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

REPLY BRIEF ON BEHALF OF PETITIONER

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PRELIMINARY STATEMENT

In *Matter of Cardenas*, 24 I. & N. Dec. 795, 801-802 (BIA 2009), the Board of Immigration Appeals ("BIA" or "Board") erroneously misinterpreted the New York late-appeals process. Without disturbing the long-standing principle that a criminal offense must attain "finality" for immigration consequences, the Board decided that Petitioner's criminal offense, pending as a late-filed direct appeal, served as a sufficient basis for his permanent removal from the United States. As a review of the New York Criminal Procedure Law section 460.30(1) makes clear, the Board's decision to distinguish Petitioner's late-filed pending direct appeal from a timely filed direct appeal has no basis under New York law. New York courts treat accepted late-filed, and therefore pending, appeals as a central and indistinguishable part of the constitutionally recognized direct appeals framework.

Having no response to this, the Government instead misdirects the Court. First, it seeks improperly to command deference to the BIA's interpretation of New York state law, a statute which the BIA does not administer. And secondly, the Government confuses the analysis of Petitioner's criminal disposition—which it agrees is a "formal judgment of guilt"—with Congress's separate concerns related to divergent state programs for deferred adjudications when it enacted a definition of "conviction" in IIRIRA.

Under the well-established finality doctrine, a non-citizen must waive or exhaust his direct criminal appeals of right –as opposed to habeas review or other forms of collateral attack – for a "formal judgment of guilt" to form the basis for a charge of removability. In its decision below, the Board, based on a misunderstanding of the New York late appeals statute and unsubstantiated speculative concerns about its operation, erroneously found that Petitioner's late-filed, but accepted, state law criminal appeal was not a direct appeal. The Board thus erroneously found his direct appeal was not entitled to the historic protections afforded by the finality rule for the direct appeals process.

Petitioner submits that the Board's analysis of New York criminal procedure law section 460.30(1) was wrong: a pending direct appeal of right, once accepted pursuant to this New York statute, is no different than a pending direct appeal of right filed within 30 days. Furthermore, as Petitioner and *Amici* established, and as the Government failed to persuasively rebut, the Board's erroneous distinction of late-filed but accepted appeals and their exclusion of such appeals from the finality rule's protections, presents serious constitutional, fairness, and due process concerns. Among other problems, the Board's decision threatens to deprive immigrants of important appellate rights, enshrined under the New York constitution, and enhancing the risk that immigrants will be irrevocably removed

from the United States on the basis of convictions that lack a sound legal basis. This issue of law is reviewed *de novo* and deserves no *Chevron* deference.

A determination that the Board erroneously distinguished an accepted appeal pursuant to section 460.30(1) from a timely filed New York appeal implicates the issue the Board did not decide: whether, when enacting a definition of "conviction" drawn from prior case law which included the finality rule, Congress intended to eliminate, through silence, the long-settled and judicially accepted finality doctrine. The Board explicitly did not decide this issue nor did it address the question of whether the statute is ambiguous in this regard. Despite the Board's silence, the Government speciously suggests that this Court owes *Chevron* deference to *the Government's* view asserted in its brief that Congress intended to eliminate the finality rule. Not only does this position deserve no deference, it is actually contrary to the views expressed by 12 of 14 Board members. Additionally, this position is irreconcilable with the Government's arguments elsewhere in its brief that the issue of finality is not before this Court.

The Government's contentions regarding Congressional intent to silently eliminate the finality requirement are incorrect. Congress is presumed to legislate with knowledge of existing case law. Under this and other canons of statutory construction, it is clear that the well-settled law of finality has not been disturbed.

Nevertheless, if this Court decides that the statute is ambiguous on the issue of finality or believes the Board should decide the question of finality in the first instance, then the Court should remand the issue to the Board.

ARGUMENT

I. THE COURT HAS JURISDICTION TO REVIEW THE BOARD'S LEGAL HOLDING *DE NOVO.*

The Government concedes that where the Board denies a motion to reopen on the basis of a legal conclusion, the Court must review that legal holding *de novo*. Gov't. Br. at 17, 24 ("The Board's legal conclusions are reviewed *de novo*[.]"). Petitioner's motion to reopen, initially filed with the Immigration Judge ("IJ"), and as appealed to the Board, raised only an issue of law and did not include an application for discretionary relief.

In support of its argument that the Board should be afforded deference in its decision to grant or deny a motion to reopen, the Government only cites inapposite cases where the petitioners sought review of motions to reopen to permit filing discretionary applications for relief, first-time asylum applications, or *sua sponte* motions which raise issues that do not necessarily require *de novo* review. *See* Gov't. Br. at 16-17. Such cases are irrelevant because unlike Petitioner's case, they do not involve pure questions of law. *See* Gov't. Br. 17-19 (citing *Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009) (involving discretionary "exceptional circumstances" grounds for motion to reopen); *INS v. Doherty*, 502 U.S. 314, 323

(reviewing whether an asylum seeker who previously withdrew application may obtain discretionary leave to file anew in the context of motion to reopen); *INS v. Abudu*, 485 U.S. 94, 108 (1988) (reviewing motion to reopen where the Board was presented with new factual evidence of persecution and respondent failed to apply for asylum in initial proceedings)).

