

08-0671-ag(L),
08-2372-ag(CON)

United States Court of Appeals
for the
Second Circuit

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VIRGILIO DITREN,

Petitioner,

– v. –

ERIC H. HOLDER, JR.,

Respondent.

ON PETITION FOR REVIEW FROM AN ORDER OF
THE DEPARTMENT OF HOMELAND SECURITY

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* National Association of Criminal Defense Lawyers and the New York State Association of Criminal Defense Lawyers certify that they are non-partisan, not-for-profit organizations. *Amici Curiae* have no parent organization or corporation, and no publicly-held company owns 10% or more of their stock.

RULE 29(c)(3) STATEMENT

Amici the National Association of Criminal Defense Lawyers (“NACDL”) and the New York State Association of Criminal Defense Lawyers (“NYSACDL”; collectively, “Amici”) respectfully submit this brief in support of petitioner Virgilio Antonio Ditren (“Ditren” or “Petitioner”). Amici submit this brief to support Petitioner’s position that successful completion of a New York State “drug court” diversion to treatment program, followed by the dismissal of all criminal charges, does not constitute a “conviction” within the meaning 8 U.S.C. § 1101(a)(48)(A). Amici believe that the decision of the Board of Immigration Appeals (“BIA”) in this case unnecessarily threatens the viability of such drug courts in areas with significant immigrant populations by deporting or barring from reentry immigrants who have successfully completed treatment. The parties have consented to the filing of this amicus brief.

NACDL is a nonprofit organization with a direct national membership of more than 12,800 attorneys, in addition to more than 35,000 affiliate members, from all fifty states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. NACDL’s mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal-defense profession; and to promote the proper and fair administration of justice.

Given the breadth of its membership and the perspectives it brings to bear, NACDL is regularly permitted to file *amicus curiae* briefs in this Court and other federal and state courts.

The New York State Association of Criminal Defense Lawyers (NYSACDL) is a not-for-profit corporation with a subscribed membership of more than 800 attorneys, which include private practitioners, public defenders, and law professors. It is a recognized State Affiliate of the National Association of Criminal Defense Lawyers. The NYSACDL was founded in 1986 to promote study and research in the field of criminal defense law and the related disciplines. Its goals include promoting the proper administration of criminal justice; fostering, maintaining, and encouraging the integrity, independence, and expertise of defense lawyers in criminal cases; protecting individual rights and improving the practice of criminal law; enlightening the public on such issues; and promoting the exchange of ideas and research, to include appearing as *amicus curiae* in cases of significant public interest or of professional concern to the criminal defense bar.

SUMMARY OF ARGUMENT

This appeal presents an issue of great practical consequence for legal immigrants, as well as for the justice system at large: whether immigrants can be deported or otherwise barred¹ from living in the United States based on their

¹ In the case at bar, Petitioner has been ordered removed based on a finding

voluntary participation in a drug treatment program as an alternative to formal, adversarial prosecution following an arrest, in this case on drug charges. In the case at bar, the BIA held that Petitioner, a lawful permanent resident of the United States, was removable under the Immigration and Naturalization Act (“INA”) on the basis of a New York State “conviction” involving alleged possession and sale of a controlled substance. But Ditren’s prosecution ultimately concluded in his favor, with all charges unconditionally dismissed, all records sealed and all his civil rights preserved following his completion of a pretrial diversion-to-drug-treatment program commonly offered as an alternative to prosecution. At issue in this appeal is whether an immigrant who participates in such a program loses the basis of all his other rights: his life in this country.²

Under the leadership of the longtime Chief Judge of the New York Court of Appeals, courts in New York State, as in a number of other states, have utilized a “problem-solving courts” approach championed by the Department of Justice and the White House and lauded by many other law enforcement professionals. That

that he was non-admissible upon his return to the country in 2003. Because the statutory definition of “conviction” affects the standards for both deportation and inadmissibility, for simplicity, this brief will refer to the deportation standard.

