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Plea at Your Peril: When Is a Vacated Plea Still a Plea for Immigration Purposes?

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PLEA AT YOUR PERIL: WHEN IS A VACATED PLEA STILL A PLEA FOR IMMIGRATION PURPOSES?

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I. INTRODUCTION

Anti-immigrant sentiment continues to run high in the United States. Laws passed and regulations adopted by administrations have made it easier for non-citizens to be deported. The Department of Justice, under President Barack Obama, continues to enforce these laws and regulations.[1]

One method that immigration courts use to maintain the steady stream of deportations from this country involves the removal of individuals who have been convicted of a crime. Some regulations specifically provide that when immigrants are *convicted* of *certain* crimes, they are to be deported.[2] This much is clear. However, this clarity becomes murky when immigration courts handle convictions that have been subsequently vacated by state-court judges and the prosecutors who obtained the convictions. Immigration courts, displaying pro-deportation leanings, have exploited this murkiness by completely disregarding properly vacated convictions. Most immigration courts maintain the position that these convictions were vacated only to avoid the harsh consequences of deportation, and as such, remain "convictions" for purposes of immigration proceedings.

This paper argues that immigration judges should not be in the business of second-guessing the motives behind local judges and prosecutors who decide—for *whatever* reason—to vacate a guilty plea. While at least one circuit court has taken steps towards limiting the discretion that immigration

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1. Many cases have been decided on this issue since President Obama took office. *See, e.g.*, *In re* Cardenas Abreu, 24 I&N Dec. 795 (BIA 2009), *vacated*, 2010 U.S. App. LEXIS 10498 (2d Cir. May 24, 2010); *In re* Almanza-Arenas, 24 I&N Dec. 771 (BIA 2009); *In re* Zorilla-Vidal, 24 I&N Dec. 768 (BIA 2009); *In re* Louissaint, 24 I&N Dec. 754 (BIA 2009).

2. *See* Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059, 1064–67 (2002). Criminal convictions serving as the basis for removal can generally be classified as crimes of moral turpitude, drug offenses, or aggravated felonies. *Id.*

judges have in reviewing the rationale behind a vacated conviction, other circuit courts have rejected such a clear approach. Indeed, this paper argues the proper approach is this: if a state court decides to vacate a conviction, federal immigration officials should honor that decision and treat the original conviction as a nullity. Immigration officials should not be able to initiate or continue removal proceedings based, in whole or in part, upon a conviction that no longer exists. The approach advocated here follows the constitutional mandate of the Full Faith and Credit Clause and, more importantly, limits the significant leeway that immigration courts presently afford themselves to continue removing people who no longer have a criminal conviction on their record.

The next section of this paper, Part II, discusses the fundamental question of what constitutes a conviction. This seemingly simple question has resulted in confusion and inconsistent results, leading Congress to adopt a federal statute that answers the question once and for all. Next, Part III addresses the difficulty in actually vacating a plea or a conviction. Part IV discusses *Pickering v. Gonzales*. Parts V and VI analyze the Third Circuit's decision in *Pinho v. Gonzales*, and cases subsequent to *Pinho*, and suggest that the approach of accepting the state trial judge and prosecutor's decision to vacate a plea or a conviction at face value is the proper approach.

II. WHAT IS A CONVICTION?

Prior to 1996, immigration law did not define the term "conviction"—the Immigration and Nationality Act assumed the term had a common definition.[3] The Immigration and Naturalization Service ("INS") routinely deferred to state law "in determining whether an immigrant was 'convicted.'"[4] This lack of a common federal definition produced confusion, as the states had varied definitions of what constituted a "conviction."[5] This divergent approach among the states created "difficulty in fashioning a uniform national immigration policy with respect to prior convictions."[6] Lack of a uniform policy created a "small uproar" in the immigration community.[7] In Congress's view, the problem was that: "[t]here exist[ed] in the various [s]tates a myriad of provisions for ameliorating the effects of a conviction. As a result, aliens

3. Pinho v. Gonzales, 432 F.3d 193, 204–05 (3d Cir. 2005); Ekwutozia U. Nwabuzor, Note, *The Cry of the Colossus: Discipio v. Ashcroft, Nonacquiescence, and Judicial Deference in Immigration Law*, 50 HOW. L.J. 575, 581 (2007).