The Board's decision to distinguish between a timely filed and late-filed appeal is an issue of law afforded *de novo* review.

II. THIS COURT OWES NO DEFERENCE TO THE BOARD'S INTERPRETATION OF NEW YORK'S LATE-FILED APPEAL STATUTE.

The Board specifically did not address the finality question. *Cardenas*, 24 I. & N. Dec. at 798 (explaining the finality question and then stating that "[w]e need not resolve that issue"). Instead, the Board analyzed the New York late-appeal statute section 460.30(1) and decided that it is more closely analogous to a deferred adjudication or collateral attack, than to a timely filed appeal as of right. That decision involves principally the interpretation of a New York criminal statute that the BIA does not administer and has no expertise in interpreting, and thus warrants no deference by this Court.

It is a well-settled principle that the Board's interpretation of a state or federal criminal statute that it does not administer is afforded no deference by federal courts on a petition for review. *Sutherland v. Reno,* 228 F.3d 171, 174 (2d

Cir. 2000) ("[C]ourts owe no deference to an agency's interpretation of state or federal criminal laws . . . .") (quoting *Michel v. INS,* 206 F.3d 253, 262 (2d Cir. 2000); *Dulal-Whiteway v. USDHS*, 501 F.3d 116, 120 (2d Cir. 2007) ("We . . . do not extend *Chevron* deference to the BIA's or an IJ's construction of . . . criminal laws."); *Dickson v. Ashcroft*, 346 F.3d 44, 48 (2d Cir. 2003) (interpreting *de novo* 18 U.S.C. § 16 as incorporated in 8 U.S.C. § 1101(a)(43)(F)); *Dalton v. Ashcroft*, 257 F.3d 200, 203 (2d Cir. 2001) (same) ("We review *de novo* [ ] the BIA's interpretation of federal or state criminal statutes.").

This is true even when, as frequently occurs, and as the Board did in Petitioner's case, the Board analyzes whether a given state or federal criminal offense falls within a particular statutory definition found within the INA. *See e.g. Dulal-Whiteway*, 501 F.3d at 120; *Dalton*, 257 F.3d at 203; *Michel*, 206 F.3d at 262-63 (BIA has no expertise in interpreting state criminal law to determine whether a given crime involved "moral turpitude" as defined by the INA, and thus its conclusion is afforded no deference). Thus in *Sui v. INS*, 250 F.3d 105, 112-13 (2d Cir. 2001), this Court reviewed *de novo* the question of whether petitioner's conviction under 18 U.S.C. § 513(a) meets the requirements of an "attempt" to commit the aggravated felony of fraud pursuant to INA §§ 101(a)(43)(M) and (U). The Court relied on the accepted rule in this and other circuits that when the Board determines that a criminal conviction triggers a given immigration

consequence, its subsidiary interpretation of the nature of the criminal statute is owed no deference. *Id.*; *see also Leocal v. Ashcroft*, 543 U.S. 1, 7, 12-13 (2004) (determining whether a Florida DUI offense was an aggravated felony without reference to the agency's view); *Vargas-Sarmiento v. DOJ*, 448 F.3d 159, 165 (2d Cir. 2006) (reviewing *de novo* whether manslaughter in the first degree under New York law is an aggravated felony); *Dickson*, 346 F.3d at 48 (same as to New York crime of unlawful imprisonment) (citing *Dalton*, 257 F.3d at 203).

Accordingly, this Court need not defer to the Board's analysis of whether New York's late appeal procedure is distinguishable from a timely filed appeal such that it fits within the definition of conviction provided in INA § 101(a)(48)(A).

The Government argues that the Board did not interpret a New York statute, but rather applied the INA's definition of "conviction" to Petitioner's case. Gov't. Br. at 39. But this is irreconcilable with the BIA's actual opinion below, *Cardenas*, 24 I. & N. Dec. at 800-01 (analyzing section 460.30(1)), and moreover is the same argument that was expressly rejected by the Second Circuit in *Sutherland*. *Sutherland v. Reno*, 228 F.3d 171, 174 (2d Cir. 2000) (rejecting the Government's "remarkable position that 'to the extent the BIA's determination required the examination of federal and state criminal law, [ ] the need for deference to the BIA's judgment is not diminished.'") (quoting Government's brief in that case)).

Even supposing *arguendo* that its understanding of criminal law were entitled to deference as a general matter, the BIA's erroneous distinction between late-filed and timely filed appeals in this case is still not entitled to deference. For the same reasons argued here and addressed in Petitioner's opening brief and argued in *Amici*'s brief, Petitioner's Br. at 10-12, 15-19, 21-23; Br. For *Amici,* Point I and III, the Board's decision is unreasonable and leads to unjust and absurd results. *Chevron*, 467 U.S. at 844 (agency decision is not entitled to deference under *Chevron* when its decision is arbitrary and leads to absurd results). Accordingly, it may not be afforded any deference.