² *Amici* will not address the specific facts of Ditren’s case except to illustrate the broader problem with the legal rule implicit in the BIA’s decision. Thus, *amici* assume *arguendo* for the sake of this brief that the facts are as stated by the BIA.

approach involves intervening early in the criminal process, before evidence has been fully developed and the adversarial system brought into play, and diverting individuals out of the formal, prosecutorial legal system and into treatment. The decision to accept treatment is a voluntary one; it must be, for treatment to work. But to accept diversion to treatment, a prospective defendant must compromise many of his or her constitutional rights: to confront witnesses, to demand proof of the underlying charges, to contest elements of those charges and possible defenses such as entrapment, and even the right against self-incrimination. In return, the defendant emerges with a fresh start, without the stigma and the attendant legal disabilities of a conviction. Instead, the state unconditionally dismisses the charges, seals the records, and treats the matter as an adjudication in the individual's favor for all purposes, with no record of conviction and no loss of state civil rights. Courts and prosecutors participate eagerly in this system because diversion gets results: not only are cases taken out of the system, but commentators have been virtually unanimous in lauding the effectiveness of drug court diversion programs in helping those who participate overcome their underlying addiction.

But lawful permanent residents would be effectively barred from participation in such programs if federal law treats them as grounds for permanent expulsion from the country and separation from their families. Yet, that is

precisely the result of the BIA’s decision. If that decision is upheld, prosecutors and judges in communities with large immigrant populations – such as New York City – will find themselves unable to use these highly effective tools. Or, worse yet, participation in these programs will become a trap for well-intentioned but unsuspecting immigrants who are unaware of their rights and unprepared to discover that they have just unwittingly signed away their lives in this country.

ARGUMENT

I. THIS COURT SHOULD HOLD THAT VOLUNTARY PARTICIPATION IN A PRETRIAL DRUG COURT DIVERSION PROGRAM DOES NOT RESULT IN A “CONVICTION” FOR IMMIGRATION PURPOSES WHERE THE IMMIGRANT SUCCESSFULLY COMPLETES TREATMENT AND THE CHARGES ARE DISMISSED

The BIA’s interpretation of the statutory term “conviction” to include the successful completion of a drug court diversion program threatens the viability of such programs. This Court should not take such a drastic step without clear Congressional direction to interfere with the operation of a state court treatment system that has proven highly effective and has received strong support from the White House, the Justice Department, and Congress as well as state prosecutors and judges. New York State treats graduates of treatment programs as having been discharged from the system without a conviction – as well it might, as such programs involve neither an adjudication on the merits nor the imposition of any

sentence. The federal government should not undo the settled expectations of the parties to this process by applying a different standard after the fact.

A. Drug Court Diversion Programs Are A Useful and Important Resource And Should Not Be Foreclosed To Immigrants

“Drug courts” are a species of “problem-solving courts” specializing in non-violent arrestees charged with drug offenses. The essential purpose of drug courts is not simply to offer an alternative to incarceration but to offer *an alternative to the entire adversarial criminal process*. Drug courts use complementary incentives: the possibility of resuming the ordinary criminal process is a “stick” to promote successful completion of drug treatment, while complete dismissal of criminal charges upon completion of treatment is the “carrot.” Deporting successful graduates of such programs would render that carrot a cruel hoax.

1. History and Effectiveness of Drug Courts

The first drug court began operations in 1989 in Dade County, Florida.³ Drug courts were still relatively rare at the time of the enactment of the present version of the INA in 1996 – there were 19 such courts in 1993, 75 in 1995, 139 in 1996.⁴ Today, “there are more than 2,140 drug courts in operation with another

³ See ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, MIAMI DADE COUNTY DRUG COURT, http://www.jud11.flcourts.org/programs_and_services/drug_court.htm (last visited Mar. 6, 2009).

⁴ See C. WEST HUDDLESTON, III, DOUGLAS B. MARLOWE, RACHEL CASEBOLT, NATIONAL DRUG COURT INSTITUTE, PAINTING THE CURRENT PICTURE: A

284 being planned or developed,” and drug courts are “operating or being planned in 50 States, the District of Columbia, Northern Mariana Islands, Puerto Rico, Guam, two Federal Districts, and more than 70 tribal locations.”⁵ The number of drug courts has increased 32% since 2004 alone.⁶

The National Association of Drug Court Professionals has established a “Key Components” guide meant to instruct on the best practices in the operation of drug courts, and while there is no one specific way a drug court must be operated – these programs are pragmatic in nature and constantly evolving to learn from experience – there are common practices used in many such courts. Most drug courts nationwide require those who participate in the program to first enter a guilty plea before commencing treatment. The entry of a guilty plea, and the fear that the judge could take the participant off the treatment track and impose a sentence, provides a powerful motivational force to assist the participant in continuing along the difficult path towards defeating his or her addiction.⁷ When

NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 1 (May 2008) (“PAINTING THE CURRENT PICTURE”), *available at* http://www.ndci.org/publications/PCPII1_web.pdf.