4. *Pinho*, 432 F.3d at 205.

5. Nwabuzor, *supra* note 3, at 581–82 (stating that "[i]n the immigration context, the myriad of state definitions caused confusion[,]" as "[m]any states also had various avenues for post-conviction relief available to non-citizens who wished to avoid removal").

6. *Pinho*, 432 F.3d at 205.

7. Nwabuzor, *supra* note 3, at 576.

who ha[d] clearly been guilty of criminal behavior and whom Congress intended to be considered 'convicted' ha[d] escaped the immigration consequences normally attendant upon a conviction."[8] In an attempt to "close the loopholes,"[9] and settle any confusion, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[10] The IIRIRA sought to establish parameters for the term by defining a conviction as:

> [A] formal judgment of guilt of the alien entered by a court or, if adjudication 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.[11]

The definition of "conviction" set out in the IIRIRA is the governing law for immigration purposes.[12] Thus, a disposition may be considered a "conviction" for immigration purposes if it meets the federal definition, even if it would not be considered a conviction in the state or jurisdiction of the underlying proceeding.[13] This definition proves helpful in certain cases; however, given alternative sentencing approaches, as well as procedures to "undo" convictions, all convictions are not created equal. Take for example, cases with withheld or deferred adjudication, or cases seeking post-conviction relief, discussed below.

A. Withheld or Deferred Adjudication

In some instances, the sentencing court may convict the immigrant but withhold sentencing if the immigrant complies with terms of probation. In

8. H.R. REP. NO. 104-828, at 224 (1996).

9. Nwabuzar, *supra* note 3, at 582–83.

> A savvy criminal defense lawyer could successfully plea bargain her client to a sentence that was one day less than the INA required for removal. Also, an otherwise deportable non-citizen could successfully petition for post-conviction relief and have the sentence ameliorated to avoid removal. Some felt that these discrepancies in the law led many "eligible" criminal non-citizens escaping the reach of the INS.

Id. at 582.

10. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [IIRIRA], Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996).

11. IIRIRA § 332(a)(1). This definition modified the BIA definition for conviction in *In re* Ozkok, 19 I&N Dec. 546 (BIA 1988).

12. Norton Tooby, *Anatomy of a Conviction*, *in* 39TH ANNUAL IMMIGRATION & NATURALIZATION INSTITUTE 171, 191–92 (Austin T. Fragomen, Jr. & Cynthia Juarez Lange eds., 2006).

13. *Id.*

Missouri, such an approach may result in a "suspended imposition of sentence" ("SIS")[14] or a "suspended execution of sentence" ("SES").[15] This type of withheld or deferred adjudication, where a penalty is applied,[16] constitutes a conviction for immigration purposes "based on the fact that the defendant must enter a plea of guilty or no contest, and a punishment follows."[17] However, if no penalty is subsequently applied, the second prong of the IIRIRA definition is not met, and there is no conviction for immigration purposes.[18]

Similarly, when an immigrant-defendant enters a pretrial intervention or diversion program, there is no conviction for immigration purposes.[19] As opposed to withheld adjudication discussed above, which requires a probationary period after a plea, under a pretrial intervention or diversion program, the probationary period is completed before a plea is ever entered.[20] Thus, without a plea—no formal admission of guilt on the record—the first prong of the IIRIRA definition is not satisfied, and there is no conviction for immigration purposes.[21] These, of course, are important options for an immigrant-defendant to consider before accepting a guilty plea.

B. Post-Conviction Relief

An area of special concern for immigrant-defendants is what effect post-conviction relief, such as a vacated sentence, has on the underlying conviction that may be the cause for their deportation. Dating back to the 1940s, the Board of Immigration Appeals ("BIA") has held "an expunged conviction was not a 'conviction' for immigration purposes, and adhered to that position with only occasional exceptions. . . ."[22] However, after the passage of the IIRIRA, the BIA now interprets the new definition of "conviction" as creating "a distinction between vacated convictions based on the reasons for the vacatur."[23] Currently, post-conviction relief based on rehabilitation or immigration hardship is still considered a conviction for immigration purposes,

14. *See* MO. REV. STAT. § 557.011.2(3) (2000).