III. PETITIONER'S ACCEPTED LATE-FILED DIRECT APPEAL RENDERS HIS CONVICTION NON-FINAL FOR REMOVAL PURPOSES.

As the Board's interpretation of state criminal law commands no deference this court must consider *de novo* the degree to which a late-filed pending appeal renders a conviction not final for immigration consequences. Under New York law, pending timely filed direct appeals of right are indistinguishable from pending 460.30(1) appeals of right. Moreover, the late-appeal process serves the critical function of protecting defendants' Constitutional right to direct appeal for attorney error. The Government fails to adequately address Petitioner's and *Amici*'s central arguments that the Board erroneously analogized between late-filed direct appeals and "deferred adjudication" offenses. Moreover, the Government's brief neglects

to even acknowledge, let alone persuasively address, the serious constitutional considerations this Court must balance in reviewing the Board's decision. Instead, the Government misconstrues the Board's policy considerations and ignores the statute's efficient and quick process for section 460.30(1) late-filed appeals.

A. The Government Fails to Persuasively Defend the Board's Erroneous Distinction Between Timely Filed and Late-Filed Appeals.

The Government does not attempt to contend with the crucial and incontrovertible fact that, under New York law, an accepted late-filed appeal is identical to a timely filed appeal. Instead, the Government attempts to dismiss Petitioner's arguments as irrelevant to whether Petitioner's accepted late-filed appeal justified his motion to reopen for purposes of terminating the proceedings. Gov't. Br. at 40-41. But, as noted above, *supra*, Part II, the Government's assertion that the nature of the state law procedure was irrelevant to the Board's decision is irreconcilable with the BIA's actual decision and reasoning in this case. *See Cardenas*, 24 I. & N. Dec. at 800-802 (interpreting and assessing New York's appeal statute); 802 (holding Petitioner removable "[g]iven the indeterminate nature of the New York late appeal procedure . . .").

The Government thus sidesteps the central issue presented here: whether the BIA erroneously distinguished between timely filed and late-filed appeals under New York law. As Petitioner argued in his opening brief, this Court should answer

this question in the affirmative because the BIA's distinction between timely filed and late-filed direct appeals is incorrect as a matter of law; was based on an improper analogy to *Matter of Polanco,* 20 I. & N. Dec. 894 (BIA 1994), and the deferred adjudication prong of the "conviction" definition; relied on policy considerations that prove unsubstantiated in practice; and presents serious Constitutional problems. *See* Petitioner's Br. at 9-26. The law is clear. As argued by *Amici* and in Petitioner's opening brief, an accepted late-filed direct appeal is legally indistinguishable from a timely filed direct appeal. Petitioner's Br. at 10-13; *Amici* Br. at 8-11 (explaining that pending 460.30(1) late-filed appeals are the same as timely filed appeals as a matter of statutory construction and New York law). Significantly, the Government fails to offer any explanation for the Board's legal conclusion to the contrary.

B. The Government and BIA Cite Unfounded Policy Concerns as Reasoning for an Improper Analogy Between Deferred Adjudications and Late-Filed Appeals in New York Without Addressing the Serious Injustices and Constitutional Problems with the Board's Decision.

Instead of addressing the legally indistinguishable nature of an accepted late-filed appeal and a timely filed appeal under New York law, the Government directs attention to the BIA's unsupported conclusion that the late-appeals process in New York is akin to a deferred adjudication due to its own assumptions about "delay" and "uncertainty" in removal proceedings—issues Congress and the Board have

sought to address in "deferred adjudication" offenses. In enacting IIRIRA, Congress was concerned that citizens of different states who plead guilty to identical offenses would be subject to vastly different immigration consequences dependent on the state in which they lived due to the differing deferred adjudication procedures. H.R. Rep. No. 104-828, at 224 (1996) (Conf. Rep.) (specifying that *Matter of Ozkok,* 19 I. & N. Dec. 546 (BIA 1988), "does not go far enough to address situations where judgment of guilt. . . may be deferred"). Thus, in making a uniform definition of conviction that would apply across all deferred adjudication programs, Congress sought to address some of these imbalances and inequities.

As argued below, Congress expressed no similar concern with regard to the "formal judgment of guilt" offenses, like Petitioner's. The Government and the Board ignore the fact that Congress's concern was specific to the "deferred adjudication" context. *Id.* Congress wanted to avoid *indefinite* delays of removal proceedings. This is a problem the Petitioner and *Amici* have shown is not a significant issue with the New York late-appeal statute. *See* Petitioner's Br. at 21-23; *Amici* Br. at 11-15.

