fourteenth Amendment guarantees a criminal defendant the effective assistance of appellate counsel).

Prior to the New York Legislature's enactment of the Criminal Procedure Law in 1971, the Court of Appeals determined that a defendant is entitled to the reinstatement of his direct appeal if he shows his criminal defense attorney failed to timely file a notice of appeal when instructed to do so. *People v. Montgomery*, 24 N.Y.2d 130, 133-34 (1969); *People v. Callaway*, 24 N.Y.2d 127, 129-30 (1969). In *Montgomery*, the Court of Appeals proclaimed its "fundamental concern that defendants be informed of their right to appeal, and that, where an attorney, whether assigned or retained, fails to apprise his client of this vital

---

> [O]nce state law grants a first appeal as of right, the Fourteenth Amendment provides twofold protection to the right to counsel. First, the due process clause forbids states from establishing a system of appeals as of right but then refusing to provide each defendant with a fair opportunity for adjudication, and second, the equal protection clause prohibits states from 'distinguish[ing] between poor and rich' in the provision of a meaningful appeal. *See Evitts* . . . . Both protections 'emphasize the central aim of our entire judicial system – 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.'

Taveras v. Smith, 463 F.3d 141, 147 (2d Cir. 2006) (citations and quotations omitted). *See also Douglas v. California*, 372 U.S. 353, 356-57 (1963) (no established appellate procedures may be implemented in a discriminatory manner.)

privilege, there is no justification for making the defendant suffer for his attorney's failings." *Montgomery*, 24 N.Y.2d at 132. The New York Legislature essentially codified these decisions when it enacted section 460.30 of the New York Criminal Procedure Law. *See People v. Corso*, 40 N.Y.2d 578, 579 (1976) (concluding the relief proscribed in *Montgomery* and *Callaway* are now "encompassed by CPL 460.30").

The New York statute and process governing late notices of appeal protect the due process and equal protection guarantees of indigent defendants in New York criminal courts and serve the important function of correcting judicial error. *Montgomery*, 24 N.Y.2d at 133-34; *Callaway*, 24 N.Y.2d at 129-30.

The canons of constitutional avoidance require the Court to interpret the definition of "conviction" consistently with the due process and full faith and credit clauses of the U.S. Constitution. The discussion above shows that New York courts sometimes dismiss pending appeals when a non-citizen is deported. *See supra*, I.C. *See also People v. Del Rio*, 14 N.Y.2d 165 (1964) (comparing deportee to escaped felon and thereby dismissing appeal because the appellant's deportation rendered him unable to return to the state and thus moot); *see also People v. Shaw*, 237 A.D.2d 995 (N.Y. App. Div. 4th Dep't. 1997) (same). *See also* Labe M. Richman, *Deported Defendants: Challenging Convictions From Outside U.S?*, N.Y.L.J. (June 14, 2006) (col. 4). In Petitioner's case, the Second Department may

loose jurisdiction of the Petitioner's challenge to his wrongful conviction—without ever considering the merits. This is especially troubling in light of the court's decision to accept Petitioner's late appeal due to his attorney's failure to timely file his notice of appeal and no fault of his own.

In sum, this Court must recognize the Board's error in treating Petitioner's offense as anything other than a non-final pending direct appeal of right. The Board's irreconcilable distinction between section 460.30 procedures and appeals filed within 30 days is not supported by New York law; Congress's understanding of deferred adjudications and "final judgments of guilt;" or *Polanco*. Moreover, the Board's policy concerns were based on conjecture. Important to this Court, the Board's interpretation of New York law also raises serious constitutional concerns. The petition for review should be granted.

II. UNDISTURBED PRECENDENT ESTABLISHES FINALITY IS REQUIRED IN THE FIRST PRONG OF 8 U.S.C. § 1101(a)(48)(A).

As explained above, Petitioner's pending direct appeal cannot be analogized to a deferred adjudication or collateral attack. It is a direct appeal and thus not final. It cannot serve as a predicate for immigration consequences. Precedent decisions from the U.S. Supreme Court and this Court thus require application of the rule of finality. No precedent Board decision has ever disturbed the finality doctrine for direct appeals following "formal judgments of guilt." Indeed, in the

case at bar, the Board did not adopt the Immigration Judge's reasoning that finality requirement no longer exists. *Cardenas*, 24 I. & N. Dec. at 796; 798. This Court has no reason to disturb settled law in this case.

The United States Supreme Court announced over half a century ago that a conviction must attain sufficient finality to support an order of deportation. *Pino*, 349 U.S. at 901. Importantly, the Supreme Court has never overruled *Pino* or the finality doctrine.