15. *See* § 557.011.2(4).

16. *See, e.g.*, *In re* Ozkok, 19 I&N at 546 (where the defendant's penalty was three years of probation and 100 hours of community service while the adjudication of guilt was deferred).

17. MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN BORN DEFENDANTS 57 (2008).

18. *Id.* "Thus, where the court orders the defendant to pay 'court costs,' but no other penalty is imposed, there is no conviction for immigration purposes." *Id. See also id.* at 85 (citing a BIA decision holding the mere imposition of court costs are not considered a punishment, thus no conviction existed for immigration purposes).

19. *Id.*

20. *Id.*

21. *Id.*

22. Pinho v. Gonzales, 432 F.3d 193, 208 (3d Cir. 2005).

23. *Id.* at 207.

and therefore, a justification for deportation.[24] In contrast, the BIA makes the distinction that a conviction vacated on the merits because of procedural or substantive infirmities does not.[25] In considering the essence of a vacated plea, immigration courts often ignore just how difficult it is for an immigrant to actually vacate a plea or conviction.

III. VACATING PLEAS AND CONVICTIONS—EASIER SAID THAN DONE?

State-court prosecutors guard their convictions, and trial judges do not take kindly to undoing a plea or conviction that took place in their courtroom and on their watch. But, as discussed below, because it is so difficult to get a guilty plea or conviction reversed on appeal, the immigration attorney is usually forced to revisit the conviction at the trial level and seek relief there.

An immigrant facing removal may seek post-conviction relief in an effort to have the conviction vacated.[26] The purpose behind post-conviction relief is "to afford a simple and efficient remedy to any prisoner who claims that his or her conviction was obtained by a disregard of the fundamental fairness essential to the very concept of justice."[27] However, actually obtaining post-conviction relief may be easier said than done.

In Missouri, post-conviction relief for a person convicted of a felony after trial is governed by Supreme Court Rule 29.15.[28] Those convicted of a felony upon a plea of guilty must rely on Supreme Court Rule 24.035 for relief.[29] An individual seeking post-conviction relief under either rule must file a Missouri Criminal Procedure Form No. 40, and therein state every claim known to warrant relief from the conviction.[30] If an appeal is taken, the motion must be filed within 90 days after the mandate of the appellate court or 180 days after the individual is delivered to the custody of the department of corrections if no appeal is taken.[31] These deadlines are mandatory, and "cannot be excused for any reason."[32] The strict enforcement of filing deadlines, along with the grim prospect of success, has led Rules 29.15 and 24.035 to be considered "veritable forfeiture factories."[33] Given the low rate of success under the post-

24. Pickering v. Gonzales, 465 F.3d 263, 266 (6th Cir. 2006).

25. *Id.*

26. *See generally* Robert G. Amsel, *Avoiding Deportation by Vacating State Court Convictions*, 19 ST. THOMAS L. REV. 351 (2006).

27. 24 C.J.S., *Criminal Law* § 2223 (2006).

28. MO. SUP. CT. R. 29.15 (2009).

29. MO. SUP. CT. R. 24.035 (2009).

30. MO. SUP. CT. R. 29.15 (2009); MO. SUP. CT. R. 24.035 (2009). A copy of Form 40 is available at http://web.archive.org/web/20011121194226/www.courtrules.org/fqno40mo.htm.

31. MO. SUP. CT. R. 29.15 (2009); MO. SUP. CT. R. 24.035 (2009).

32. Henry B. Robertson, *The Needle in the Haystack: Towards a New State Postconviction Remedy*, 41 DEPAUL L. REV. 333, 337 (1992).

33. *Id.*

conviction-relief statutes, an immigrant seeking to have a conviction vacated is usually forced to seek relief in the original trial court. An immigration attorney will reach out to the prosecutor who obtained the original guilty plea and the state trial judge who accepted the original plea in order to determine if there is any willingness to possibly vacate the conviction. In most instances, either the trial judge or the prosecutor is unwilling to work with the immigration attorney to fashion an alternative to the conviction on record.