For the reasons put forth in Petitioner's opening brief and *Amici*'s brief, section 460.30(1) enforces a criminal defendant's right to a direct appeal of a criminal conviction, which is a right with Constitutional roots. Petitioner's Br. at

13-15. The Government completely ignores this argument. Moreover, the statute includes a strict one-year time limit for late-filed appeals and requires a court to grant the application if the enumerated grounds are met. N.Y.Crim. Proc. L. § 460.30(1); Petitioner's Br. at 11-13; *Amici* Br. at 7-11. Case law cited in Petitioner's and *Amici*'s briefs show that these deadlines and requirements are strictly enforced.

Furthermore, as the *Amici* showed,[1] in part based on a recent survey of 460.30(1) motions filed in the First and Second Departments of the Appellate Division and interviews with appellate defender organizations,[2] the Board's conjecture that New York's late appeal procedure results in significant delay and uncertainty is unfounded. *Amici* Br. at 11-15. A survey of 460.30(1) motions demonstrates that 460.30(1) motions are routine, and involve a quick turn-around

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[1] The Government seeks to completely avoid responding to the evidence put forth by *Amici* with regarding New York's section 460.30(1) by conflating the general presumption against efforts by parties to enlarge the administrative record on appeal embodied in 8 U.S.C. Section 1252(b), with the broad license given to Amici Curiae under the federal rules to introduce new perspectives to aid the court on appeal. Gov't. Br. at 38 n.6. However, the commentary to Fed. R. App. P. 29(b) explicitly encourages amicus to present new information not offered by the parties below, and cautions amicus to address only matters not adequately addressed by the parties themselves. Fed. R. App. P . 29(b) Comm. Note, quoting Sup. Ct. R. 37.1. *See also* Fed. R.App . P . 29(d) Comm . Note (amicus brief "should treat only matter not adequately addressed by a party") (emphasis added).

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

that is not fact intensive or judgment-laden. According to this survey, the First and Second Departments decide motions pursuant to 460.30 on average within 72 days, or roughly two and a half months. NYSDA Advisory at 4. Motions requesting permission to file late-appeals are filed on average 114 days, or less than four months, after the date by which timely appeals must be filed. *Id.* Further, in no instance surveyed, was an application remanded to the trial court for further fact-finding, or appealed to the Court of Appeals. *Id.* at 3-4. In other words, actual examination of the operation of New York's late appeal procedure reveals that the Board's speculative concerns about potentially indefinite delays and lengthy avoidance of removal proceedings, which Congress sought to correct in the deferred adjudication contexts, simply do not play out in Section 460.30 practice.[3]

More importantly, the minor delays that may result in removal proceedings for the non-citizens whose late-filed appeals are accepted and adjudicated are a small price to pay given the fundamental constitutional concerns implicated by the Government's position. As Petitioner and *Amici* have argued, the right to appeal, and the right to affective assistance of counsel on appeal, cannot be sacrificed to

[3] The Board's and the Government's concerns about theoretical delays and discretion in section 460.30(1) motions are not even implicated here, where the petitioner's late-filed appeal has been accepted by the Second Department. *See Amici* Br. at 10-11. These concerns are merely a red herring designed to distract the Court from the incontrovertible fact that, once accepted, a late-filed appeal is indistinguishable as a matter of law from a timely-filed direct appeal.

improvidently rush deportation. Petitioner's Br. at 13-15, 23-26; *Amici* Br. at 15-23.

Further, a review of what transpired in Petitioner's case illuminates the important fairness and justice purposes New York's late appeals process protects. Due to the failure of his criminal defense attorney, Petitioner's notice of appeal was not filed timely. (JA-00087). The Second Department deemed the notice of appeal timely filed and invoked section 460.30(1) to correct this error. (JA-000103-105). In doing so, the Second Department used its authority to remedy a potentially unconstitutional deprivation of access to a criminal appeal. *See* Petitioner's Brief at 24-26. The Government's suggestion that Petitioner is improperly using the late-filed appeal process to delay removal, Gov't. Br. at 41 n.7, is unsubstantiated by anything in the factual record. On the contrary, the Petitioner believed his criminal case was on appeal—a factual point with which the reviewing criminal court agreed with and which principles of comity require that the IJ, Board, and this Court recognize.

The Government argues that any potential constitutional problems have been remedied by the fact that this Petitioner was able, through the section 460.30(1) motion, to seek review of his criminal offense. Gov't. Br. at 45. But this just proves Petitioner's point: the reason he has been able to pursue his appeal and obtain appointment of counsel is because he remains in the United States.

The Government's disingenuous argument that the Petitioner's proper avenue for review is in a motion to re-open and terminate *after* his direct appeal has been favorably resolved, even if he is deported, does not address the constitutional concerns Petitioner and *Amici* raise. Gov't. Br. at 45. The Board's decision is precedential—others in Petitioners' position may have shorter sentences, such that their deportation would likely occur prior to the completion of the appeal. In New York, appellate courts routinely dismiss appeals where a non-citizen criminal defendant has been deported. *See* Petitioner's Br. at 22-23; *Amici* Br. at 16-17.

