Note

Finality of Conviction, the Right to Appeal, and Deportation Under Montenegro v. Ashcroft: The Case of the Dog That Did Not Bark

By Ashwin Gokhale*

If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness,—a country where he may have formed the most tender connections; where he may have vested his entire property... and where he may have nearly completed his probationary title to citizenship... if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.

—James Madison

Ahmed D. is a college student who has grown up and lived in California for the past twenty years after immigrating to the United States from a Middle Eastern country with his parents as a small child. Ahmed married a girl with whom he had a tumultuous relationship and whose family disapproved of him. The ill-advised marriage gradually disintegrated into divorce, with name-calling and threats from both sides. Her family obtained a restraining order against Ahmed, which both he and she regularly violated by continuing to contact each other. Finally, in an exercise of youthful bad judgment, Ahmed ended up in a physical altercation with her father and

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2. Ahmed is a pseudonym. The facts presented here are from a real case, but because of privacy issues his real name will not be used. Documentation is on file with author.
brother-in-law, resulting in Ahmed’s arrest and subsequent assault conviction. His lawyer filed an appeal on his behalf, as is guaranteed to him under California law. The appeal is based in part on the assertion that the prosecutor made statements during the trial designed to exploit racial prejudice, with knowledge that two jurors had previously admitted that they harbored prejudice towards Middle Eastern men.

Despite the pendency of his appeal, Ahmed was detained by federal agents immediately after the trial verdict and put in removal proceedings by the Department of Homeland Security (“DHS”). This was done as part of an aggressive deportation policy that offers virtually no quarter to any deportable person, regardless of the individual circumstances or danger posed. Immigration legislation passed in 1996 mandates detention without bond during removal proceedings despite the fact that Ahmed was not sentenced to any jail term at his trial. Even though his appeal is still pending, and before that appeal is ever heard, he may be uprooted from his home and family and deposited in a foreign country with which he has no real connection—a stiff penalty for getting into a fight. If deported, Ahmed will have little to no chance of ever returning to his life as he knows it, even if his conviction is eventually overturned, and he is cleared of any criminal wrongdoing.

To the relief of Ahmed, this outcome is not possible in California due to a longstanding rule that bars deportation based on a criminal conviction until the right to direct appeal has been exhausted or waived (“finality rule”); the use of this rule as a defense to deporta-

3. Cal. Penal Code §§ 1237, 1466(2) (West 2004). The right of appeal is virtually universal and is included in many state constitutions. See infra Part III.A.1.

4. Deportation proceedings were replaced with “removal” proceedings in the 1996 amendments to the Immigration and Nationality Act (“INA”). Removal proceedings encompass what was previously separated into “deportation” and “exclusion” proceedings. 5 Charles Gordon et al., Immigration Law and Procedure § 64.01 (2005). This Note uses the terms interchangeably.


7. See, e.g., White v. INS, 17 F.3d 475 (1st Cir. 1994); Martinez-Montoya v. INS, 904 F.2d 1018 (5th Cir. 1990); Morales-Alvarado v. INS, 655 F.2d 172 (9th Cir. 1981); Marino v. INS, 537 F.2d 686 (2d Cir. 1976); Aguilera-Enriquez v. INS, 516 F. 2d 565 (6th Cir. 1975); Will v. INS, 447 F.2d 529 (7th Cir. 1971). Despite the finality rule, criminal appellants have been deported. See People v. Garcia, 89 P.3d 519, 520 (Colo. Ct. App. 2004); Cuellar v. State, 13 S.W.3d 449, 452 (Tex. App. 2000); People v. Shaw, 654 N.Y.S.2d 886 (N.Y. App. Div. 1997); State v. Castano, No. 88-02822, 1989 Fla. App. LEXIS 7259 (Fla. Dist. Ct. App. Nov. 7, 1989); State v. Ortiz, 774 P.2d 1229, 1230 (Wash. 1989). In many cases, this is likely
tion resulted in the termination of removal proceedings in this case. However, the possibility of deportation, an unfair and illogical result, is now the reality within the jurisdiction of the Seventh Circuit after *Montenegro v. Ashcroft.* The *Montenegro* court appears to have found that the statutory definition of "conviction" for immigration purposes included in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") displaces the judicially-created finality rule. This decision was reluctantly followed as binding precedent for this proposition by a lower court in *Galarza-Solis v. Ashcroft* to deport a legal permanent resident who had lawfully made his home in the United States for over two decades.

The defendant in *Galarza-Solis* was deported despite the pendency of a direct appeal from his underlying criminal conviction, an appeal guaranteed to him by the Illinois Constitution. Meanwhile, in an opinion issued just months after *Montenegro*, the Sixth Circuit applied the finality rule without considering that it may no longer be valid.

This Note argues that the *Montenegro* decision should not be considered binding precedent for a finding of congressional abolishment of the finality rule. Such a reading of the case is unsupported and even contradicted by the authority the court cites and has drastic effects upon noncitizens that Congress and the *Montenegro* court could not have intended. The innocuous language of the decision and its radical apparent consequences, along with the complete lack of evidence of congressional intent to abolish the finality rule, is analogous to Sherlock Holmes's clue of the "dog that did not bark," necessitating a closer examination of whether such a reading is reasonable and justified.

Sir Arthur Conan Doyle's Great Detective understood that a due to the fact that noncitizens are not entitled to a state-appointed attorney in removal proceedings, and many are thus not well-equipped to rely on the finality rule to challenge their deportation. See, e.g., *Goonsuwan v. Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001); *Saakian v. INS*, 252 F.3d 21, 24 (1st Cir. 2001). The *Montenegro* decision prevents even immigrants fortunate enough to have representation from availing themselves of the finality rule.

8. 355 F.3d 1035 (7th Cir. 2004).
10. 355 F.3d at 1037.
12. *Id.* at 4 n.4 ("Solis' [sic] contends that *Montenegro* was wrongly decided because it results in deportation before the alien has a chance to fully appeal the criminal conviction resulting in the deportation. While this Court feels that this result is certainly unfair, the Seventh Circuit dictates our decision in this case.").
13. ILL. CONST. art. VI, §§ 4, 6.
15. *See infra* Part III.B.
watchdog's failure to bark in the night was an important clue, and so too should courts take into account the absence of any congressional intent or debate concerning the finality rule before concluding that it has been abolished.

Part I of this Note lays out background on the grounds for removal of noncitizens, traces the history of the definition of "conviction" and the accompanying finality rule, and describes how passage of IIRIRA changed this definition. An examination of legislative intent indicates that Congress sought to include deferred adjudications in the definition of "conviction" as that definition had been set by the Board of Immigration Appeals, and not that it intended to abolish the finality rule promulgated by the Supreme Court. Part II analyzes the reasoning of Montenegro, arguing that reading the decision to find congressional elimination of the finality rule is inappropriate. The survival of the finality rule was a moot issue in the case, and thus it is likely that the court never intended to make the expansive holding created by its unspecific language. Part III argues that IIRIRA should not be read to eliminate the finality rule due to principles of federalism, constitutional due process and equal protection concerns, the complete lack of congressional intent to eliminate the rule, and canons of statutory construction. The right to appeal from a trial conviction is ingrained in our criminal justice system as being crucial to determining guilt and innocence and should not be denied to anyone. Overall, this Note seeks to outline the relevant arguments for bringing a future challenge to Montenegro or any interpretation of it similar to that in Galarza-Solis.16

I. Background

Congress derives its plenary constitutional authority17 to regulate immigration from the Immigration and Nationality Act ("INA").18 The INA defines several classes of deportable noncitizens, including those convicted of aggravated felonies, crimes of moral turpitude, controlled substance violations, and crimes of violence.19 The statutes defining these deportable crimes seek to incorporate by reference

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16. All of the arguments for survival of the finality rule outlined in this Note apply equally to Moosa v. INS, 171 F.3d 994 (5th Cir. 1999), dicta of which arrives at the same holding as, and is relied upon by, Montenegro. Moosa is discussed in detail infra Part II.B.1.
hundreds of state and federal criminal offenses.\textsuperscript{20} Noncitizens convicted of removable crimes may be detained by United States Immigration and Customs Enforcement ("ICE")\textsuperscript{21} and put in removal proceedings before an immigration judge.\textsuperscript{22} The immigration judge's decisions can be appealed before the Board of Immigration Appeals ("BIA") or, in some circumstances, before the federal court of appeals that has jurisdiction over the circuit in which the immigration proceedings took place.\textsuperscript{23} When construing an immigration statute, federal courts will accord deference to the BIA's interpretation as long as it is a reasonable construction.\textsuperscript{24}