This Court followed the Supreme Court's decision: "[A]n alien is not deemed to have been 'convicted of a crime under the Act until his conviction has attained a substantial degree of finality . . . . Such finality does not occur unless and until direct appellate review of the conviction (as contrasted with collateral attack) has been exhausted or waived."). *Marino v. INS*, 537 F.2d 686 (2d Cir. 1976) (internal citations omitted). *See also Montilla v. INS*, 926 F.2d 162, 164 (2d Cir. 1990) ("[T]he drug conviction is considered final and a basis for deportation when appellate review of the judgment – not including collateral attacks – has become final."). The Board likewise followed *Pino* in *Matter of O—*, 7 I. & N. Dec. 539 (BIA 1957). *See also Ozkok*, 19 I. & N. Dec. at 549-50, 552 n.7; *Matter of Thomas,* 21 I. & N. Dec. 20 (BIA 1995).

This Court has never overruled the entrenched finality doctrine in the context of a direct appeal. Most recently, in *Walcott v. Chertoff*, 517 F.3d 149, 154

(2d Cir. 2008), this Court considered whether AEDPA was given impermissible retroactive effect by an IJ. DHS argued that Mr. Walcott's direct appeal of the conviction, which was pending at the time of AEDPA's enactment, defeated the petitioner's argument. *Id.* This Court noted that "[t]he decision to appeal a conviction [ ] suspends deportability[,]" and remanded for the IJ to make a factual determination. *Id.* This Court's reasoning in *Walcott* is consistent with the long-standing finality rule this Circuit has traditionally applied in the "conviction" definition's first prong analysis.[6]

The Board, here, also chose not to disturb the finality doctrine despite the IJ's analysis that Congress intended to eliminate the finality requirement when it defined "conviction." Congress's action, however, was directed to address concerns that the Board's case law in the deferred adjudication context led to disparate results. In some states, a violation of the terms of a deferred adjudication led to immediate entry of a judgment of conviction but in other states it triggered further proceedings on the issue of guilt. In *Ozkok*, the Board had created a three pronged standard to govern the immigration consequences of the different types of deferred adjudication.[7] Congress eliminated the part of the *Ozkok* test that

---

[6] There is no dispute that the case before this Court involves the first prong of the "conviction" definition. *Cardenas*, 24 I. & N. Dec. at 799.

[7]Under *Ozkok* a removal order can be based upon a deferred adjudication when: (1) a judge or jury has found the alien guilty or he has entered a plea of guilty or *nolo*

required further court proceedings prior to the adjudication of guilt, but adopted the remaining two parts of the *Ozkok* rule nearly verbatim. *See Punu*, 22 I.&N. Dec. at 227 (quoting H.R. Conf. Rep. No. 104-828, at 224 (1996). Again, this modification only applied to cases, unlike Petitioner's, in the "deferred adjudication" prong of the "conviction" definition.[8]

Significantly, the *Ozkok* decision separately emphasized the long-standing finality rule: "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." 19 I. & N. Dec. at 552 n.7 (citing *Marino v. INS*, 537 F.2d 686 (2d Cir. 1976); *Aguilera-Enriquez* v. INS, 516 F.2d

---

contendere or has admitted facts to warrant a finding of guilt, and (2) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed; and (3) a judgment or adjudication of guilty may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge. *Id.* at 551-52.

[8] Moreover, in analyzing the second prong of the "conviction" definition or extending the second prong analysis to collateral attacks or post-conviction relief, courts have taken care to distinguish first prong decisions. *See Matter of Punu*, 22 I. & N. Dec. at 234 n.1 (BIA 1999) (Grant, Member, concurring) ("[T]his opinion does not address the circumstance of an alien against whom a formal adjudication of guilt has been entered by a court, but who has pending a noncollateral post-judgment motion or direct appeal."); *Griffiths,* 243 F.3d at 54 n.3 ("Since we address petitioner's case here under the second test, we likewise do not address any finality requirements for finding a conviction under the first prong.") (citing *Punu*, 22 I. &N. Dec. at 234 n.1).

565 (6th Cir. 1975), *cert denied*, 423 U.S. 1050 (1976); *Will v. INS*, 447 F.2d 529 (7th Cir. 1971)).