Moreover, the Government's assertion does not comport with its position in other cases—that agency regulations prohibit motions to reopen after physical deportation from the country. *See, e.g., Rosillo-Puga v. Holder* 580 F.3d 1147, 1159 (10th Cir. 2009); *Lin v. Gonzales*, 473 F.3d 979, 981 (9th Cir. 2007); *see generally Matter of Armendarez-Mendez*, 24 I. & N. Dec. 646 (BIA 2008); 8 C.F.R. §§ 1003.2(b), 1003.23(b). Thus even if the criminal appeal is not dismissed, on the Government's view, Petitioner would not be able to reopen his removal proceedings if he has been deported. *Id. See also* Amici Br. at 16-18. The Government completely misconstrues Petitioner's argument and ignores the constitutional issues by framing them as a "hardship" in litigating his criminal appeal if he were deported. Gov't. Br. at 44.

IV. THERE IS NO BASIS, EITHER IN THE BIA'S DECISION OR THE LAW, FOR THE GOVERNMENT'S POSITION THAT CONGRESS ELIMINATED THE LONG-STANDING PRINCIPLE THAT CRIMINAL DISPOSITIONS RESULTING IN A "FORMAL JUDGMENT OF GUILT" MUST BE FINAL TO SERVE AS THE BASIS FOR REMOVAL.

Assuming this Court finds that the BIA erroneously distinguished between late-filed and timely filed direct appeals, the Government urges the Court to next address its central argument: that Congress intended to eliminate the finality doctrine—through silence—when it enacted the definition of "conviction." Gov't. Br. at 26, 28. However, the Board below never held this, and nothing in the text nor history of IIRIRA suggests that Congress intended to disturb this well-established principle. *See* Petitioner's Br. at 27-35; *Amici* Br. Point III.A, IV.

The Government's position—argued in the absence of legislative history or the Board's decision (which expressly reserved judgment on this question)—is that the enactment of INA § 101(a)(48)(A) eliminated the finality requirement for all formal judgments of guilt. *See* Gov't. Br. at 26; *but see Cardenas*, 24 I. & N. Dec. at 798 (expressly reserving judgment on the finality issue). As shown below, the Government is wrong. Employing tools of statutory construction, this Court should find Congress did not intend to eliminate the long-standing finality rule.

Even more remarkably, the Government contends this court should defer to *the Government's* position that Congress eliminated the finality requirement when enacting IIRIRA. The Board did not interpret INA § 101(a)(48)(A) to eliminate the long-standing finality principle. *Cardenas*, 24 I. & N. Dec. at 798 (reserving judgment on the finality issue). The Court cannot defer to a legal conclusion which the Board has not made simply because the Government continues to advance an argument the Board rejected. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("We have never applied the principle of [*Chevron*] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.").

Notwithstanding the Government's efforts to have this Court uphold a decision the BIA did not render and the law does not support, if the Court believes that the BIA should be afforded an opportunity to decide the question it reserved in the first instance, then the Court should remand to the Board.

A. Contrary to the Government's Assertion, Congress Adopted *Ozkok*'s "Formal Judgment of Guilt" Language Without Eliminating the Long-Standing Associated Finality Requirement.

In addition to seeking *Chevron* deference where there has been no agency decision in support of its view, the Government also errs in its argument that the statute unambiguously eliminated the finality requirement. The first step in the *Chevron* analysis is to consider whether the statute, INA § 101(a)(48)(A), is

ambiguous on the issue in question by "employing traditional tools of statutory construction." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (*citing Chevron*, 467 U.S. at 843 n. 9). "In determining whether Congress has specifically addressed the question at issue [under step one of *Chevron*], a reviewing court should not confine itself to examining a particular statutory provision in isolation. . . . A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme." *FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-133 (2000)* (citation and internal quotation marks omitted)).

Given this proper context and against the backdrop of the prevailing law it imported into its definition of "conviction," it is clear and unambiguous that Congress had no intent to eliminate the well-established finality rule when enacting IIRIRA.

1. Congress is Presumed to Legislate in Light of Decisional Case Law.

Where, like here, Congressional legislation takes the form of adopting language from decisional law, Congress is presumed to know and import the common law judicial and administrative interpretations of that language, unless Congress expressly states otherwise. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) (cited by *Cardenas*, 24 I. & N. Dec. at 798 (majority), 815 (dissent)). *See also N.Y. Council, Ass'n of Civilian Technicians v. FLRA*, 757 F.2d 502, 509 (2d Cir. 1985); *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434

U.S. 575, 580-83 (1978). This is true even when Congress makes modifications to the language it extracts from precedent, or incorporates only sections of prior case law or statute. *See Chisom v. Roemer*, 501 U.S. 380 (1991); *Murphy v. United States*, 340 F. Supp. 2d 160, 172-73 (D. Con. 2004) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation of a statute when it reenacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of prior law, Congress normally can be presumed to have had knowledge of the interpretation given the incorporated law, at least insofar as it affects the new statute.") (quoting *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 783 n. 15 (1985)).