Sometimes, however, the state court and the prosecutor will work with the immigration attorney and, in some instances, are even willing to vacate the conviction. This takes a tremendous amount of effort on the part of all parties—especially the immigration attorney. Mr. James O. Hacking, III, an immigration attorney in St. Louis, recently represented a woman facing deportation who had pled guilty to three drug misdemeanors in Missouri state court.[34] The prosecutor in that instance was willing to consider vacating the convictions, and the state court ultimately agreed due to the original defense attorney's failure to consider or inform the client of the almost-certain immigration consequences of a guilty plea.[35] Mr. Hacking prepared, and the prosecutor consented to, a Joint Motion to Vacate the Convictions. Subsequently, Mr. Hacking filed the Order signed by the trial judge vacating the convictions with the immigration court. The Order specifically stated that the convictions were vacated due to the constitutional infirmity attached to the immigrant's prior attorney's failure to advise her of all possible consequences of her plea, including immigration consequences. Upon receipt of this Order, the immigration judge terminated the removal proceedings. In this case, the state-court Order and the immigration judge accepted these reasons as stated. The problem arises when immigration judges do not accept the stated reason

34. Allison Retka, *Pleas Lead to Peril: Do Criminal Defense Attorneys Have a Duty to Inform Clients About Possible Deportation?*, MO. LAW. WKLY., at 1, Oct. 12, 2009.

35. The issue of whether or not a defense attorney has an obligation to consider and inform an immigrant defendant of the possible deportation issues attendant to a state court guilty plea was recently decided by the U.S. Supreme Court in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). Padilla, a lawful permanent resident of over 40 years and Vietnam veteran, faced deportation proceedings after pleading guilty to a drug offense. Padilla sought post-conviction relief claiming he received ineffective assistance of counsel when his defense attorney failed to advise him of the immigration consequences of his plea. Eventually, the issue reached the Supreme Court which agreed with Padilla and held the Sixth Amendment right to effective assistance of counsel included the duty to inform clients of potential immigrations consequences that may accompany a plea or conviction. In light of the Supreme Court's holding in *Padilla*, immigrants seeking to have a conviction vacated based on their trial counsel's failure to inform them of immigration consequences have a substantive ground for doing so. As such, judges should find vacated convictions made under this premise valid for immigration purposes; however, what judges will actually do remains to be seen—will they give effect to the vacatur, or hold that the conviction was vacated only for immigration purposes?

but rather second-guess state-court decisions in an attempt to determine the perceived "true reasons" behind the state court's decision to vacate.[36]

IV. SECOND-GUESSING STATE-COURT JUDGES: *PICKERING V. GONZALES*

In seeking to vacate a plea or conviction, as Mr. Hacking did above, immigration attorneys must have a firm understanding of *Pickering v. Gonzales*.[37] This case established a stringent test for whether a vacated conviction will still be considered a conviction for immigration purposes.

In 1980, Christopher Pickering pled guilty in his native Canada to the unlawful possession of lysergic acid diethylamide ("LSD").[38] Pickering later moved to the United States with his family for his job.[39] In 1996, Pickering's drug offense was pardoned and he applied to obtain lawful-permanent-resident status; however, his application was denied.[40] After the denial, Pickering convinced a Canadian court to quash his conviction, but was again denied permanent-resident status and removal proceedings were initiated.[41] Ultimately, the immigration judge in the removal proceeding declined to give effect to the Canadian court's action, holding the conviction remained a conviction for immigration purposes.[42]

On appeal, the BIA noted that "when a court vacates an alien's conviction for reasons solely related to rehabilitation or to avoid adverse immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes."[43] In reaching its decision, the BIA relied on Pickering's notice of appeal to the Canadian court which stated "he was appealing his conviction because of the bar it placed on his permanent immigration to the United States," as well as the absence of anything in the record indicating what the Canadian court relied on to quash the conviction.[44] As a result, the BIA reasoned the conviction was quashed solely for immigration hardships, and thus still valid for removal purposes in light of IIRIRA.[45]

The Sixth Circuit noted that the BIA appeared to have "imparted the Petitioner's motivation for seeking to have the conviction quashed onto the

36. *See generally* Pickering v. Gonzales, 465 F.3d 263 (6th Cir. 2004).