⁵ DRUG COURTS, OFFICE OF NATIONAL DRUG CONTROL POLICY, <http://www.whitehousedrugpolicy.gov/enforce/drugcourt.html> (last visited Mar. 6, 2009).

⁶ PAINTING THE CURRENT PICTURE, at 2.

⁷ “Research indicates that a person coerced to enter treatment by the criminal justice system is likely to do as well, if not better, than one who volunteers.”

participants successfully complete the program, the provisional guilty plea required for participation is generally vacated or expunged – this aspect being one of the carrots meant to entice participants to enter the program in the first place. This is not, however, an after-the-fact rehabilitative expungement, but rather is part of the deal from the very beginning. Many participants would not make the choice to forego their right to a jury trial, and other valuable procedural protections, and choose to enter a treatment program, if successful completion did not offer them a clean slate. Indeed, part of what makes drug courts so different from traditional efforts to rehabilitate *after* conviction is that it involves a cooperative process that is agreed upon from the outset.

Numerous studies show drug courts to be effective in both reducing recidivism rates for drug offenders and saving taxpayer dollars. In February of 2005, the GAO issued its third and most exhaustive report on the effects of adult criminal drug courts, finding that “in 11 of 14 of the programs that reported data on drug offense recidivism, drug court participants were either rearrested or reconvicted for drug offenses at lower rates.”⁸ Results from 23 program

DEFINING DRUG COURTS, THE KEY COMPONENTS, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS (1997); *see also* Hubbard, R., Marsden, M., Rachal, J., Harwood, H., Cavanaugh, E., and Ginzburg, H., *Drug Abuse Treatment: A National Study of Effectiveness*, Chapel Hill: University of North Carolina Press (1989).

⁸ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, ADULT DRUG COURTS, EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR

evaluations confirmed that drug courts significantly reduced crime.⁹ “Four independent meta-analyses . . . have now concluded that drug courts significantly reduce crime rates an average of approximately 7 to 14 percentage points. In some evaluations the effects on crime were as high as 35 percentage points.”¹⁰

Moreover, although up-front costs for drug courts were generally higher than for probation, drug courts were found to be more cost-effective in the long run because

OTHER OUTCOMES 49 (Feb. 2005).

⁹ PAINTING THE CURRENT PICTURE, at 2.

¹⁰ *Id.* at 6-8 (collecting citations to studies). Among the studies cited:

- “In line with their effects on crime rates, drug courts have continued to prove cost-effective. One economic analysis in Washington State concluded that drug courts cost an average of \$4,333 per client, but save \$4,705 for taxpayers and \$4,395 for potential crime victims, thus yielding a net cost-benefit of \$4,767 per client.” *Id.*
- “A recent study of nine adult drug courts in California reported that re-arrest rates over a 4-year period were 29% for drug court clients (and only 17% for drug court graduates) as compared to 41% for similar drug offenders who did not participate in drug court.” *Id.*
- “A study of four adult drug courts in Suffolk County, MA, found that drug court participants were 13% less likely to be re-arrested, 34% less likely to be re-convicted, and 24% less likely to be re-incarcerated than probationers who had been carefully matched to the drug court participants using sophisticated ‘propensity score’ analyses.” *Id.*
- “A recent long-term evaluation of the Multnomah County (Portland, OR) Drug Court found that crime was reduced by 30% over 5 years, and effects on crime were still detectable an astounding 14 years from the time of arrest.” *Id.*

they avoided law enforcement efforts, judicial case-processing, and victimization resulting from future criminal activity.¹¹

2. *There Is A Strong Federal Policy Favoring Drug Courts*

The federal government, at every level, has strongly supported drug courts and emphasized the importance of their non-adversarial approach. Indeed, federal support has been largely responsible for spreading Dade County's innovation nationwide. Imputing to the 1996 Congress an unstated intention to attach adverse immigration consequences to completion of drug court diversion programs would undermine this important federal goal.