Here, Congress codified the definition of conviction almost verbatim from prior case law that contained the long-established requirement of finality. This Court must presume Congress understood and accepted the settled finality principle found within the decisional case law it quoted, at least insofar as it related to convictions in the formal judgment of guilt context, like Petitioner's.

As Petitioner has already established, in enacting INA § 101(a)(48)(A) in 1996, Congress ratified *Ozkok's* recognition of two types of convictions, each measured by its own set of criteria: formal judgments of guilt, implicated in this case, and deferred adjudications meeting other specified requirements. Petitioner's Br. at 9-10; 13-15. In crafting a definition of "conviction" based on the *Ozkok* test,

Congress adopted the "formal judgments of guilt" language essentially verbatim. Its only major change was to omit one of *Ozkok*'s deferred adjudication elements. Congress explained this alteration as an attempt to remedy disparate state-by-state immigration consequences in the deferred adjudication context. *See Matter of Punu*, 22 I. & N. Dec. 224, 227 (BIA 1998) (quoting H.R. Rep. No. 104-828, at 224 (1996) (Conf. Rep.) (the elimination of *Ozkok's* third prong clarified "Congressional intent that even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws."). *See also* H.R. Rep. No. 104-879, at 123 (1997); *Amici* Br. at 25-27. This change has no impact on the requirement of finality for formal judgments of guilt.

Nowhere in the language defining "conviction," or the related congressional report is there any hint that Congress intended to upset the finality rule for "formal judgments of guilt." Rather, in contrast to Congress's lengthy explanation of its departure from *Ozkok*'s rule in the deferred adjudication prong, Congress expressed no concern with and gave no indication of any intention to upset the long-recognized inclusion of the finality rule for formal judgments of guilt. *Pino v.*

Landon, 349 U.S. 901 (1955); *Ozkok*, 19 I. & N. Dec. at 549-50, 552 n.7; *Marino v. INS*, 537 F.2d 686 (2d Cir. 1976).[4]

The Government's citation to *Puello v. Bureau of Citizenship & Immigration Services*, 511 F.3d 324 (2d Cir. 2007), as favorable authority for its argument that Congress intended to remove the finality rule is clearly without merit. As the BIA recognized in its majority opinion, the language in *Puello* with regard to finality was pure *dicta* as the case involved a completely different issue than the one before this Court. *See Cardenas*, 24 I. & N. Dec. at 797 n.3 ("[T]hat case related to the effective date of a conviction and did not involve a challenge based on the appeal of a conviction."). The Government acknowledges, as it must, that *Puello*'s few words on the question were merely dicta. Gov't. Brief at 46 n.9. In fact, post-*Puello*, this Court has continued to assume that the finality principle remains in effect. *See, e.g*., *Walcott v. Chertoff*, 517 F.3d 149, 155 (2d Cir. 2008) ("The decision to appeal a conviction . . . suspends an alien's deportability . . . until the

[4] To the extent the Government asks this Court to find that the legislative history makes clear that Congress did not intend for late-filed appeals to come within the finality rule's protections, Petitioner's and *Amici*'s arguments apply with the same impact. Congress made no alterations to its understanding of "formal judgment of guilt" offenses and thus any explicit explanation of its intentional changes to deferred adjudications cannot be read to apply to the entirely separate first prong of the conviction definition. The Government's backdoor effort to taint the state law inquiry and conflate the deference analysis is not supported by law or statutory analysis.

conviction becomes final . . . ."). *See also* Petitioner's Br. at 32-34 (distinguishing *Puello*).

If Congress had intended to abolish the long-standing finality rule in the formal judgment of guilt context it would have said so. *See Amici* Br. at Point IV. Congress's silence on such an important issue points to its intent to leave the finality rule intact. *See, e.g*., *Chisom*, *supra* (refusing to recognize that Congress would have repealed through "silence," well established judicial interpretations of language incorporated into statute). *See also Cardenas*, 24 I&N Dec. at 798 (majority), 814, 815 (dissent) ("I conclude that Congress was aware of and accepted the decisions of the Supreme Court, the United States courts of appeals, and this Board underlying and affirming *Ozkok*, with regard to finality.").

2. The Government's Argument that Congress Intended to Eliminate the Finality Principle when Enacting INA § 101(a)(48)(A) Does not Comport with the Principle of Constitutional Avoidance.

The Government's interpretation should also be rejected under principles of constitutional avoidance. An interpretation of the statute that Congress intended to extinguish the long-standing finality rule threatens the important due process and equal protection rights of criminal defendants in New York courts. As Petitioner and *Amici* establish, New York laws and procedures governing the direct-appeal process protect the due process and equal protection rights of indigent defendants in New York criminal courts and serve the important function of correcting judicial

error. *See Supra at 13-14; Amici* Br. at 15-23; Petitioner's Br. at 23-27 (addressing serious constitutional concerns with Board's decision).