37. *Id.* at 265.

38. *Id.*

39. *Id.* (also stating that Pickering's wife and children were granted permanent resident status in 1993).

40. *Id.*

41. Pickering v. Gonzales, 465 F.3d 263, 265–66 (6th Cir. 2004).

42. *Id.* at 266.

43. *Id.*

44. *Id.* at 267.

45. *See id.* at 266.

Canadian court as its rationale for quashing the conviction," which is of limited relevance in reviewing the underlying purposes for the Canadian court's action.[46] Rather than accept the BIA determination, the Court found the record[47] incomplete and lacking the actual basis for the Canadian court's decision.[48] The Court did find relevance in the fact that Pickering appealed his conviction pursuant to the Canadian Charter of Rights and Freedoms, which required a Canadian court to conclude Pickering's rights under the statute that had been purportedly violated.[49] Accordingly, the Sixth Circuit held the record did not support the BIA's findings, rather the BIA had "relied on certain parts of the Petitioner's affidavit and notice of appeal, while minimizing or ignoring other parts."[50] The Court reversed the BIA decision stating "the evidence supporting deportation can hardly be described as 'clear and convincing.'"[51]

Although the Sixth Circuit reversed the BIA's decision, the Court also held that the BIA "correctly interpreted the law" with regards to a conviction vacated for immigration reasons remaining a conviction for immigration purposes.[52] It is this language from *Pickering* that has allowed subsequent immigration courts to ignore state-court decisions to vacate a conviction when the immigration courts believe that immigration consequences motivated the vacatur.

For example, in *In re Langley*,[53] the BIA concluded that the immigrant remained "convicted" of a felony for immigration purposes despite the fact that a Montana state court vacated the felony conviction and entered a misdemeanor conviction instead.[54] Rather than accepting the Montana court's decision to vacate the felony conviction, the BIA looked to the state court's order and conviction documents, which the BIA felt did not "identify the legal basis for the decision to grant the [Respondent's Motion to Vacate]."[55] However, the BIA noted that during proceedings, the state court judge indicated "the modified resolution of this case is in response to the possibility that [the immigrant] . . . could be deported . . . ."[56] In light of this remark, the

46. Pickering v. Gonzales, 465 F.3d 263, 267 (6th Cir. 2004).

47. The record did not include a record of the Canadian hearing or reveal any basis for that court's action. *Id.* at 267, 269 (6th Cir. 2004).

48. *Id.* at 267.

49. *Id.* at 268.

50. *Id.* at 269.

51. Pickering v. Gonzales, 465 F.3d 263, 269–71 (6th Cir. 2004). *Id.* at 269–71.

52. *Id.* at 266, 267.

53. *In re* Langley, File: A73 385 650 - Seattle, 2004 WL 1739155 (BIA June 29, 2004), *aff'd*, . 182 F. App'x 641, 642 (9th Cir. 2006).

54. *Id.* (also stating that the felony conviction rendered respondent removable, while the misdemeanor conviction would not).

55. *Id.*

56. *Id.*

BIA determined the felony was vacated for immigration purposes, and thus remained a felony conviction rendering the respondent removable.[57]

Similarly, in *Sanusi v. Gonzales*,[58] the Sixth Circuit concluded that an Arkansas state court vacated the defendant's conviction solely to avoid immigration consequences, leaving the man "convicted" for immigration purposes.[59] Sanusi, a native of Indonesia, was cited in Arkansas for property theft.[60] The misdemeanor carried a maximum possible sentence of one year, which made it a removable offense for immigration purposes.[61] In lieu of a court appearance, Sanusi opted to pay a $600 fine.[62] Several years later, removal proceedings were initiated against Sanusi, leading him to ask the Arkansas court to vacate the theft conviction.[63] In his petition to vacate, Sanusi acknowledged that the only way to avoid deportation was to have his conviction vacated.[64] Additionally, he asserted that the procedure the Arkansas court established to expeditiously resolve the matter did not contemplate the severe consequences for aliens who would face deportation by simply paying the fine.[65] The Arkansas court granted Sanusi's petition to vacate his conviction without providing any explanation for doing so.[66] Nevertheless, an immigration judge, the BIA, and the Sixth Circuit all successively concluded the Arkansas court granted the vacatur petition for immigration purposes.[67] The Sixth Circuit concluded that because Sanusi's petition cited his pending immigration consequences without providing a colorable legal ground for a vacatur, his "conviction was vacated for the sole purpose of relieving Sanusi from deportation."[68] Because the Court concluded his conviction was vacated to avoid immigration hardships, Sanusi remained "convicted" for immigration purposes.[69]