Before passage of IIRIRA, the definition of what constituted a "conviction" for immigration purposes was an ever-evolving judicial construct.\textsuperscript{25} Federal courts have continually refined the definition of "conviction" over the years to take into account the increasing prevalence of state rehabilitative statutes, such as suspended sentences,\textsuperscript{26} deferred adjudications,\textsuperscript{27} and expungements.\textsuperscript{28} In its 1955 decision in

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\item \textsuperscript{20} Brian Bates, Good Ideas Gone Bad: Plea Bargains and Resident Aliens, 66 Tex. Bar J. 878 (2003).
\item \textsuperscript{21} Prior to the September 11 attacks, immigration services and enforcement were handled by the Immigration and Naturalization Service ("INS"). After the attacks, the INS was abolished and its responsibilities were transferred to the new Department of Homeland Security, which splits immigration and naturalization services and immigration enforcement between United States Citizenship and Immigration Services and ICE, respectively. See 6 U.S.C.A. § 291 (West 2005); id. § 251; 8 C.F.R. § 2.1 (2004).
\item \textsuperscript{22} 1 Charles Gordon et al., Immigration Law and Procedure §§ 1.02, 104.13 (2005).
\item \textsuperscript{23} 1 Id. § 104.13(3)(c).
\item \textsuperscript{25} See In re Ozkok, 19 I. & N. Dec. 546, 548–49 (B.I.A. 1988); see also Chevron U.S.A., Inc., 467 U.S. at 842–43.
\item \textsuperscript{26} A suspended sentence is one in which imposition of the sentence is postponed indefinitely, unless further crimes are committed. Black's Law Dictionary 1092 (8th ed. 2004).
\item \textsuperscript{27} In deferred adjudications a judge determines that a defendant who has pled guilty should be placed on probation without continuing the proceedings to arrive at a formal adjudication of guilt. LaRonn Hogg Haught, Comment, Deferred Entry of Judgment: An Overlooked and Undervalued Benefit of Proposition 21, 38 U.S.F. L. Rev. 339, 347–50 (2004) (describing deferred adjudications in the context of juveniles). Many states have provisions allowing for deferred adjudication and probation, with expungement of criminal records upon successful completion of probation. Deferred adjudications are typically given in limited types of cases, such as those involving first-time offenders, juveniles, or minor crimes. Deferred adjudications also serve interests of judicial economy since they are given in exchange for a guilty plea. See Margaret Colgate Love, Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code, 30 Fordham Urb. L.J. 1705, 1724 n.75 (2003) (citing state deferred adjudication statutes); see also Haught, supra, at 351 (praising deferred adjudications in the context of juveniles).}
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Pino v. Landon, the Supreme Court first articulated that the finality rule is an additional consideration in determining the sufficiency of a "conviction" for deportation purposes. Unlike the definitional elements of "conviction," the finality rule was a constant until Montenegro.

A. The Pre-IIRIRA Finality Rule and Definition of "Conviction" for Immigration Purposes

In Pino, the Court considered whether a noncitizen could be deported based on a conviction that had been placed "on file" by the state court, meaning that no sentence would be imposed despite a finding of guilt. The defendant challenged the use of an "on file" conviction as a basis for deportation, but the appellate court did not accept this argument and upheld the deportation order. The Supreme Court reversed, expressing the concept of the finality rule in a short per curiam opinion, which reads in its entirety "[o]n the record here we are unable to say that the conviction has attained such finality as to support an order of deportation within the contemplation of § 241 of the Immigration and Nationality Act. The judgment is reversed." Since Pino, every circuit presented with the issue interpreted the concept of "finality" to include that all direct appellate review of the conviction was either exhausted or waived. When conviction reversal rates and the universal nature of the right to criminal appeal are considered, the importance of the finality rule is revealed: it ensures that the harsh sanction of deportation is reserved for those whose guilt is verified and subject to judicial review.

30. Id.
31. Moosa v. INS also contains language that indicates IIRIRA eliminated the finality rule, although it has not been followed thus far for this proposition by any court except for Montenegro. Moosa v. INS, 171 F.3d 994 (5th Cir. 1999); Montenegro v. Ashcroft, 355 F. 3d 1035, 1037 (2004). Moosa is discussed in detail infra Part II.B.1.
32. Pino, 349 U.S. at 901 (rev'g Pino v. Nicolls, 215 F.2d 237, 241 (1st Cir. 1954)).
34. Pino, 349 U.S. at 901.
35. See, e.g., White v. INS, 17 F.3d 475 (1st Cir. 1994); Martinez-Montoya v. INS, 904 F.2d 1018 (5th Cir. 1990); Morales-Alvarado v. INS, 655 F.2d 172 (9th Cir. 1981); Marino v. INS, 537 F.2d 686 (2d Cir. 1976); Aguilera-Enriquez v. INS, 516 F. 2d 565 (6th Cir. 1975); Will v. INS, 447 F.2d 529 (7th Cir. 1971).
36. See infra Part III.A.
In 1959, the BIA in *Matter of L-R*[^37] defined a "conviction" as existing for immigration purposes where (1) there has been a judicial finding of guilt, (2) there is some sentence imposed, and (3) the action of the court is considered a conviction by the State for some purpose.[^38] This definition of "conviction" was in effect until the 1988 BIA decision in *Matter of Ozkok*.[^39] The BIA in *Ozkok* set forth the framework for determining a "conviction" for purposes of the INA that was used until 1996 passage of IIRIRA. The BIA in *Ozkok* departed from the *Matter of L-R* definition in order to account for the increasing use of state rehabilitative measures and changes in criminal procedure that had taken place over the previous thirty years.[^40] The appellant in *Ozkok* pled guilty to a drug offense in exchange for a stay of judgment and three years probation.[^41] When he was subsequently placed in removal proceedings, he argued that the stay of judgment negated a conviction for immigration purposes.[^42] The *Ozkok* court modified the definition of conviction that was then in force to take into account situations in which there is deferred adjudication of guilt to arrive at the following rule:

As in the past, we shall consider a person convicted if the court has adjudicated him guilty or has entered a formal judgment of guilt. Since such a judicial action is generally deemed a final conviction in both federal and state jurisdictions, it will be sufficient to constitute a conviction for immigration purposes without consideration of the other two factors of our former test.

Where adjudication of guilt has been withheld, however, further examination of the specific procedure used and the state authority under which the court acted will be necessary. As a general rule, a conviction will be found for immigration purposes where all of the following elements are present:

1. a judge or jury has found the alien guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty;

2. the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed (including but not limited to incarceration, probation, a fine or restitution, or community-based sanctions such as a rehabilitation program, a work-release or study-release program, revocation or suspension of a driver's license, deprivation of nonessential activities or privileges, or community service); and

[^38]: Id. at 270.
[^40]: Id. at 550.
[^41]: Id. at 547.
[^42]: See id. at 548.
(3) a judgment of adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge.\textsuperscript{43}

This definition creates a two-part test for determining whether someone is "convicted" for immigration purposes. The first part covers a normal trial court conviction, and the second part consists of a three-prong test to determine what types of deferred adjudications will be considered "convictions" for immigration purposes. The first and second prong cover a finding of criminal behavior and the imposition of some sort of penalty. The third prong distinguishes between rehabilitative statutes that defer adjudication and statutes that expunge a prior adjudication, allowing for removal in the latter case but not the former.\textsuperscript{44}

A footnote to this definition notes the separate consideration of the \textit{Pino} finality rule, as had always been in place under the \textit{Matter of L-R} framework,\textsuperscript{45} adding that "[i]t is well established that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived."\textsuperscript{46} Under this overall framework, the court held that Ozkok's conviction was "sufficiently final to support an order of deportation," since the state statutory basis for his deferred adjudication allowed for judgment to be entered without any further review of the question of guilt.\textsuperscript{47}

**B. IIRIRA and the Definition of "Conviction" for Immigration Purposes**

The 1996 passage of the IIRIRA (and its contemporary Antiterrorism and Effective Death Penalty Act\textsuperscript{48} ("AEDPA")) marked a major upheaval in the already Byzantine INA,\textsuperscript{49} imposing sweeping changes

\textsuperscript{43.} \textit{Id.} at 551–52 (footnote omitted) (citation omitted).

\textsuperscript{44.} \textit{See} \textit{Acosta v. Ashcroft}, 341 F.3d 218, 226 n.8 (3d Cir. 2003).

\textsuperscript{45.} \textit{Martinez-Montoya v. INS}, 904 F.2d 1018, 1021–22 (5th Cir. 1990). While this case's reliance on \textit{Ozkok} for its exclusion of deferred adjudication from the definition of conviction has been superseded by IIRIRA, its discussion of the history of the definition of conviction and the finality rule remains valid. \textit{See id.} (finality rule); 8 U.S.C. § 1101(a)(48)(A) (2000) (superseding statute).