The majority in *Matter of Cardenas* strongly suggested the vitality of the finality doctrine established by the Supreme Court in *Pino*, which this Court follows. 24 I. & N. Dec. at 798-99. It did not overturn the longstanding finality rule. *Cardenas*, 24 I. & N. Dec. at 798-99. On the contrary, at least half of the members of the *en banc* Board expressly stated that finality is still required. *Id.* at 811-823 (Greer, for 6 Board members, dissenting); *id.* at 802-803 (Grant, concurring) ("I would find that the "finality" requirement does still apply to cases where a direct appeal is pending or direct appeal rights have not been exhausted."). An additional five members strongly suggested they agreed with the dissenters on this issue, *Cardenas*, 24 I. &N. Dec. at 798.

Despite the Board's misinterpretation of late noticed appeals, *see supra* Part I, it correctly acknowledged "the strength of the argument that Congress intended to preserve the traditional treatment of direct appeals." *Id.* at 799.

The majority specifically noted:

> At the time the IIRIRA was enacted, 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. This well-accepted principle can be traced to the decision of the United States Supreme Court in *Pino v. Landon*, 349 U.S. 901 (1955). The legislative history of the IIRIRA accompanying the adoption of the definition of a 'conviction' gave no indication of an intent to disturb this

> principle that an alien must waive or exhaust his direct appeal rights to have a final conviction. With this backdrop regarding the broad context of this issue and the statute, a forceful argument can be made that Congress intended to preserve the long-standing requirement of finality for direct appeals as of right in immigration law.

Id. at 798 (internal citations omitted). In fact, only two Board members wrote separately to argue IIRIRA extinguished finality. *Id*. at 803-811 (Pauley and Cole, concurring) (arguing that finality is not required); *Cf. Cardenas*, 24 I. & N. Dec. at 798 (strong dicta that finality is still required); *id.* at 811-823 (Greer, for 6 Board members, dissenting) (analyzing and concluding that finality doctrine still exists); *Cardenas*, 24 I. & N. Dec. at 802-803 (Grant, concurring) (agreeing with dissent on finality issue).

Puello v. B.C.I.S., 511 F.3d 324, 332 (2d Cir. 2007), cited by the IJ below (but not followed by the Board), *see Cardenas* 24 I. & N. Dec. at 797, provides little support for an argument that the finality doctrine has been altered in this Circuit. In that case an appeal of a conviction was not at issue. *Id. at* 332. In *dicta*, the Court stated without explanation that IIRIRA had eliminated the finality requirement. *Id.* (citing *Abiodun v. Gonzales*, 461 F.3d 1210, 1213 (10th Cir. 2006) (raising the suggestion in dicta); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004) (same); *Moosa v. INS,* 171 F.3d 993, 1009 (5th Cir. 1999) (same)). At the same time, the Court recognized the distinction Congress intended between a "formal judgment of guilt" and a finding of guilt which has been "withheld." *See*

Puello, 511 F.3d at 331 ("Looking closely at the 'conviction' definition in the INA demonstrates that its purpose is to contrast the run-of-the-mill 'formal judgment of guilt' with a vast array of procedures states had devised to mitigate the effects of criminal convictions.").

The Court in *Puello*, 511 F.3d at 325, was faced with the question of timing—when does a "conviction" initially occur under 8 U.S.C. § 1101(a)(48)(A)? The issue is entirely different from the one currently before the Court—whether a "conviction" occurred. Nothing before the Court in *Puello* required resolution of the issue presented in the instant case. Indeed, *Puello* even provides some support for Petitioner's argument, as the Court recognized that "[t]he entirety of the commentary on the new definition of conviction focuses on the deferred-adjudication prong; the language regarding 'formal judgment of guilt' remains essentially unchanged from the *Ozkok* formulation." *Id.* at 332.

The Court in *Puello* conducted no analysis of the cases cited to support its *dicta*. Other circuits have since held (or stated in *dicta*) the opposite.[9] Indeed, the

[9] For example, the Sixth Circuit in *United States v. Garcia-Echaverria*, 374 F.3d 440, 445 (6th Cir. 2004), considered in the re-entry context whether an offense on appeal was final for sentencing enhancement purposes. It determined that the appeal was a collateral attack, and therefore not "final" for immigration purposes. *Id.* at 445-46 ("To support an order of deportation, a conviction must be final.") (citing *Pino v. Landon*, 349 U.S. 901 (1995)). *See also Paredes v. Attorney General of U.S.*, 528 F.3d 196, 198 (3d Cir. 2008) (joining other circuits that pending collateral attacks do not vitiate finality; recognizing "a conviction does not attain a sufficient degree to finality for immigration purposes until direct appellate

balance of circuit courts examining the question have continued to apply the finality doctrine. *See Cardenas*, 24 I.&N.Dec. at 818-820 (Greer, Member dissenting) (distinguishing Court of Appeals decisions where finality is considered extinguished as *dicta* or cases where pending appeals are not at issue).[10] The Board's majority did not rely upon the dicta in *Puello* to eliminate finality, *Cardenas*, 24 I. & N. Dec. at 797 n.5, and nor should this Court.