The manner in which immigration courts and the BIA now interpret *Pickering* allows these courts tremendous freedom—undoubtedly too much

57. *Id.*

58. Sanusi v. Gonzales, 474 F.3d 341 (6th Cir. 2007).

59. *See generally id.* For other cases refusing to accept a state court vacatur, and instead finding the defendant still "convicted" for immigration purposes, see Saleh v. Gonzales, 495 F.3d 17 (2d Cir. 2007).

60. *Sanusi*, 474 F.3d at 343.

61. *Id.*

62. *Id.* Of the total amount, $500 was for a "criminal fine" and $100 was for "criminal costs." *Id.* Paying the fine amounted to a guilty plea as to the property theft charge, thus leaving Sanusi convicted of the charge. *See id.*

63. *Id.*

64. *Id.*

65. Sanusi v. Gonzales, 474 F.3d 341, 343–44 (6th Cir. 2007).

66. *Id.* at 344.

67. *Id.* at 344–45, 347–48.

68. *Id.* at 347.

69. *Id.* at 347–48.

freedom—to second-guess the motives of state-court prosecutors and judges who decide, for whatever reason, to vacate a conviction. Due-process concerns are implicated as there is no certainty of outcome for immigrants facing deportation and there is no hard-and-fast standard to be used. There is too much reliance upon the immigration courts "guessing" why the particular conviction was vacated. A need exists for a more objective standard. Moreover, an immigrant-defendant is not given the opportunity to present evidence as to the actual motives of the state-court judge and/or prosecutor in deciding to vacate the conviction.

In addition, this "super" review by federal immigration courts runs afoul of the Full Faith and Credit Clause of the U.S. Constitution.[70] Federal administrative agencies and courts are required by the Constitution to give full faith and credit to decisions by state courts. Allowing immigration courts to try and glean the "real motives" behind decisions to vacate a plea or conviction strips the state courts of the very authority to vacate the plea or conviction.

Viewed in a benign light, the problem is simply one of allowing immigration courts too much leeway in their treatment of vacated pleas or convictions. However, viewed slightly differently, the post-*Pickering* approach gives the immigration courts free rein to declare by fiat that a particular vacated plea or conviction does not pass muster and to then void state-court decisions.

It has been the unfortunate experience of numerous immigration attorneys to have presented clear and unequivocal vacated convictions to the immigration court, only to have them discounted or completely disregarded. These courts frequently place the burden—either explicitly or implicitly—upon the immigrant and the attorney to prove that the court's decision to vacate a conviction was *not* done for immigration purposes. This approach runs contrary to the requirement that the *government* show removability by clear and convincing evidence.[71]

These fundamental defects with *Pickering* need to be remedied through a bright-line rule. The Third Circuit moved toward a clearer, more sensible approach in the case of *Pinho v. Gonzales.*[72]

V. PINHO V. GONZALES

In *Pinho*, the Third Circuit established a categorical test to guide the determination of when a vacated criminal conviction remains a "conviction"

70. U.S. CONST. art. IV, § 1.

71. *See* 8 U.S.C. § 1229a(c)(3)(A) (2006) ("In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable.").