\textsuperscript{46.} \textit{Ozkok}, 19 I. & N. Dec. at 552 n.7.

\textsuperscript{47.} \textit{Id.} at 553.


\textsuperscript{49.} \textit{See Lok v. INS}, 548 F.2d 37, 38 (2d Cir. 1977) (comparing the INA to the mythical labyrinth of the Minotaur in ancient Crete); \textit{see, e.g., Teresa A. Miller, Citizenship and Severity: Recent Immigration Reforms and the New Penology}, 17 \textit{Geo. Immigr. L.J.} 611, 612 (2003).
and provoking strong emotions and concerns from noncitizens and their advocates. Among other changes, IIRIRA eliminates judicial discretion as to individual circumstances, mandates detention during removal proceedings, and also greatly expands the universe of deportable crimes; this includes an expanded definition of "aggravated felony" that makes jumping a subway turnstile in New York City a crime punishable by exile. Many refer to this watershed as the "criminalization" of immigration law.

As is consistent with this overall purpose, IIRIRA enlarges the scope of what is considered a "conviction" for immigration purposes, although it does so in a narrower manner than is suggested by Montenegro.

The IIRIRA definition codifies the two-part Ozkok rule with the exception of the third prong of the second part, which served to exclude deferred adjudications from the definition of "conviction":

The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where

(1) 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

(2) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(noting that immigration practitioners are "reeling" from reform legislation that has "created a sense of crisis that pervades the practice of immigration law").


51. Morawetz, supra note 50, at 1941.


The House Conference Report ("Report") associated with IIRIRA states that the purpose of creating a statutory definition is to "broaden[ ] the scope" of what constitutes a "conviction" by eliminating the part of the Ozkok rule that did not allow for removal in certain types of deferred adjudications. The Report notes that the eliminated prong allowed noncitizens who clearly engaged in criminal behavior (due to the first two prongs of a finding or plea of guilt along with some form of punishment or restraint on liberty) to escape deportation. After this description of the Ozkok rule and criticism of its treatment of deferred adjudications, the Report goes on to state the two purposes of adding a statutory definition of "conviction" to the INA. The first purpose is to adopt the Ozkok definition sans the third prong of the second part, thus clarifying congressional intent that a deferred adjudication should always be considered a "conviction" for deportation purposes. The second purpose of adding a definition is that any court-ordered sentence be considered "actually imposed" regardless of whether it is carried out when determining immigration consequences that depend on the length of a sentence. The Report does not make any reference to the Pino finality rule or to availability or pendency of direct appeal; it is chiefly concerned with including deferred adjudications within the definition of "conviction."

In Montenegro, the defendant was convicted by a jury for possession of cocaine with intent to distribute. Montenegro is the first decision to suggest that the finality rule is eliminated in the context of a case arising under the first part of the IIRIRA definition dealing with a trial conviction and is not just a non-factor in deferred adjudication cases under the second part.

II. Montenegro Should Not Be Accrued the Status of Binding Precedent in Regards to the Finality Rule

Marcelino Montenegro, a legal permanent resident of the United States, was convicted by a jury in 1996 of cocaine possession with intent to distribute and sentenced to twenty years imprisonment. He was subsequently placed in removal proceedings on the basis of that conviction.
conviction and was stripped of his permanent resident status and ordered removed by an immigration judge in 1998.\footnote{Id.} His appeal of the removal order came before the Seventh Circuit Court of Appeals in 2004 on appeal from a district court's denial of his petition for a writ of habeas corpus.\footnote{Id.}

On appeal, Montenegro made four arguments: (1) that he was eligible for discretionary withholding of deportation despite the abolishment of such relief by IIRIRA and AEDPA, (2) that application of IIRIRA and AEDPA to his pre-1996 conviction violated the Ex Post Facto Clause, (3) that abolition of discretionary relief constituted an equal protection violation, and (4) that his conviction was not final.\footnote{Id. at 1036–37.} The court dispensed with his first argument by finding that his case did not fit into either of the two exceptions to the IIRIRA provisions abolishing the availability of discretionary relief.\footnote{Id.} His second argument was thrown out since the Ex Post Facto Clause does not apply to removal proceedings, and the court declined to address his equal protection argument since he did not develop it in a meaningful way.\footnote{Id. at 1037.}

The court then turned to Montenegro's finality of conviction argument, making note of the pre-IIRIRA Pino rule barring removal where there is a pending appeal. The court then stated "IIRIRA, however, treats an alien as 'convicted' once a court enters a formal judgment of guilt. IIRIRA eliminated the finality requirement for a conviction, set forth in Pino, even for noncitizens who were found guilty before April 1, 1997."\footnote{Id. (citations omitted).} The court devoted just four sentences to the issue of finality, citing Moosa v. INS\footnote{171 F.3d 994 (5th Cir. 1999).} and Griffiths v. INS\footnote{243 F.3d 45 (1st Cir. 2001).} as authority for the proposition that IIRIRA eliminated the finality rule without supplying any new analysis.\footnote{Montenegro, 355 F.3d at 1037–38.} The court's language concerning the finality rule was both unnecessary and unsupported by the precedent it cited, needlessly increasing the risk that someone who is not actually guilty of a crime will be banished from the United States.

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  \item \footnote{Id.}
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  \item \footnote{Id.}
  \item \footnote{Id. at 1037.}
  \item \footnote{Id. (citations omitted).}
  \item \footnote{171 F.3d 994 (5th Cir. 1999).}
  \item \footnote{243 F.3d 45 (1st Cir. 2001).}
  \item \footnote{Montenegro, 355 F.3d at 1037–38.}
\end{itemize}
A. The Issue of Finality of Conviction Was Not Before the Montenegro Court

The question of whether IIRIRA eliminates the finality rule did not need to be decided by the Montenegro court because the types of appeals that Montenegro had pending were never a bar to his removal under the finality rule. The finality rule bars removal until the right of direct appeal has been exhausted or waived, not where there is a pending discretionary or collateral appeal or a writ of certiorari to the Supreme Court. At the time of the removal order, the only appeals Montenegro had pending were a writ of certiorari to the Supreme Court and a post-conviction appeal. He had already exhausted his avenues for direct appeal, as his conviction was affirmed by an appellate court, and the Illinois Supreme Court had declined to consider further appeal. The government's brief filed in opposition to Montenegro's appeal of his removal order argued that Montenegro would be considered convicted for immigration purposes regardless of whether the finality rule survived enactment of IIRIRA. According to the Seventh Circuit's own precedent, the fact that survival of the finality rule was not relevant to the disposition of the case made the discussion of the finality rule dicta, weakening its value as precedent.

Indeed, the per curiam nature and conclusory language of the decision, in addition to the court's eschewment of oral argument as unnecessary, strongly suggests that the court viewed its ruling as one applying existing law, as opposed to promulgating an expanded rule finding that finality is no longer a factor for cases arising under the

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70. See Morales-Alvarado v. INS, 655 F.2d 172, 175 (9th Cir. 1981); In re Polanco, 20 I. & N. Dec. 894, 896 (B.I.A. 1994).
72. Id. at 937.
74. The Seventh Circuit has outlined its principles for distinguishing dicta from binding holdings. The court outlines an approach that looks for reasons against giving weight to a passage found in a previous opinion, with the factors including (1) that the “passage was unnecessary to the outcome,” and therefore “not as fully considered”; (2) that it can be eliminated “without damaging the analytical structure of the opinion”; (3) that the passage “was not grounded in the facts of the case”; and (4) that it was not presented as an issue, and therefore not “refined by the fires of adversary presentation.” United States v. Crawley, 837 F.2d 291, 292–93 (7th Cir. 1988). Consideration of the first three factors strongly weigh towards viewing the finality rule discussion in Montenegro as dictum; as for the fourth, while the issue was raised by the petitioner, its treatment in the government's brief as being in any case irrelevant can hardly be considered as sharpening the issue for the court. Brief of Respondents-Appellees at 18–21, Montenegro v. Ashcroft, 355 F.3d 1035 (7th Cir. 2004) (No. 03-1850).
first part of the IIRIRA definition of "conviction" covering a trial conviction. The remainder of this section shows that the precedent cited by Montenegro resists a reading finding such an expanded rule.

B. Montenegro's Finality Rule Holding Is Based on Inadequate and Inapposite Precedent

Montenegro relied entirely on Moosa v. INS and Griffiths v. INS to support its statement that IIRIRA eliminated the finality rule and did not contain any new analysis on the issue. The following analysis will thus focus on what support, or lack thereof, these two cases offer for finality rule annulment. Both cases dealt with deferred adjudications falling under the second part of the IIRIRA definition of "conviction," as opposed to the formal judgment of guilt at issue in Montenegro. Like Montenegro, the court in Moosa discussed the finality rule despite the fact that it was a moot issue in the case. To the extent that Moosa concluded that the finality rule has been abolished, it was wrongly decided. Griffiths provided even less support for the Galarza-Solis reading of Montenegro, as it explicitly stopped short of the proposition that the finality rule no longer applied in any context while strongly suggesting that it should apply to cases falling under the first part of the definition covering a formal adjudication of guilt. Ultimately, the precedent relied upon by Montenegro did not support the broad language of its holding.