These arguments apply with even greater force in the late-filed appeal context. The procedure New York established is designed to protect the constitutional rights of defendants who, for example, are subjected to ineffective assistance of counsel or prosecutorial abuse; and through no fault of their own would be barred from asserting appellate rights. *Id.* Unless no other interpretation is possible, this Court may not interpret INA § 101(a)(48)(A) to raise such grave constitutional concerns. *Id. See e.g. Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (stating that "grave and doubtful constitutional questions" can lead a court to assume Congress has not authorized an agency's interpretation).

3. In Preserving Preexisting Finality Provisions Throughout IIRIRA and its Accompanying Regulations, Congress and the Attorney General Demonstrated a Consistent Intent to Retain Finality throughout the Regulatory Scheme.

The Government's position that INA § 101(a)(48)(A) silently extinguished the finality requirement also cannot be reconciled with Congress's decision to leave finality intact in various other provisions of IIRIRA. *See, e.g.*, INA § 237(a)(2)(D), 8 U.S.C. § 1227(a)(2)(D) (retaining language pertaining to finality formerly codified at 8 U.S.C. § 1251(a)(2)(D); INA § 238(c)(3)(A)(iii), 8 U.S.C. § 1228 (similarly preserving preexisting finality language when amending former INA § 242a, 8 U.S.C. § 1252a(a)(3)(A)(iii) (1988)).

The fact that throughout the Act, Congress, in re-codifying prior sections of the INA bearing language regarding finality, preserved that language without modification signifies that Congress was both aware of and had no intent to disturb long-established norms regarding finality. Congress could have easily excised it had that been consistent with the purposes of IIRIRA.

For similar reasons, the Government's argument that the Attorney General's inclusion of a finality requirement in the expedited removal regulations, but not in the Congress's definition of conviction, suggests an intention to eliminate the finality requirement in INA § 101(a)(48)(A) also fails. Gov't. Br. at 29. The regulation cited by the government, at 8 C.F.R. § 1238.1(b)(1)(iii), is simply a re-codification of regulations implementing the predecessor expedited removal provision in the INA that existed prior to IIRIRA. *See* INA § 242A, 8 U.S.C. 1252a (1994 & Supp. I) (as modified by Pub. L. No. 103-322, 108 Stat. 1796, 2026–27 (Sept. 13, 1994)); and 8 C.F.R. § 242.25(b)(iii)(1996). Far from signaling an understanding that finality had been selectively extinguished, the Attorney General's decision to carry forward preexisting finality regulations is fully consistent with an understanding that Congress intended to leave finality intact throughout the Act.

Indeed, in adopting the final rule regarding expedited administrative removal of those convicted of aggravated felonies, the INS responded to objections raising

concerns that INS officers were less competent than immigration judges to make determinations regarding deportability by stating that "pursuant to other provisions of the Act and other regulations, immigration officers regularly determine issues *germane to deportability*, including . . . whether an alien is *finally convicted* of an aggravated felony (for purposes of issuing charging documents) . . . ." 60 Fed. Reg. 43954, 43960 (Aug. 24, 2005) (emphasis added).

Nor is the Government correct in suggesting that the language in INA § 238(a)(3)(A) relating to the desire "to the extent possible" to complete removal proceedings before an alien's release from incarceration, signals some overarching Congressional intent in IIRIRA "expedite" deportations at all costs. *See* Resp. Br. at 30 n.3. Rather, as noted above, the language referred to in Section 238 was not new to IIRIRA, but was taken directly from prior INA Section 242A, which was enacted in 1994. Pub. L. No. 103-322 § 130004(a), 108 Stat. 1796, 2026-27 (Sept. 13, 1994). The regulatory language cited by the government was included in INS' original implementing regulations for the provision, promulgated and adopted prior to IIRIRA, see 60 Fed. Reg. 43686 (Mar. 30, 1995) (proposed rule); 60 Fed. Reg. 43964 (Aug. 24, 2005) (final rule). The regulation simply reflects the INS' understanding that Congress intent that a conviction must be final before it may ground a removal proceeding, and clarifies that this continues to apply outside the

traditional context of immigration court proceedings under current INA § 240 (former INA § 241).

The Government's argument that Congress intended to excise the finality requirement from the definition of "conviction" fails in light of further inquiry into the expedited removal provisions it cites.

B. Even though the Board did not Reach the Finality Question, a Majority of its Members Expressed a View Contrary to the Government's Argument that Congress Intended to Eliminate the Long-Standing Finality Requirement.

The Government advocates for an interpretation of "conviction" which eliminates the long-standing finality doctrine for both "formal judgments of guilt" and deferred adjudications. This position was not endorsed by the Board below.

Rather, while leaving the finality rule undisturbed, the Board's majority opined that Congress intended to preserve the finality requirement in promulgating INA § 101(a)(48)(A):

> 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 appeals as of right in immigration law.