72. Pinho v. Gonzales, 432 F.3d 193, 215 (3d Cir. 2005).

for removal purposes.[73] The Court expressed its disapproval of the BIA's procedures that "require [*sic*] speculation about, or scrutiny of, the reasons for judges' actions other than those reasons that appear on the record."[74] Judge D. Michael Fisher recognized the pitfalls of the BIA's dubious approach to examining the underlying reasons for a vacatur stating:

> Were we to allow the Department of Homeland Security to base its legal determinations of immigrants' statutory eligibility for adjustment status upon hypothetical scenarios . . . we would be opening the door to—indeed in many cases due process would require—a flood of subpoenas to judges and prosecutors of sovereign states ordering them to appear in federal immigration proceedings to answer questions about motives, feelings, and sympathies that appear nowhere in the record, but may have prompted their official action . . . [W]e see the specter of such unseemly inquisitions.[75]

Aside from the absurdity of such a process,[76] Judge Fisher acknowledged that considerations of comity and federalism require deference to the state-court decisions.[77] Perhaps most significant in the *Pinho* decision is Judge Fisher's recognition of the need for a bright-line rule regarding the status of vacated convictions: if immigrants are to have any certainty as to the effect that state court criminal proceedings may have on their immigration status, those bounds must be drawn plainly and brightly.[78] Accordingly, Judge Fisher proceeded to announce a simple test that proves useful for future courts that may encounter similar issues:

> To determine the basis for a vacatur order, the agency must look first to the order itself. If the order explains the court's reasons for vacating the conviction, the agency's inquiry must end there. If the order does not give a clear statement of reasons, the agency may look to the record before the court when the order was issued. No other evidence of reasons may be considered.[79]

VI. POST-*PINHO*

Some courts have been receptive to the *Pinho* rationale for a categorical test to determine whether an alien is convicted for immigration purposes under *Pickering*. For instance, the Third Circuit reaffirmed the *Pinho* test in *Cruz v. Attorney General*.[80] In *Cruz*, the BIA denied the appeal of a removal order for

73. *Id. See also* Andrew Moore, *Criminal Deportation, Post-Conviction and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 689–90 (2008).

74. *Id.* at 212.

75. *Id.* at 211–12.

76. *Id.* at 212 ("Whether or not constitutional avoidance requires this result, avoidance of absurdities surely does.").

77. *Id.*

78. *Pinho*, 432 F.3d at 215.

79. *Id.*

80. Cruz v. Attorney Gen., 452 F.3d 240, 247–48 (3d Cir. 2006).

an immigrant whose conviction was subsequently vacated.[81] The BIA reached its decision based on the timeliness of Cruz's appeal, without deciding whether he remained convicted under *Pickering*.[82] The Third Circuit ultimately remanded to the BIA to consider whether Cruz remained convicted for immigration purposes.[83] In so doing, the Court suggested the *Pinho* test must be applied to all similar cases by stating: "Even if we assume that the BIA rejected the argument that Cruz's conviction had been vacated for immigration purposes, we could not affirm that determination without assuring ourselves that the Board had reached this conclusion in accordance with the categorical test we established in *Pinho*."[84]

In re Escobar-Guerra[85] took *Pinho* a step further by applying the categorical test to the facts.[86] In this case, the BIA faced a decision on whether a vacated conviction was substantive or rehabilitative.[87] In making the determination, the BIA noted the state court was silent as to its rationale for vacating the underlying conviction.[88] Thus, under the second prong of the *Pinho* test, the BIA's analysis shifted to the record produced when the vacating order was issued.[89] The BIA reasoned that because the respondent's unopposed motion to vacate the conviction cited ineffective representation for support, the state court's vacatur was based on substantive grounds.[90]

However, not all courts have received the *Pinho* decision in the same manner. For instance, the court in *Rumierz v. Gonzales*[91] distinguished *Pinho* and in so doing, reached a result the *Pinho* test hoped to avoid.[92] Rumierz, faced with deportation proceedings, petitioned a Vermont state court for relief from his underlying criminal conviction.[93] The Vermont court granted Rumierz's petition;[94] however, the order vacating the underlying conviction was silent as to the grounds.[95] Additionally, an affidavit filed later stated "the merits of [Rumierz's] claim were not addressed or adjudicated" in connection

81. *See id.* at 243.

82. *Id.* at 248.

83. *Id.*

84. *Id.*

85. In re Escobar-Guerra, File: A96 263 387 - York, 2006 WL 3485830 (BIA Oct. 12, 2006).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *See* Rumierz v. Gonzales, 456 F.3d 31, 41–42 (1st Cir. 2006).