1. Moosa Should Not Be Relied upon for Abolishment of the Finality Rule

In Moosa, the defendant was appealing a deportation order based on a deferred adjudication. This should have meant a relatively simple analysis given the clear intent of Congress to include deferred adjudications in the definition of "conviction"; indeed, the Moosa court pointed to the Report's clear intent in this regard. The Moosa court went on to note that the issue of finality was moot because the defendant did not actually have any right to appeal from his deferred adju-

75. See Walker v. Doe, 558 S.E.2d 290, 295 (W. Va. 2001) ("[A] per curiam opinion involves application of settled law to facts . . . "). Dep't of Legal Affairs v. Dist. Court of Appeal, 434 So. 2d 310, 312–13 (Fla. 1983) ("[S]uch a decision is not a precedent for a principle of law and should not be relied upon for anything other than res judicata.").

76. 171 F.3d 994 (5th Cir. 1999).

77. 243 F.3d 45 (1st Cir. 2001).

78. Montenegro v. Ashcroft, 355 F.3d 1035, 1037 (7th Cir. 2004).

79. Moosa, 171 F.3d at 997.

80. Id. at 1002.
dication. 81 Despite this, the court engaged in lengthy dicta on the finality rule, putting forth three justifications for finding that passage of the IIRIRA definition of "conviction" overruled Pino: that (1) IIRIRA modification of Ozkok means abrogation of the Pino finality rule; (2) Congress intended to track the INS Legalization Appeals Unit's rule in Matter of M. 82; and (3) the BIA found elimination of the finality rule in Matter of Punu. 83, 84 Examination of these justifications finds all of them wanting, seriously undercutting the persuasiveness of Moosa to the extent it discusses the finality rule.

a. **Moosa Incorrectly Characterized the Finality Rule's Relationship with the Definition of "Conviction"

Moosa based its dicta on abolishment of the finality rule in part upon the fact that Pino was a judicial construction of the then undefined term "conviction" and that Congress has now provided a definition that does not include the finality rule. 85 This argument holds initial appeal, but it assumes that Congress legislated in a vacuum when it enacted § 1101 (a) (48) (A). It is clear that Congress intended to adopt the Ozkok framework with one modification: the elimination of the portion of the definition of "conviction" that exempted deferred adjudications. 86 When Congress exhibits detailed knowledge of a judicial construction that it adopts with selected changes, other judicial interpretations that Congress does not explicitly remove are presumed to be left intact. 87

This argument also rests on the erroneous assumption that the finality rule was part of the Ozkok definition of "conviction." 88 In fact, Ozkok noted the finality rule as a separate, overarching consideration outside of the Ozkok prongs, as the Moosa court stated before contradicting itself several pages later; the court first referred to the finality rule as being "superimposed" on the definition of "conviction," but

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81. *Id.* at 1009 n.8. The Seventh Circuit has stated that this constitutes reason for treating all of Moosa's discussion on the finality rule as dicta. See United States v. Crawley, 837 F.2d 291, 299–93 (7th Cir. 1988). As of this Note, Montenegro remains the only case to cite Moosa for finding that IIRIRA abrogates the finality rule.


84. Moosa, 171 F.3d at 1002.

85. *Id.* at 1008–90; see also *In re Punu*, 22 I. & N. Dec. 224, 230 (Grant, J., concurring).


88. Moosa, 171 F.3d at 1009. "Congress deliberately eliminated the third prong of the Ozkok test (which appears to incorporate a finality concept)." *Id.*
then stated that it is incorporated into the third *Ozkok* prong.\textsuperscript{89} The concept of "finality" that is implicated in the third *Ozkok* prong relates to distinguishing between different types of rehabilitative statutes,\textsuperscript{90} an entirely different consideration from the issue of direct appeal from a trial conviction encompassed by the finality rule.

The history of the finality rule and definition of "conviction" provides further evidence that they are separate.\textsuperscript{91} The finality rule was promulgated by the Supreme Court in *Pino*, while the definition of "conviction" had been in the hands of the BIA, first in *Matter of L-R*\textsuperscript{92} and later in *Ozkok*.\textsuperscript{93} *Matter of L-R* does not mention the finality rule, while *Ozkok* made note of the "longstanding" rule in a footnote to its definition of "conviction." Fundamentally, this means that *Ozkok* and *Pino* expressed two related concepts that do not overlap or infringe upon each other.\textsuperscript{94} To reason that the *Pino* finality rule was merely the first step in the promulgation of the definition of "conviction" as opposed to a separate, if related, consideration would mean that the BIA in *Matter of L-R* somehow eliminated the finality rule that the Supreme Court promulgated and that *Ozkok* brought it back nearly thirty years later. This was not the case, however, as the finality rule was in consistent use throughout the time periods when each of these BIA definitions of "conviction" were in effect.\textsuperscript{95} *Ozkok* is more clearly read as simply annotating a new definition of "conviction" with the related finality rule for the benefit of practitioners; the so-called omission of the finality rule from § 1101(a)(48)(A) does not warrant a finding that it has been abolished.

\textsuperscript{89} Compare id. at 1000 (the finality requirement is "superimposed" on the definition of "conviction"), with id. at 1009 (the finality requirement is incorporated in the third *Ozkok* prong); see also Martinez-Montoya v. INS, 904 F.2d 1018, 1021 (5th Cir. 1990) (noting the separate consideration of the finality rule); *In re Ozkok*, 19 I. & N. Dec. 546, 552 (B.I.A. 1988).

\textsuperscript{90} See Acosta v. Ashcroft, 341 F.3d 218, 226 n.8 (3d Cir. 2003).

\textsuperscript{91} Martinez-Montoya, 904 F.2d at 1021 (noting the separate consideration of the finality rule).

\textsuperscript{92} 8 I. & N. Dec. 269, 270 (B.I.A. 1959).


\textsuperscript{94} Wilson v. INS, 43 F.3d 211, 215 (5th Cir. 1995) ("[T]he decision of the BIA to apply a federal conviction standard in *Ozkok* does not infringe at all, either explicitly or implicitly, upon the Supreme Court's holding in *Pino*.").

\textsuperscript{95} *In re Ozkok*, 19 I. & N. Dec. 546, 552 n.7 (B.I.A. 1988).

\textsuperscript{96} Moosa v. INS, 171 F.3d 994, 1009 (5th Cir. 1999).
b. Reliance on *Matter of M*- Is Misplaced

The *Moosa* court also suggested finality rule abolishment by comparing the text of the IIRIRA definition of “conviction” with the rule announced in *Matter of M-*.

*Matter of M-* was decided by the Legalization Appeals Unit (“LAU”) of the INS, which hears appeals of denials of applications for permanent resident status. The LAU in this case stated that it was not bound by BIA precedent and could promulgate its own rules, and proceeded to state a new, LAU-only framework for determining sufficiency of conviction that dispensed with the finality rule. *Matter of M-* was summarily overturned by the Fifth Circuit, which found that the LAU is subordinate to and bound by BIA precedent, including the *Ozkok* decision that references the finality rule.

There are problems with this analysis, starting with the fact that the IIRIRA definition is substantively different from the one unsuccessfully promulgated in *Matter of M-*.

Section 1101(a)(48)(A) contains an additional clause that creates one analysis for noncitizens for whom there is a formal judgment of guilt and another for those whose adjudication has been deferred; declaring the two rules to be the same impermissibly reduces this additional clause to surplusage. Furthermore, the Report makes no mention of *Matter of M-*; instead stating that Congress is adopting the *Ozkok* rule sans the third prong of the second part. It simply does not make sense to discern congressional intent by looking to the discredited analysis of a division of an INS administrative unit while ignoring the joint statement of the House and Senate contained in the Report. Had the *Moosa* court substituted *Ozkok* for *Matter of M-* in its analysis, its logic would have dictated that since *Ozkok* incorporated finality, Congress did so as well when it adopted a slightly modified version of the *Ozkok* framework.