Each of the past three presidents has indicated their unequivocal support for drug court programs. Former President Clinton:

Three quarters of the growth in the number of federal prison inmates is due to drug crimes. Building new prisons will only go so far. Drug courts and mandatory testing and treatment are effective. I have seen drug courts work. I know they... make a difference.¹²

Former President George W. Bush, in his 2001 budget:

Drug courts are an effective and cost efficient way to help non-violent drug offenders commit to a rigorous drug treatment program in lieu of prison. By leveraging the coercive power of the criminal justice system, drug

¹¹ Id.

¹² NATIONAL DRUG COURT INSTITUTE, MODEL STATE DRUG COURT LEGISLATION: MODEL DRUG OFFENDER AND ACCOUNTABILITY ACT 21 (May 2004), *available at* <http://www.ndci.org/publications/ModelStateDCLegislation.pdf>.

courts can alter the behavior of non-violent, low-level drug offenders through a combination of judicial supervision, case management, mandatory drug testing, and treatment to ensure abstinence from drugs, and escalating sanctions.¹³

Then-Senator Obama:

I will ensure that states have the resources to support existing drug courts, which have been proven successful in dealing with non-violent offenders. These courts offer a mix of treatment and sanctions, in lieu of traditional incarceration. Currently, the Department of Justice makes grants available to state and local governments to establish drug courts. I will replicate these efforts within the federal criminal justice system by signing a law that would authorize federal magistrates to preside over drug courts and federal probation officers to oversee the offenders' compliance with drug treatment programs.¹⁴

Federal support for drug courts has been more than rhetorical. The U.S. Department of Justice's Bureau of Justice Assistance (BJA) Drug Court Discretionary Grant Program "provides financial and technical assistance to states, state courts, local courts, units of local government, and American Indian tribal governments to develop and implement treatment drug courts."¹⁵ In 1994,

¹³ A BLUEPRINT FOR NEW BEGINNINGS: A RESPONSIBLE BUDGET FOR AMERICA'S PRIORITIES 66 (Feb. 28, 2001), *available at* <http://www.gpoaccess.gov/usbudget/fy02/pdf/blueprnt.pdf>.

¹⁴ The Partnership For a Drug-Free America, *Presidential Candidates Weigh In*, http://www.drugfree.org/Portal/DrugIssue/Features/Presidential_Candidates_Weigh_In (last modified Dec. 13, 2007).

¹⁵ DRUG COURTS, OFFICE OF NATIONAL DRUG CONTROL POLICY, <http://www.whitehousedrugpolicy.gov/enforce/drugcourt.html> (last visited

Congress passed the Violent Crime Control and Law Enforcement Act, calling for federal support for planning, implementing, and enhancing drug courts for nonviolent drug offenders.¹⁶ In his 2007 budget, President Bush provided for \$69 million to fund drug courts.¹⁷

The National Association of Drug Court Professionals' ("NADCP") manual, distributed by the BJA, stresses the non-adversarial approach taken by drug courts:

To facilitate an individual's progress in treatment, *the prosecutor and defense counsel must shed their traditional adversarial courtroom relationship and work together as a team.* Once a defendant is accepted into the drug court program, the team's focus is on the participant's recovery and law-abiding behavior – not on *the merits of the pending case.*¹⁸

Mar. 6, 2009). Funding for the National Drug Court Institute is also provided by the White House Office of National Drug Control Policy and the National Highway Traffic Administration. PAINTING THE CURRENT PICTURE, first page.

¹⁶ Violent Crime Control and Law Enforcement Act of 1994, Pub L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

¹⁷ 2007 BUDGET OF THE UNITED STATES GOVERNMENT 169. President Bush also requested more than seventy million dollars for drug courts for fiscal year 2006. 2006 BUDGET OF THE UNITED STATES GOVERNMENT 704, 706. *See also* 2008 BUDGET OF THE UNITED STATES GOVERNMENT, DEPARTMENT OF JUSTICE 93; 2009 BUDGET OF THE UNITED STATES GOVERNMENT, AID TO STATE AND LOCAL GOVERNMENTS 109, 1174.