92. *Id.* at 49.

93. *See id.* at 34.

94. *Id.* (stating that the Vermont court struck Rumierz's conviction for possession of stolen property and amended it to negligent operation of a motor vehicle).

95. *Id.*

with the order vacating the conviction.[96] Instead of looking to the record as the *Pinho* test directs, the BIA placed the burden on the petitioner to show his vacatur was based on substantive grounds.[97] The First Circuit upheld this procedure, which goes against the *Pinho* test.[98] Under the *Pinho* test, Rumierz's conviction would remain vacated because the record did not show the Vermont court was motivated by immigration considerations. For the same reason, Rumierz could not satisfy the burden the court placed on him of showing that the vacatur was *not* motivated by immigration hardships.[99] Thus, despite his vacated conviction, the court held Rumierz remained "convicted," and therefore, removable.[100]

VII. CONCLUSION

Immigrants in this country are facing higher and higher hurdles in their fight to resist removal. This is particularly true for immigrant-defendants who, although successful in vacating a plea or conviction, can still be removed on the basis of that vacated plea or conviction because immigration judges are able to second-guess the motives behind the local judges and prosecutors who made that decision. While the Third Circuit in *Pinho* established a test to guide the determination of when a vacated criminal conviction remains a "conviction" for removal purposes,[101] subsequent courts have not necessarily followed it, leading to uncertainty and confusion.

As Judge Fisher recognized in *Pinho*, permitting immigration judges to base their deportation decisions on "hypothetical scenarios," not supported by the legal record or perhaps making the immigrant-defendants create a record whereby local judges and prosecutors would be hauled into immigration court to testify regarding their reasons for vacating a plea or conviction, is hardly sensible.[102] All of this, of course, as Judge Fisher acknowledged, also ignores considerations of comity and federalism requiring deference to the state-court decisions.[103] Finally, and as this paper argues, most significantly, is Judge Fisher's recognition in the *Pinho* decision of the need for a bright-line rule regarding the status of vacated convictions.[104]

Perhaps the *Pinho* decision did not go far enough in establishing a bright-line rule that would create certainty and consistency in an immigration court's

96. Rumierz v. Gonzales, 456 F.3d 31, 34 (1st Cir. 2006).

97. *See id.*

98. *Id.* at 35–39. The dissent sharply criticized the majority's decision for failure to apply the *Pinho* test. *Id.* at 44–54.

99. *Id.* at 40–42.

100. *Id.* at 44.

101. Pinho v. Gonzales, 432 F.3d 193, 199 (3d Cir. 2005).

102. *See id.* at 211–12.

103. *Id.* at 212.

104. *Id.* at 215.

handling of an immigrant's vacated plea or conviction. *Pinho* suggests that an immigration court should first look to the state-court order to determine the basis for the vacatur, and if the order states the reason or reasons for vacating the conviction, then that is accepted without further review.[105] If, however, the order fails to provide "a clear statement of reasons, the agency may look to the record before the court when the order was issued. No other evidence of reasons may be considered."[106] This approach permits (perhaps, requires) the immigration court to review the reason or reasons for a state court's decision to vacate a plea or conviction. It is this type of review and discretion by the immigration courts that has created uncertainty and confusion for immigrants facing deportation.

This paper respectfully suggests that the rule in *Pinho* can be even more simplified—for immigrants as well as immigration courts who should not be burdened with the responsibility to determine the state court's and prosecutor's underlying motives for vacating a plea or conviction. This bright-line rule would simply state that if an immigrant's plea or conviction has been vacated—regardless of the reason, stated or otherwise—it cannot then be used as a basis for removal. Simply put, immigration officials should not be able to initiate or continue removal proceedings based, in whole or in part, upon a conviction that no longer exists. The approach advocated here follows the constitutional mandate of the Full Faith and Credit Clause and, more importantly, limits the significant discretion that immigration courts presently have in removing people who no longer have a criminal conviction on their record.

105. *Id.*

106. Pinho v. Gonzales, 432 F.3d 193, 215 (3d Cir. 2005).