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98. 4 GORDON ET AL., *supra* note 4, § 52.09 (2005).
100. Martinez-Montoya v. INS, 904 F.2d 1018, 1023 (5th Cir. 1990).
103. Moosa v. INS, 171 F.3d 994, 999 n.3 (5th Cir. 1999).
104. Disabled in Action v. Hammons, 202 F.3d 110, 124 (2d Cir. 2000) (noting that a conference report represents the final statement of terms agreed to by both houses and is therefore the most persuasive evidence of congressional intent next to the statute itself).
c. *Moosa* Incorrectly Cited *Punu* as Eliminating the Finality Requirement

*Moosa* also relied on *In re Punu* for the proposition that finality is no longer a requirement. This reliance is overly broad, as the en banc opinion in *Punu* specifically does not address whether finality is an issue under the first part of the IIRIRA definition. *Punu* dealt with a defendant who was given a deferred adjudication under a Texas statute allowing for further proceedings under certain circumstances, a fact that he argued should negate the finality of his conviction. The *Punu* court quickly dispensed with this argument after comparing congressional intent with the Texas deferred adjudication statute.

The Report documenting congressional intent in including a definition of "conviction" in the INA states:

> In some States, adjudication may be "deferred" upon a finding or confession of guilt, and a final judgment of guilt may not be imposed if the alien violates probation until there is an additional proceeding regarding the alien's guilt or innocence. In such cases, the third prong of the *Ozkok* definition prevents the original finding or confession of guilt to be considered a "conviction" for deportation purposes. This new provision, by removing the third prong of *Ozkok*, clarifies 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.

The Texas statute provides for deferred adjudication of guilt and probation following a guilty or no contest plea when the court determines that doing so would best serve the interests of society. It further provides that a violation of probation can result in re-opening of

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106. *Moosa*, 171 F.3d at 1009 (referring to *Punu* as a case in which the BIA determined that a deferred adjudication was a "conviction" without applying the finality rule). The *Moosa* court's reliance on the BIA in this manner stems from the established principle that courts should give deference to administrative interpretations of statutes that they are given responsibility of administering, such as DHS's administration of the INA, as long as that interpretation is based on a permissible construction. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).
107. 22 I. & N. Dec. at 234 n.1 (Grant, J., concurring) ("[T]his opinion does not address the circumstance of an alien against whom a formal adjudication of guilt has been entered by a court, but who has pending a noncollateral post-judgment motion or direct appeal.").
108. *Id.* at 225 (majority).
109. *Id.* at 227.
adjudication of the original charge, in which a guilty adjudication will result in the same proceedings and options (such as sentencing, probation, and appeals) that would have existed had there never been a deferral.\textsuperscript{112}

The Texas statute thus provides for exactly the kind of deferred adjudication that Congress intended the term "conviction" to encompass when it added a statutory definition.\textsuperscript{113} The \textit{Punu} court acknowledged the possibility that a future appeal right could vest should Punu violate his probation and then be adjudicated guilty in a subsequent proceeding.\textsuperscript{114} However, the court found that the finality rule could not be implicated because Congress specifically intended to obviate the need to inquire into the mere possibility of future appellate review where there is a deferred adjudication.\textsuperscript{115}

Two of the judges in \textit{Punu} wrote separately from the majority, and each discussed the finality rule in some detail. Judge Rosenberg, concurring in part and dissenting in part, argued that the \textit{Pino} finality rule should somehow bar removal when there is a deferred adjudication, despite the clear intent of Congress otherwise.\textsuperscript{116} Judge Grant, concurring, argued against this view, while specifically noting that the en banc opinion does not address whether a "conviction" is sufficient for immigration purposes where there is a pending direct appeal in a case arising under the first part of \textsection 1101(a)(48).\textsuperscript{117} The en banc \textit{Punu} opinion was concerned with the relatively narrow question of whether a deferred adjudication is a "conviction" under IIRIRA despite the possibility of a right to appellate review arising should there be a probation violation.\textsuperscript{118} Reliance on \textit{Punu} for a broader proposition of finality rule abrogation is thus inappropriate.\textsuperscript{119} \textit{Moosa} conflated its analysis of the two parts of the definition by citing \textit{Punu} in this manner. Since \textit{Moosa} also dealt with a deferred adjudication, it should only be read to follow the BIA for the narrower interpretation that \textit{Punu} actually makes.

\begin{thebibliography}{99}
\bibitem{112} Id. at 228 n.3.
\bibitem{113} Id.
\bibitem{114} Id. at 228.
\bibitem{115} See id. at 228.
\bibitem{116} Id. at 235-36 (Rosenberg, J., concurring in part and dissenting in part).
\bibitem{117} Id. at 234 (Grant, J., concurring). The concurrence specifically notes "this opinion does not address the circumstance of an alien against whom a formal adjudication of guilt has been entered by a court, but who has pending a noncollateral post-judgment motion or direct appeal." Id. at 234 n.1.
\bibitem{118} Id. at 228 (majority); id. at 234 (Grant, J., concurring).
\bibitem{119} Griffiths v. INS, 243 F.3d 45, 51 (1st Cir. 2001).
\end{thebibliography}
The *Moosa* court ended its finality rule discussion by indicating that its interpretation was in accordance with the *Chevron* rule, which determines when courts should defer to an administrative agency's interpretation of a statute.\(^{120}\) The court found finality rule abrogation under the first *Chevron* step, which asks whether Congress has spoken directly to the precise issue before it,\(^{121}\) a question to be answered employing traditional tools of statutory construction.\(^{122}\) If there is ambiguity, the second *Chevron* step calls for deference to the interpretation put forth by the administrative agency as long as it is a "reasonable construction."\(^{123}\) The *Moosa* court noted if it had found that Congress had not spoken to the issue, the second step of *Chevron* analysis would have reached the same result since the INS interpretation was the same as its own.\(^{124}\) However, the *Moosa* INS brief does not contain any argument on finality,\(^{125}\) and the available evidence indicates that the government has consistently avoided arguing that IIRIRA displaces the finality rule.\(^{126}\) Furthermore, Congress can hardly be said to have clearly spoken to that issue under the rules of statutory construction.\(^{127}\) Alternatively, *Moosa's* statement that Congress has clearly spoken is entirely reasonable if it refers to the question of whether the finality rule bars removal where there is a deferred adjudication. Assuming this to be the case also elucidates *Moosa's* second statement referring to the INS construction as identical to its own, as this can only refer to the BIA decision in *Punu* that addressed this precise question.\(^{128}\)

Ultimately, the *Moosa* court's discussion of the finality rule is of questionable value as precedent, not in the least because it discussed

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120. *Moosa v. INS*, 171 F.3d 994, 1010 n.9 (5th Cir. 1999).

121. *Id.* (citing *Chevron U.S.A.*, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984)).

122. *Chevron*, 467 U.S. at 843 n.9.

123. *Id.* at 843.


126. *Griffiths v. INS*, 243 F.3d 45, 54 (1st Cir. 2001) (INS was "careful" at oral argument not to say that it could deport someone with pending appeal or appeal period); Government's Answering Brief at 27 n.22, *United States v. Bucio-Carrillo*, 2004 U.S. App. LEXIS 15094 (9th Cir. 2004) (No. 03-50352) ("to resolve this appeal, this court need not decide whether" the IIRIRA definition "eliminated the finality requirement"). The only other appellate brief to be found that addresses this is the *Montenegro* brief which cites *Moosa*, discussed *supra* note 73 and accompanying text.

127. *See supra* Part II.B.1.a; *infra* Parts III.B–C.

128. *In re* Punu, 22 I. & N. Dec 224, 234 (Grant, J., concurring).
an issue irrelevant in the case.\textsuperscript{129} It has the additional problem of conflated analysis between the two parts of the IIRIRA definition of "conviction" in its overly broad citation of \textit{Punu}. The court's insertion of \textit{Matter of M-} into the chain of events leading to the IIRIRA definition of "conviction" is particularly troubling,\textsuperscript{130} as is its casual dismissal of Moosa's contention that finality rule elimination could lead to the absurd result of post-deportation reversal of a criminal conviction.\textsuperscript{131} The \textit{Moosa} court's eagerness to find finality rule abolishment in a case that did not actually implicate the issue\textsuperscript{132} contributes to the appearance that the Fifth Circuit tends to construe immigration statutes against noncitizens.\textsuperscript{133}

\textsuperscript{129} In the words of Chief Justice Marshall, if portions of an opinion "go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit . . . ." \textit{Cohens v. Virginia}, 19 U.S. 264, 399 (1821); \textit{see also United States v. Crawley}, 887 F.2d 291, 292-93 (7th Cir. 1988); \textit{see generally Richard B. Cappalli, What Is Authority? Creation and Use of Case Law by Pennsylvania's Appellate Courts, 72 TEMP. L. REV. 303 (1999)}.

\textsuperscript{130} \textit{Moosa} v. \textit{INS}, 171 F.3d 994, 1002 (5th Cir. 1999).