¹⁸ U.S. DEP'T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS, 3 (2004), *available at* <http://www.ojp.usdoj.gov/BJA/grant/DrugCourts/DefiningDC.pdf> (last visited March 9, 2009) (emphasis added).

The NADCP likewise recommends that prosecutors make “decisions regarding the participant’s continued enrollment in the program *based on performance in treatment rather than on legal aspects of the case*, barring additional criminal behavior.” *Id.* (emphasis added) The drug treatment proceedings that the NADCP envisions bear little resemblance to anything that could result in a “conviction” with due process. To the contrary “because criminal prosecution for admitting to [alcohol or drug] use in open court will not be invoked, *the defendant is encouraged to be truthful with the judge* and with treatment staff, and informs the participant that *he or she will be expected to speak directly to the judge, not through an attorney.*” *Id.* at 4 (emphasis added). This cooperative, sometimes *ex parte* process is *not* designed to protect a defendant such as Ditren from providing the federal government with the grounds for his own deportation.

3. *Operation of Drug Courts In New York State*

Judge Judith Kaye, Chief Judge of the New York Court of Appeals from 1993 to 2008, long advocated the creation and enhancement of drug courts, noting that such courts help both participants and the state of New York by “halting the revolving door of drugs-crime-jail.”¹⁹ Under her direction, New York courts established a variety of local drug courts, including the Kings County Screening & Treatment Enhancement Part, the program in which Petitioner allegedly

¹⁹ Hon. Judith Kaye, *Making The Case For Hands-On Courts*, NEWSWEEK, Oct. 11, 1999, at 2, *available at* <http://www.newsweek.com/id/89749>.

participated. “New York State leads the nation in the expansion and implementation of drug courts into daily court operations.”²⁰ Each drug court in New York has a presiding judge who is experienced in the administration of such diversionary treatment. As of January 2009, there were 175 drug courts operating in New York and another 23 in the “planning stage.”²¹

Through January 6, 2008, a total of 50,498 individuals had participated in New York State court drug treatment programs, of whom 20,394 graduated.²² In addition, 666 drug-free-babies have been born to drug treatment court participants while in the program.²³ But despite the large numbers, such programs handle only a small fraction of eligible defendants – only those who *voluntarily agree* to participate. In 2007, 4,894 defendants were referred to drug courts for eligibility

²⁰ HON. JUDY H. KLUGER, NEW YORK DRUG TREATMENT COURTS, http://www.nycourts.gov/courts/problem_solving/drugcourts/index.shtml (last visited Mar. 7, 2009) (“KLUGER”).

²¹ *Id.*

²² COURT OPERATIONS AND PLANNING, OFFICE OF THE DEPUTY CHIEF ADMINISTRATIVE JUDGE, DRUG TREATMENT COURTS OVERVIEW, http://www.nycourts.gov/courts/problem_solving/drugcourts/overview.shtml (last visited Mar. 7, 2009).

²³ *Id.*

assessment and only 664 agreed to participate.²⁴ But of those 664, 432 graduated.²⁵

New York's drug courts offer assistance to those initially charged with possession or low-level distribution of controlled substances.²⁶ Once a defendant has been charged, the prosecutor and clinical staff will review the case to determine if the defendant is eligible for diversionary treatment. If found eligible, the defendant will be given the option of contesting the charges and facing the possibility of significant prison time, or pleading guilty and submitting to the authority of the drug court. The only time the plea will ripen into a conviction is if the individual fails to complete the treatment program, the judge orders a sentence imposed, and a judgment of conviction is then entered.²⁷ Admission for those alleged to have been involved in a sale is generally limited to those who sell to support their own habit, and does not include those believed by prosecutors to be in the business of selling drugs for profit.²⁸ Violent offenders are generally not

²⁴ DARREN EDWARDS, NEW YORK CITY CRIMINAL COURT DRUG COURT INITIATIVE, 2007 ANNUAL REPORT 4 (Justin Barry, ed. 2008) (“EDWARDS”).