This court is also not bound by *Alejo v. Mukasey*, a summary order, relying on *Puello*'s dicta to reject a petitioner's claim that a pending state court appeal prevented the immigration judge from ruling him inadmissible on the basis of a conviction. 292 Fed App'x 128, 129 (2d Cir. 2008) (unpublished). The one paragraph consideration of this issue does not bind this Court. There is no discussion of *Pino* or the Court's decisions following *Pino*. *Id.* Moreover, it is unclear from the brief discussion whether the Court was faced with a direct appeal of right or, indeed, whether the petitioner's conviction was still on appeal at the time of the Court's review. *Id.*

---

review of the conviction has been exhausted or waived.") (citing *Matter of Ozkok*, 19 I.&N. Dec. 546, 552 n.7 (BIA 1988)). In the circuits where finality has been questioned or held no longer required, the cases before the courts were not pending direct appeals or otherwise distinguishable to the issue before this Court.

[10] *See, e.g., Garcia-Maldonado v. Gonzales*, 491 F.3d 284, 290-291 (5th Cir. 2007) (citing *Renteria-Gonzalez v. INS*, 322 F.3d 804) (5th Cir. 2002); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037(7th Cir. 2004).

This Court should follow the undisturbed finality principle in "formal judgment of guilt" adjudications (provided in *Pino)* and determine the Board erred in affirming the Immigration Judge's decision to deny the Petitioner's motion to re-open and terminate proceedings. This Court should grant this petition for review and remand for purposes of re-opening and terminating proceedings.

In the alternative, this Court should reverse the Board's decision to treat Petitioner's pending direct appeal of right as a collateral attack or rehabilitative vacatur, and remand to the Board to consider first whether a criminal case, pending on direct appeal as of right, provides a valid predicate to a removal order.

III. THIS COURT SHOULD APPLY THE RULE OF LENITY AND DECIDE ANY AMBIGUITY IN FAVOR OF THE PETITIONER

Finally, any lingering ambiguities in the relevant immigration and criminal statutes should be construed in favor of the immigrant under the rule of lenity. The rule of lenity applies when "reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute." *United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). It can be applied both to deportation statutes, *INS v. St. Cyr,* 533 U.S. 289, 320 (2001), and to criminal statutes referenced therein. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

This Court should apply the rule of lenity when harsh consequences would flow from a contrary decision. *See Rosario v. INS*, 962 F.2d 220, 225 (2d Cir. 1992) (interpreting immigration statute in petitioner's favor "in light of the harshness of deportation"); *Lennon v. INS*, 527 F.2d 187, 193 (2d Cir. 1975) ("[S]ince the stakes [of deportation] are considerable for the individual, we will not assume that Congress [in enacting deportation statutes] meant to trench on [a non-citizen's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." (citation omitted)). Namely, construing the first prong of the INA's definition of "conviction" to include *pending* direct appeals of right would enlarge the scope of offenses and circumstances in which non-citizens may face the harsh consequences of removal. *See Cardenas*, 24 I. & N. Dec. at 817 n.8 (Greer, Member, dissenting) ("Removal of the individual pending direct appellate review would lead to serious consequences should the conviction be reversed."). In the case before this Court, a contrary decision will lead to permanent removal of a legal permanent resident for over 10 years. In the interest of fairness and justice, application of the rule of lenity is warranted in this case.

CONCLUSION

For the foregoing reasons and in the interest of justice, this petition for review should be granted.

This Court cannot distinguish between the Petitioner's accepted late- noticed pending appeal and any other pending appeal. The Court should vacate and remand with instructions to terminate removal proceedings due to the Board's error in treating Petitioner's offense—pending on direct appeal—similar to a collateral attack or rehabilitative vacatur.

In the alternative, this Court should reverse, vacate in part and remand with instructions for the Board to consider in the first instance whether the Court must follow the well established finality doctrine of *Pino*.

Respectfully Submitted,

RACHEL MEEROPOL
DARIUS CHARNEY
SUNITA PATEL
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 11102
(212)614-6439
spatel@ccrjustice.org

ATTORNEYS FOR THE PETITIONER

September ___, 2009