\textsuperscript{131} \textit{Id.} at 1009. The court stated in response to Moosa's argument, "Be that as it may, such concerns are more properly addressed to Congress." \textit{Id.} This assertion ignores the rule of statutory construction that courts should not construe a statute in a manner that leads to absurd results. Given this rule, Moosa was correct to address this concern to the Fifth Circuit, and the court should not have dismissed his claim without at least considering the possible absurd result of its interpretation. \textit{William N. Eskridge, Jr. et al., Legislation and Statutory Interpretation 260-63 (2000)}; \textit{Norman J. Singer, Statutes and Statutory Construction § 45:12 (6th ed. 2000)}. The "classic example" of the absurd results canon is \textit{Green v. Bock Laundry Machine}, in which the Supreme Court found an interpretation of a rule of evidence to be absurd due to the potential constitutional issues it engendered. \textit{Green v. Bock Laundry Mach.}, 490 U.S. 504, 509-10 (1989); \textit{id.} at 527 (Scalia, J., concurring); \textit{Eskridge, Jr. et al., supra}, at 261. Given the constitutional issues raised by an interpretation of § 1101(a)(48)(A) that eliminates the finality rule as outlined \textit{infra} Part III.A, this would seem to be a situation in which usage of the absurd results canon would have been appropriate.

\textsuperscript{132} \textit{Moosa}, 171 F.3d at 1009 n.8 (stating "whether the finality rule has survived is a moot issue with regard to Moosa"). The finality rule issue does not receive mention in the government's brief in the case. \textit{Sur-Reply Brief for Respondent, Moosa v. INS}, 171 F.3d 994 (5th Cir. 1999) (No. 96-60821).

\textsuperscript{133} The Fifth Circuit has also held that a conviction previously vacated on appeal on the merits or for procedural or constitutional defects is a basis for removal under the IIRIRA definition of "conviction," leaving it alone among the circuits in this regard. \textit{See Renteria-Gonzalez v. INS}, 322 F.3d 804, 811 (5th Cir. 2002); \textit{id.} at 820-23 (Benavides, J., concurring) (criticizing the majority for "painting with too broad a brush"); \textit{see also Cruz-Garza v. Ashcroft}, 396 F.3d 1125, 1128-30 (10th Cir. 2005) (noting the Fifth Circuit's "tenuous adherence to a categorical disregard of all vacaturs"); Barbara Hines, \textit{Immigration Law}, 95 Tex. Tech L. Rev. 929, 931-934 (2004) (arguing that the Fifth Circuit's decision is "wrong and unfair," with "disastrous consequences for noncitizens"). The Fifth Circuit recently appeared ready to reconsider \textit{Renteria-Gonzalez} when it granted en banc review in a case raising this issue. The government's response rendered the case moot by changing its position and indicating that it is undertaking a "policy review" on pursuing such cases. \textit{Discipio v. Ashcroft}, 369 F.3d 472, 474-75 (5th Cir. 2004) (applying and criticizing \textit{Renteria-}}
Given these issues, *Moosa* should only be read to confirm that a deferred adjudication is a “conviction” for immigration purposes, and its dicta on the finality rule should not be relied upon. At the time of this Note, while several opinions cite *Moosa* when appellant noncitizens attempt to use the finality rule to stop removal based on their deferred adjudications,134 *Montenegro* remains the only decision to cite *Moosa* on the topic of conviction outside of this context.

2. *Griffiths* Did Not Put Forth the Proposition that *Montenegro* Purports to Follow

The *Montenegro* court’s other source for its holding that the finality rule no longer exists is *Griffiths v. INS.*135 However, *Griffiths* contradicts *Montenegro*’s statement more than it supports it. *Griffiths* again deals with the question of finality of conviction where there is a deferred adjudication with a theoretical future right to appeal. The court applied the BIA’s *Punu* standard, found a “conviction” for immigration purposes, and upheld deportation.136

Unlike the conflated analysis in *Moosa*, the *Griffiths* court was careful to distinguish between the two parts of the statutory definition of “conviction.” The court explicitly limited its holding, noting that the BIA in *Punu*

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\text{did not address the meaning of the first prong of INA § 1101(a)(48)(A), governing cases where there is a “formal judgment of guilt.” . . . Since we address petitioner’s case here under the second test, we likewise do not address any finality requirements for finding a conviction under this first prong.} \]

By citing *Griffiths* in a case that comes under the first part of § 1101(a)(48)(A) dealing with a formal judgment, *Montenegro* cited *Griffiths* for a holding it explicitly refused to reach.138

Not only did the *Griffiths* court stop short of the proposition that *Montenegro* would ascribe to it, but it contradicts that proposition. The court noted in *Griffiths* that the “INS was careful at oral argument to say that it was not taking the position it could deport someone adjudi-

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135. 243 F.3d 45 (1st Cir. 2001).

136. See id. at 52.

137. Id. at 53 n.3.

138. Id.
cated guilty while their appeal or appeal period was pending," and that it makes sense to take a different view of availability of direct appeal between the two prongs. Somewhat ironically, given the later use of *Griffiths* by *Montenegro* and (by extension) *Galarza-Solis*, the court summarily dismissed the noncitizen's contention that ruling against him on this argument would allow the INS to deport in cases where there is a pending direct appeal, saying that "[t]his is simply not the case." Since the court found that the finality rule does not apply under the second part, taking a different view of the finality rule under the first part can only mean its continued application. Rather than supporting *Montenegro*'s ruling as interpreted by *Galarza-Solis*, the *Griffiths* court intimated that it would apply the finality rule in cases arising under the first part of § 1101(a)(48)(A).

The court in *Montenegro* was ultimately too quick to find annulment of the finality rule—that is, if the court can truly be said to have done so in a purposive sense. Overall, it is likely that the *Montenegro* court never intended to make any new case law regarding the finality rule as is imputed to it by *Galarza-Solis*, and *Montenegro*'s broad language on finality is the consequence of a poorly drafted decision that fails to take into account the distinction between the two parts of the IIRIRA definition of "conviction." Whether or not the *Montenegro* court intended to eliminate finality rule protection for noncitizens in its jurisdiction, *Galarza-Solis* demonstrates that this is the result of the decision. However, there are substantial arguments for the necessity of the finality rule's survival in the context of the first part of § 1101(a)(48)(A).

### III. IIRIRA Should Not Be Read to Eliminate the Finality Rule

Deporting someone on the basis of a criminal conviction prior to exhaustion or waiver of the right to appeal raises a series of problems. The ensuing constitutional concerns, absence of congressional intent to abrogate the finality rule, and application of rules of statutory construction require that a finding of guilt arising under the first prong

139. *Id.* at 54.
140. *Id.*
141. *Id.*
142. *Id.* at 54 ("There are substantial practical differences between the situation faced by a defendant currently exercising a direct appellate right and that faced by a defendant with a theoretically available right to appeal that lay dormant until and unless the case is later brought forward . . . .").
of the IIRIRA definition of "conviction" should not be considered sufficient for immigration purposes until final.

A. Constitutional Problems Arising from Displacement of the Finality Rule

Abrogation of the right to appeal violates principles of federalism through interference with state criminal procedure; it also gives rise to issues related to access to the courts and due process guarantees at both the state and federal level.

1. Violation of Principles of Federalism Through Abrogation of the Right to Appeal

The principle that places the administration of criminal justice within the province of the states lies at the core of the federalist structure of the United States. In recognition of this fundamental aspect of state sovereignty, the Supreme Court has promulgated a doctrine of abstention that prevents federal courts from exercising jurisdiction in a manner that would interfere with state criminal proceedings. Professor Redish has sought to discern the judicial bases for this federal deference, finding one to be avoiding interference with substantive state legislative goals. He makes note of the Court's emphasis on avoiding a disruption of a state's efforts to protect the interests underlying its criminal laws through its judiciary. The right to appeal qualifies as just such an effort.

Forty-seven states and the federal government provide for at least one direct appeal as-of-right to all those convicted under a criminal statute. Many states enshrine this right in their constitutions. The

144. The Federalist No. 17 (Alexander Hamilton) (stating that the "ordinary administration of criminal and civil justice" is the "one transcendent advantage belonging to the province of the State governments").
147. Id. at 469.
149. Fifteen states provided a constitutional right as of 1992. Arkin, supra note 148, at 516–17 n.64.
"tough on crime" trend of the last two decades has not changed the consonance of the states on the importance of this right as fundamental to our legal system. The right of appeal is considered so indispensable in establishing certainty of guilt that a plurality of appellate courts will vacate the conviction and dismiss the original indictment if a defendant dies before his appeal is heard. Inherent in these facts is an enduring consensus on the part of state legislatures that providing a right of direct appeal is essential in determining who is guilty and who is innocent, an interest that cuts to the foundation of criminal law and procedure. Indeed, it has been argued that the very legitimacy of the criminal justice system in the eyes of society is tied to the right to appeal a trial verdict. Eliminating the finality rule is tantamount to abolishing this right as held by noncitizens; continued application of the finality rule avoids implicating the powerful state interest at stake.