²⁵ *Id.*

²⁶ *See* MICHAEL REMPEL ET AL., CENTER FOR COURT INNOVATION, THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS 33, Tbl. 3.2 (2003) (“REMPEL”).

²⁷ *See* EDWARDS, at 4.

²⁸ NEW YORK STATE COMM’N ON DRUGS AND THE COURTS, CONFRONTING THE CYCLE OF ADDICTION & RECIDIVISM: A REPORT TO JUDGE JUDITH S. KAYE

eligible.²⁹ Drug courts operate nothing like the traditional criminal process; “[w]hat distinguishes drug courts is their uniquely collaborative approach to treatment” involving “voluntary entry into court-supervised programs” and “[r]ules of participation [that] are defined clearly in a contract agreed upon by the defendant, the defendant’s attorney, the district attorney and the court.”³⁰

New York has reported positive long-term results from drug courts:

Based on the Center for Court Innovation’s study of New York drug courts, the State Court System estimates that \$254 million in incarceration costs were saved by diverting 18,000 non-violent drug offenders into treatment. . . . [T]he re-conviction rate among 2,135 defendants who participated in six of the state’s drug courts was, on average, 29 percent lower (13% to 47%) over three years than for the same types of offenders who did not enter the drug court.³¹

4. *The Benefits of Drug Courts Will Be Lost For Immigrants Who Face Deportation If They Participate*

All of the above benefits hinge on the willingness of the defendant, early in the process, to voluntarily accept diversion to treatment. But as a practical matter, no immigrant will accept such a result – and no defense counsel will advise an

(2000).

²⁹ *Id.*

³⁰ KLUGER.

³¹ NATIONAL DRUG COURT INSTITUTE, DRUG COURT BENEFITS, http://www.ndci.org/courtfacts_benefits.html (citing REMPEL). *See also* KLUGER (“Results from these treatment programs have been overwhelmingly positive.”)

immigrant to do so – if it leads automatically to deportation. Criminal defense attorneys would be negligent if they failed to advise their clients of the draconian immigration consequences, and it would be unjust for treatment programs to have to depend on the ignorance of their clients of the consequences of participation. This would be a bad result not only for immigrants but for the entire criminal justice system. In light of the strong federal and state policies in favor of these programs, this Court should not undermine them by altering the terms on which enrollees initially agreed to participate.

B. A Bright-Line Rule Is The Best Way For This Court To Avoid Fact-Specific Disputes Such As Those Presented In The Case At Bar

Petitioner addresses at some length the obstacles Respondent faces in carrying its burden to prove the elements of a “conviction” under the INA on the basis of the records submitted by the government. This is not an idiosyncratic problem, but rather one that is likely to recur in future efforts to deport immigrants who have completed diversion to treatment programs.

For example, Petitioner notes that the only purported evidence regarding the voluntariness of Ditren’s participation in treatment or the possibility that he would be sentenced if he did not participate comes from an informal letter from a New York Supreme Court judge (J.A. 259) – a letter that Petitioner contends was not properly admissible under BIA standards and was not referenced by the BIA on

reconsideration. (See Pet. Br. at 22-23 n. 7; S.P.A. 2.) Meanwhile, the formal docket record (J.A. 219) shows simply that Ditren has no conviction: all charges were dropped under CPL 160.60, which provides:

§ 160.60 Effect of termination of criminal actions in favor of the accused.

Upon the termination of a criminal action or proceeding against a person *in favor of such person . . .* the arrest and prosecution *shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution.* The arrest or prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession, or calling. Except where specifically required or permitted by statute or upon specific authorization of a superior court, no such person shall be required to divulge information pertaining to the arrest or prosecution.

N.Y.C.P.L. § 160.60 (McKinney’s 2004) (emphasis added). The Certificate of Disposition, showing a Dismissal, further directs that “ALL OFFICIAL RECORDS AND PAPERS RELATING TO THIS CASE ARE SEALED” pursuant to CPL 160.50(1)(c), which provides, in the case of a disposition in the defendant’s favor:

[A]ll official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor’s office shall be sealed and not made available to any person or public or private agency.

N.Y.C.P.L. § 160.50 (McKinney’s 2009) (emphasis added).