Cardenas, 24 I. & N. Dec. at 798-99 (citations omitted). This view was shared by 5 other members. Another Board member wrote separately to state the long-standing finality rule remains undisturbed by Congress. *Id.* at 802-03 (Grant, Member, concurring). Only two of fourteen Board members expressed the view that finality is no longer required. *Id.* at 807 (Pauley, Board Member, concurring, joined by Cole, Member).

Not surprisingly, given that the vast majority of the Board appears to view the finality rules as remaining in place, an examination of cases decided since *Cardenas* shows numerous invocations of the finality requirement in Board analysis and decisions. *See e.g. Matter of Adu Osei*, No. A045462474, 2009 WL 2171750 (BIA Aug. 31, 2009) (Pauley, Member) (finding post-conviction motion did not effect finality: "The conviction became final for immigration purposes when the respondent failed to appeal his conviction, allowed the appeal period to lapse, waived his right to direct appeal, or exhausted the direct appeal of his conviction.") (citing, *inter alia*, *Marino*, 537 F.2d at 691-93); *Matter of Otero-Luna*, No. A045873939, 2009 WL 2171750 (BIA June 29, 2009) (Wetland, Member) (holding that the finality rule still applies to convictions on direct appeal; determining that motion seeking leave to appeal conviction to New York Court of Appeals was not an appeal as of right). *See also Matter of Kehinde*, No. A047123110, 2009 WL 2171714 (BIA June 26, 2009) (Grant, Member) (finding

respondent's conviction final because he "ha[d] not demonstrated that his conviction is on direct appeal.") (*citing Harris v. United States,* 149 F.3d 1304, 1307 (11th Cir. 1998); *United States v. Rosen*, 763, 766 (11th Cir. 1985); *Matter of Polanco*, 20 I. & N. Dec. 894 (BIA 1994)); *Matter of Dixon*, No. 037620982, 2009 WL 3063806 at n.2 (BIA Sept. 17, 2009) (Adkins-Blanch, Member) (IJ did not consider convictions on direct appeals in determination of removability); *Matter of Wu*, No. A038731161, 2009 WL 3713245(BIA Oct. 26, 2009) (Pauley, Member) (acknowledging finality principle when determining post-conviction relief for non-constitutional defects does not alter a conviction's impact for removal); *Matter of Roberts*, No. A095857794, 2009 WL 3713297 (BIA Oct. 27, 2009) (Greer, Member) (reasoning that because "respondent has not established that his criminal convictions are on direct appeal or have been vacated" his conviction still bars eligibility for adjustment of status) (citing *Cardenas*).[5]

* * *

[5] In fact, one case suggests that even DHS has not taken the broad reaching position the Government argues this Court should take. In *Matter of Castaneda Vargas*, DHS did not oppose a respondent's request for remand to the IJ following an appeal challenging the validity of the guilty plea which served as the basis for his removal order. 2009 WL 2171718, A079387863 (BIA June 26, 2009) (Wendtland, Member). DHS' request to preserve the right to investigate whether the conviction remained final for removal purposes suggests DHS believed a direct appeal would affect the finality of respondent's conviction. *Id.*

The Government asks this Court to radically depart from precedent to determine that finality is not required "in formal judgment of guilt" cases, even though the BIA did not agree that this was Congress's intent. Moreover, the BIA continues to apply the finality principle. Based on various canons of construction, including constitutional avoidance, this Court should not now take such a radical step.

Once a late appeal has been accepted, it is identical to any other appeal pending before an intermediate appellate court. The Board's decision otherwise established a rule based on conjecture and mistaken policy concerns, rather than law. The Government does not attempt to defend or even address this interpretation, but tries instead to gloss over the Board's actual holding as an endorsement of its own (contradictory) argument that the finality requirement has been eliminated whole cloth. The Board's decision cannot stand and this petition should be granted.

CONCLUSION

For the reasons stated above, in Petitioner's opening brief, and *Amic*i's brief, this Court must reverse the Board's erroneous distinction between timely filed and late-filed appeals. Moreover, if this Court chooses to decide the issue, Petitioner urges this Court to apply the traditional tools of statutory construction to hold that Congress did not silently eliminate the long-standing requirement of finality when

it enacted INA § 101(a)(48)(A). Alternatively, if the Court believes the BIA should be afforded an opportunity to decide the question it reserved in the first instance, then the Court should remand to the Board for a determination on whether Congress intended to eliminate the long-standing tradition of finality when enacting INA § 101(a)(48)(A).

Respectfully Submitted,

___/s/Rachel Meeropol_____

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December 23, 2009

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(s) /s/ Rachel Meeropol

Attorney for Appellant, Roberto Cardenas Abreu

Dated: 12/23/2009

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I hereby certify that a pdf copy of the foregoing Reply Brief on Behalf of the Petitioner was served by electronic mail and two paper copies by first class mail, postage prepaid on:

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on this 23rd day of December, 2009.

__/s/ Claire Dailey_____
Claire Dailey