Principles of federalism also counsel against finding that Congress has preempted the right of direct appeal. Plenary power over immigration and the Supremacy Clause means that there is field preemption of state immigration regulations and other state regulations that conflict with federal immigration goals. However, this rule

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150. See Jones v. Barnes, 463 U.S. 745, 756 n.1 (1983) (Brennan, J., dissenting) ("There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction."); see also AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS: CRIMINAL APPEALS § 21-1.1 (1980), available at http://www.abanet.org/crimjust/standards/crimappeals_blk.html (last visited Oct. 19, 2005) ("The possibility of appellate review of trial court judgments should exist for every criminal conviction. It is undesirable to have any class of case in which such trial court determinations are unreviewable.").

151. This is done under the doctrine of abatement ab initio. See Rosanna Cavallaro, Better Off Dead: Abatement, Innocence, and the Evolving Right to Appeal, 73 U. COLO. L. REV. 943, 943-46 (2002).

152. Evitts v. Lucey, 469 U.S. 387, 404 (1985) (noting that states have "made the appeal the final step in the adjudication of guilt or innocence of the individual").


155. U.S. Const. art. VI, cl. 2. The Supremacy Clause states that laws of the United States preempt state laws. Id.
does not extend to the preemption of state laws unrelated to immigration when doing so is unnecessary to achieving the federal interest, and there is no clear and manifest intent by Congress to effect an ouster of state power.\textsuperscript{156} Simply waiting to institute removal proceedings until the right to appeal is exhausted or waived, as has been done for decades, would fulfill both state and federal goals without diluting either; the only real difference from the federal government's perspective is the timing of when it will bear the cost of imprisonment during removal proceedings, a meaningless consideration since the cost itself remains the same. If anything, waiting will lower ICE expenses and improve the government's ability to give adequate attention to each removal case in the overburdened immigration courts,\textsuperscript{157} since it will never have to expend time and money on imprisoning and deporting anyone who will ultimately be successful on appeal.\textsuperscript{158}

The First Circuit and a federal district court in Texas have found that treating a deferred adjudication as a "conviction" does not violate principles of federalism through the interference with state criminal adjudications due to congressional plenary power.\textsuperscript{159} However, this is distinct from the denial of the right to appeal. Congress has not indicated any intent on the face of the statute or in the Report to deny the right of appeal, whereas it has explicitly indicated the intent to treat a deferred adjudication as a "conviction."\textsuperscript{160} Congress has therefore clearly intended to preempt the state's power to affect the purpose of a deferred adjudication.\textsuperscript{161} Plenary power should not be invoked to justify an act that Congress cannot definitively be said to have taken. Furthermore, abrogation of the right to appeal in a case like Galarza-

\begin{itemize}
\item \textsuperscript{157} See Claire Cooper & Emily Bazar, Immigration Appeals Swamp Federal Courts, SACRAMENTO BEE, Sept. 5, 2004, at A1.
\item \textsuperscript{158} This lack of intent and interest in negating the appeal right as held by noncitizens is discussed further infra at Part III.B. This lack of a government interest also has implications for an argument based on equal protection. A reading of § 1101(a)(48)(A) that finds it to abrogate the right of appeal as held by noncitizens creates a classification between citizens and noncitizens that requires a rational basis to pass constitutional muster. While courts will generally uphold immigration statutes that make such distinctions, it is worthwhile to note that the one area where a court has struck down such a classification involved a limitation on access to the courts. Hampton v. Mow Sun Wong, 426 U.S. 88, 94 (1976) (specifying rational basis review for alienage classifications); Yang Bi Kei v. Am. Int'l Knitters Corp., 789 F. Supp. 1074, 1078-79 (N.D. Mar. I. 1992) (refusing to find government expediency to be a rational basis for denying noncitizens equal access to a court of law).
\item \textsuperscript{161} Herrera-Inirio, 206 F.3d at 306-08.
\end{itemize}
Solis is a direct interference with an ongoing state proceeding, while proceedings are at a halt where there is a deferred adjudication. A deferred adjudication is typically granted in exchange for an admission of guilt.\textsuperscript{162} Removal under such circumstances therefore does not impact the state’s interest in determining guilt or innocence as does removal where the appellant has contested guilt at trial and continues to do so on direct appeal, since such an appeal constitutes an adjudication on the merits.\textsuperscript{163} Finally, the right to appeal is on a much stronger footing\textsuperscript{164} than any right related to an effective deferred adjudication that may exist. Under these circumstances, a principle of “cooperative federalism” calls for continued application of the finality rule.\textsuperscript{165}

2. Constitutional Problems at the State Level

Noncitizens are “persons” entitled to the protection of the Due Process Clause of the Constitution.\textsuperscript{166} Those convicted after trial have the right to meet with their attorneys in order to pursue appeals through the due process guarantee of access to the courts.\textsuperscript{167} Removing an appellant from the country negates this right. Those seeking exoneration also have the right to a “reasonably adequate opportunity” to present claims to the court, be it through access to law libraries or some other method.\textsuperscript{168} Removal to a foreign country will, in most cases, cut off meaningful access to the laws and jurisprudence of the United States, damaging the opportunity to present a claim.

In addition, state appellate proceedings are subject to some level of constitutional due process, including at least the right to a trial transcript and an attorney.\textsuperscript{169} The Supreme Court has recognized the importance of the first appeal as of right, holding that a criminal ap-


\textsuperscript{163} Halbert v. Michigan, 125 S.Ct. 2582, 2587 (2005).

\textsuperscript{164} In addition to its long history, the right to appeal is subject to other constitutional protections. See infra notes 165–67.

\textsuperscript{165} Gruntz v. County of Los Angeles, 202 F.3d 1074, 1085 (9th Cir. 2000).

\textsuperscript{166} Demore v. Kim, 538 U.S. 510, 543, 546 (2003) (Souter, J., concurring in part and dissenting in part) (citing Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893)).


pellant is guaranteed certain minimum safeguards to ensure that such an appeal is "adequate and effective." It is not difficult to see how the higher costs and difficulties inherent in pursuing an appeal in a United States court while located in a foreign country, particularly for an appellant who lacks resources or language skills in the country of removal, may severely damage the effectiveness of an appeal. Furthermore, removal renders an appeal completely ineffective in jurisdictions that will dismiss an appeal as moot when the defendant is deported. Those convicted of controlled substance violations or crimes of moral turpitude (such as subway turnstile jumping) are subject to a permanent bar to reentry. Noncitizens in such a jurisdiction are thus subject to a permanent punishment without the possibility of even one appeal. Those convicted of aggravated felonies are subject to a twenty-year bar to reentry, with all others subject to a ten-year bar.

Of course, unlike in Griffin and Douglas, the due process violation in the state appellate proceeding here is effectuated by the federal government, not the state. The First Circuit in Herrera-Inirio v. INS has justified due process concerns arising from negation of the validity and effectiveness of a state deferred adjudication by pointing to an underlying congressional purpose in creating a nationally uniform definition of the term "conviction" for immigration purposes. The court also noted that the liberty interest in having a deferred adjudication given full effect is not fundamental. However, the right to appeal benefits from much deeper roots, and its universal nature does not impact considerations of uniformity. The Herrera-Inirio court's jus-


171. Some states will dismiss the appeal of a deported criminal appellant on grounds of mootness, negating effectiveness of the appeal. See Shaw, 654 N.Y.S.2d at 886; Castano, 1989 Fla. App. LEXIS 7259. Others will allow the appeal to continue, as winning will remove the conviction that stands as a bar to reentry. People v. Garcia, 89 P.3d 519, 520 (Colo. Ct. App. 2004); Cuellar v. State, 13 S.W.3d 449, 452 (Tex. App. 2000); State v. Ortiz, 774 P.2d 1229, 1230 (Wash. 1989).

172. Morawetz, supra note 50, at 1941.


174. Id. § 1182(a)(9)(A)(ii).

175. 208 F.3d 299 (1st Cir. 2000).

176. Id. at 308–09.

177. Id.
3. Due Process Considerations at the Federal Level

A deportation based on a criminal conviction when there is a pending appeal also creates due process questions in the federal removal proceeding. Noncitizens receive lower due process protections in the immigration context. The Supreme Court has held that judicial review of due process in a removal proceeding is limited to determining whether the procedures used meet an essential standard of fairness. Factors for determining whether procedures have met this fairness standard include the interest at stake for the individual, the risk of erroneous deprivation of that interest, the probable value of additional procedural safeguards, and the interest of the government in using the current procedures. The interest at stake for the individual is that of fundamental liberty, as deportation deprives noncitizens of "the right to stay and live and work in this land of freedom." This is accompanied by the interest in having an opportunity to appeal a criminal conviction at trial, an interest that is negated by deportation in some jurisdictions. The "probable value" of the direct appeal right could scarcely be higher. Since Congress has not articulated the intent, much less any related interest, to deport noncitizens whose appeal has yet to be heard, discerning such an interest is an exercise in speculation. Such speculation should not justify denial of the concrete liberty interest at stake for the individual.