What this means is that the evidence that the federal immigration authorities need if they are to carry their burden of proving who has and has not been “convicted” resides under seal, and no state officials can provide that evidence without violating state law.³² This is in addition to the fact that, as the record in this case reflects, the formal documentation regarding participation in diversion to treatment programs may not reliably record all the details of a charge, plea, allocution, sentence, etc. Thus, even if the Justice Department uses its authority in an attempt to preempt state privacy law in order to obtain sealed records, it may nonetheless end up without a clear record of the underlying proceedings, necessitating protracted proceedings before the BIA and involving the federal appellate courts in a certain amount of guesswork.

In other words, the documentary problem in this case is not at all unique; it is likely to recur throughout this Court’s extensive immigration docket if the BIA’s rule is upheld. While this Court may choose to resolve Petitioner’s challenge on

³² CPL 160.50(d) provides a list of exceptions in which disclosure is permitted. Federal immigration authorities are not listed among the exceptions, although the statute does permit unsealing at the request of “a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it . . .” N.Y.C.P.L. § 160.50(d)(ii) (McKinney’s 2009). This standard plainly does not contemplate automatic access on the part of the immigration authorities but rather yet another individualized inquiry.

narrow, fact-specific grounds, the better and more practical way to avoid this problem altogether going forward is to hold that a successful diversion to treatment, followed by the dismissal of all charges that is treated as an adjudication in the defendant's favor under state law, is not a "conviction" under the INA.

II. IT IS FUNDAMENTALLY UNFAIR TO IMMIGRANTS WHO WERE UNAWARE OF THE CONSEQUENCES TO DEPORT THEM ON THE BASIS OF VOLUNTARY PARTICIPATION IN A DIVERSION PROGRAM

In addition to the adverse prospective effect on diversion to treatment programs, adoption of the BIA's rule would have a severe and fundamentally unfair impact on immigrants who have previously completed such programs and would now face deportation for a "conviction." These immigrants have acted in good faith reliance on the representation made by law enforcement and the court system that entering treatment would leave them without a criminal record. It would not only be grossly unfair to impose unforeseen consequences on them; it would actually place immigrants who had successfully completed treatment in a *worse* position than those who pleaded guilty in the regular criminal process.

Entering a diversion program inherently entails surrendering a defendant's constitutional rights to contest the charges against him or her, as well as surrendering defenses based on police misconduct, violation of Fourth and Fifth Amendment rights, and other defenses. Surrendering the right to challenge the underlying facts of a drug charge can also mean specifically losing the ability to

contest aspects of a charge that could carry immigration consequences. Initial charges at the arrest or even indictment stage may represent the most aggressive set of facts the government may hope to prove; at later stages in the process, after an assigned Assistant District Attorney has had an opportunity to review the evidence and allegations made by the police, such charges may be reduced or dropped before they even reach a factfinder. For example, the government may charge possession with intent to sell when it only has evidence to support a simple possession charge, or may bring an initial charge that overstates the quantity of a drug involved, either due to haste or error or as a plea bargaining chip. All too often, immigrants who enter a diversion program may not consider the possibility that the nominal charge of sale as opposed to possession can carry dire consequences such as deportation.

For example, simple possession of less than 30 grams of marijuana is not a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i), and while it is a ground for inadmissibility to the country, it may be waived under 8 U.S.C. § 1182(h). A noncitizen charged with the possession of slightly over 30 grams of marijuana, or with the possession of less than 30 grams of marijuana with the intent to sell, may not realize that participating in a diversion program on the promise of ultimate dismissal of the charge will have the same immigration consequences as pleading to the greater charge. Given that many of the people who enter diversion programs

do so after an arrest on marijuana charges, this will be a recurring issue if the BIA's rule is adopted.³³

Likewise, a lawful permanent resident who has been in the country for more than 7 years can be eligible for a discretionary cancellation of removal if convicted of a deportable offense that is not an "aggravated felony." *See* 8 U.S.C.

§ 1229b(a)(3); *Alsol v. Mukasey*, 548 F.3d 207, 210-211 (2d Cir. 2008). *See also*

Lopez v. Gonzales, 549 U.S. 47, 50-51, 58-59 (2006). Whether an offense is an

"aggravated felony" turns on the definitions in the Controlled Substances Act,

which with certain exceptions treats first offenses for simple possession as

misdemeanors. *See* 21 U.S.C. § 844(a); *Lopez*, 549 U.S. at 50-51, 58-60.

Defendants who have already completed drug court diversion programs in most

instances will not even realize that the initial charge, later dismissed, would matter

in this calculus; future defendants may find it necessary to enter into adversarial

bargaining over the charge, a dynamic at odds with the cooperative, public health

treatment model at the heart of all diversion programs.³⁴

³³ EDWARDS, at 28 (noting that the drug of choice of 61% of the program's participants is marijuana).

³⁴ This Court has previously hesitated to use immigration law to unsettle the expectations of parties to plea bargains, in light of the reliance on such agreements by noncitizens and by the State in securing a mutually beneficial outcome. *Alsol*, 548 F.3d at 217 (noting that treating a second possession conviction as a felony when the State elected not to pursue a recidivist conviction would undermine the State's ability to negotiate plea agreements). The same dynamic applies in the case of voluntary agreement

Further, eligibility for cancellation of removal may also turn on factual findings such as whether an alleged recidivist has admitted to his or her status as a recidivist or has had that status determined by a court or jury within the prosecution for the second possession offense. *See Alsol*, 548 F.3d at 217. Second possession offenses are but one instance in which the breadth of a charging instrument may make the difference between admissibility and inadmissibility for cancellation of removal. *See, e.g., Beckford v. Filip*, No. 08-0693-ag, 2009 WL 230085, at *2 (2d Cir. Feb. 2, 2009) (summary order) (declining to treat a guilty plea for distribution of a small quantity of marijuana as an aggravated felony because the accused made no admission regarding remuneration, and could potentially have availed himself of a mitigating exception that “punishes distribution of a small amount of marijuana for no remuneration as a misdemeanor”). In such circumstances, the overbreadth of charges entered at the outset of a diversion program – or admissions made *ex parte* during such programs – may needlessly lead to a deportation which could have been avoided had the immigrant invoked his or her rights to be prosecuted or plea bargain through the regular criminal process. Moreover, as discussed above, factfinding relating to the precise scope of such charges will be complicated by the nature and documentation of diversion to treatment programs. This Court has already expressed its

to enter a diversion to drug treatment program.

skepticism that immigration judges are well equipped to make these determinations when they are not clear on the face of the state's records. *See Alsol*, 548 F.3d at 217. The better course is to recognize that the graduates of diversion to treatment programs simply do not have a conviction, and leave the matter at that.

Finally, as discussed in Petitioner's brief (Pet. Br. at 47-49), graduates of diversion to treatment programs are in a particular bind if they were not advised that participating in such a program would lead to their deportation: unlike ordinary criminal defendants, they cannot collaterally challenge their "convictions" on grounds of ineffective assistance of counsel, *because as a matter of state law they have no convictions to challenge*.

Drug courts are not designed to be traps for the unwary. This Court should not endorse a construction of the INA that would consign to deportation immigrants who voluntarily participate in, and successfully complete, a court-approved treatment program that results in the vacatur of an initial plea and unconditional dismissal of the charges – especially where such immigrants may never have had reason to believe they were surrendering their right to live in this country.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that this Court should reverse the BIA and hold that successful, voluntary completion of a New York State drug court diversion to treatment program, followed by the dismissal of all criminal charges, does not constitute a “conviction” within the meaning 8 U.S.C. § 1101(a)(48)(A).

Dated: New York, New York
March 9, 2009

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RULE 32(a)(7)(C) CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for *amici* the National Association of Criminal Defense Lawyers and the New York State Association of Criminal Defense Lawyers certifies that this brief complies with type-volume limitations of the Federal Rules of Appellate Procedure because this brief contains 5,922 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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_____, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at the address shown above, or _____

That on the 10th Day of March, 2009, deponent served the within

AMICUS BRIEF with Amended Caption

upon the attorneys, and by the method designated below, who represent the indicated parties in this action, and at the addresses below stated, which are those that have been designated by said attorneys for that purpose.

- By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

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