It is also necessary to examine the abrogation of due process in the context of the increased willingness by Congress and the courts to discriminate against noncitizens after the September 11 attacks. Comparing the Supreme Court's recent decisions in Zadvydas v. Davis and Demore v. Hyung Joon Kim reveals the scope of post-IIRIRA

180. Id. at 34.
183. See supra Parts III.A.1-2.
noncitizen due process and how that scope is constricted after September 11, with the two cases dealing with similar issues but reaching opposite conclusions.\textsuperscript{187} The Court in \textit{Zadvydas} considered a challenge to an IIRIRA provision that appears to allow potentially indefinite detention of criminal noncitizen aliens past the ninety-day removal period following issuance of a removal order.\textsuperscript{188} \textit{Zadvydas} held that such indefinite detention of noncitizens would violate constitutional due process, and that the provision must therefore be read as limiting post-removal-period detention to a period of time reasonably necessary to effect removal from the United States to avoid such a violation.\textsuperscript{189} The Court makes particular note of the complete lack of congressional intent to authorize indefinite detention in its ruling.\textsuperscript{190}

Two years later, the Court in \textit{Demore} held that IIRIRA-instituted mandatory detention without individualized bail hearings during removal proceedings does not violate due process.\textsuperscript{191} The \textit{Demore} Court cited statistics relied on by Congress showing that many noncitizens with past criminal convictions failed to appear for their removal hearings as well as precedent for allowing mandatory detention during removal proceedings.\textsuperscript{192} The Court distinguished the temporary period of detention at issue in \textit{Demore} from the indefinite and potentially permanent detention challenged in \textit{Zadvydas}. It also contrasted \textit{Demore}'s denial of a procedural right during removal proceedings with the post-removal proceeding liberty interest at stake in \textit{Zadvydas} in which the immigration purpose of the detention no longer exists.\textsuperscript{193} Significantly, the \textit{Demore} Court noted at the outset of its analysis that the respondent's prior convictions were "obtained following the full procedural protections our criminal justice system offers."\textsuperscript{194}

The denial of the right to appeal a criminal conviction and the use of a non-final appeal in removal proceedings engendered by \textit{Montenegro} is closer to \textit{Zadvydas} than \textit{Demore}. There is no \textit{Demore}-like study

\textsuperscript{186} 538 U.S. 510 (2003).
\textsuperscript{187} \textit{Zadvydas} interpreted an IIRIRA detention provision before the September 11 attacks and found a due process violation, while \textit{Demore} interpreted a related provision and reached the opposite conclusion after the attacks and subsequent anti-immigrant backlash. \textit{See} Yoh Nago, Comment, Demore v. Kim: Is the Supreme Court Decreasing the Rights of Lawful Permanent Residents?, 37 Loy. L.A. L. Rev. 1715, 1725–26 (2004).
\textsuperscript{188} \textit{Zadvydas}, 533 U.S. at 682.
\textsuperscript{189} \textit{Id.} at 690, 699.
\textsuperscript{190} \textit{Id.} at 697.
\textsuperscript{191} \textit{Demore}, 538 U.S. at 513, 528.
\textsuperscript{192} \textit{Id.} at 518, 523–26.
\textsuperscript{193} \textit{Id.} at 527–29.
\textsuperscript{194} \textit{Id.} at 513.
or congressional finding to justify the denial of due process;\textsuperscript{195} there is instead a complete lack of affirmative congressional intent or indicia of purpose for such denial,\textsuperscript{196} as in \textit{Zadvydas}. Denying the right to direct appeal is a denial of one of the core procedural protections of our criminal justice system, the fulfillment of which \textit{Demore} implies is justification for lower procedural protections in deportation proceedings based upon a criminal conviction.\textsuperscript{197} The liberty interest at stake is serious, encompassing a potentially permanent sanction as in \textit{Zadvydas}, unlike the temporary detention in \textit{Demore}. Taken together, \textit{Zadvydas} and \textit{Demore} strongly indicate that the denial of the right to appeal arising from \textit{Montenegro} interferes with due process guarantees to an impermissible degree. As the Supreme Court did with the IIRIRA provision challenged in \textit{Zadvydas}, the IIRIRA definition of "conviction" for immigration purposes should be interpreted to maintain the finality rule in order to avoid constitutional due process concerns.

Interpreting the IIRIRA definition of "conviction" to eliminate the finality rule causes too many constitutional issues for such an interpretation to stand. It is well-established that if a construction of a statute raises constitutional problems, courts must accept a "fairly possible" alternative interpretation of that statute that avoids such questions.\textsuperscript{198} As shown in the remainder of this Note, legislative intent and canons of statutory construction easily support an interpretation of the IIRIRA definition of "conviction" that leaves the \textit{Pino} finality rule intact.

\textbf{B. Legislative Intent and \textit{Montenegro}'s Results Weigh Against Finding Abolishment of the Finality Rule}

The most important reason for finding that the finality rule survives IIRIRA is the complete lack of intent to eliminate the finality rule combined with the constitutional problems that result from such elimination. A House Conference Report is considered the most influential type of legislative history since it reflects the final statement of terms agreed upon by both houses of Congress.\textsuperscript{199} The Report on

\begin{itemize}
  \item \textsuperscript{195} Id. at 518–19.
  \item \textsuperscript{196} See infra Part III.B.
  \item \textsuperscript{197} \textit{Demore}, 538 U.S. at 513.
  \item \textsuperscript{198} \textit{INS v. St. Cyr}, 533 U.S. 289, 299–300 (2001). This rule is accepted even by those who advocate looking exclusively at the plain language of a statute to discern its meaning. See infra note 213.
  \item \textsuperscript{199} Disabled in Action v. Hammons, 202 F.3d 110, 124 (2d Cir. 2000); JAMES WILLARD HURST, DEALING WITH STATUTES 42 (1982).
\end{itemize}
IIRIRA is remarkably explicit and clear in expressing its purposes of including deferred adjudications under the definition of “conviction” and treating any court-ordered sentence as being “actually imposed.”\textsuperscript{200} It is difficult to discern any additional purpose Congress had in creating the statutory definition of “conviction” other than the two explicitly stated.\textsuperscript{201} It is a principle of statutory construction that courts should not presume that a statute is intended by the legislature to overthrow long-established principles of law unless that intention is made clear though express declaration or by necessary implication.\textsuperscript{202} If Congress intended to abolish the long-standing finality rule as well as further its two stated purposes, it seems overwhelmingly likely that the Report would explicitly reflect this, but no such intent is manifest or implied. Outside of Moosa’s mischaracterization,\textsuperscript{203} there is no basis for asserting that removal of the third prong of the second part of the Ozkok rule implicitly eliminates the finality rule. Thus, it is inappropriate to find that Congress intended to abolish the well-established finality rule given this absence of express declaration or necessary implication.\textsuperscript{204}

The proposition that Congress did not intend to abrogate the finality rule is buttressed by the difficulty in discerning any interest served by such abrogation. A substantial percentage of state criminal convictions are reversed on appeal,\textsuperscript{205} and the BIA and federal courts are barely able to cope with the tide of immigration appeals as it is.\textsuperscript{206} The finality rule serves to reduce this workload by keeping successful criminal appellants out of the immigration courts. While a criminal appellant may not necessarily be imprisoned during the pendency of his or her appeal and is thus capable of committing more crimes,
there is no reason to believe that noncitizens are any more likely to do this than citizens. This is particularly true since all available data indicates that the immigrant crime rate is lower than that for citizens.\(^{207}\) Since the finality rule is limited in the types of appeals it covers among the myriad available to criminal defendants,\(^{208}\) the delay created by the finality rule in deporting the majority of convicts who will end up losing on those appeals is not great; noncitizens can still be deported without having access to forms of relief from their convictions that are available to citizens. The Supreme Court recently justified the need to avoid delay in deportation due to the prolonged violation of federal law inherent in any delay in deporting someone who is removable under the INA.\(^{209}\) However, this justification cannot be bootstrapped into determining the threshold question of removability.\(^{210}\) In any case, simply waiting to institute removal proceedings until direct appeal is exhausted or waived does not prevent the government from achieving its interest in deporting criminal noncitizens.

Overall, it is difficult to see any legitimate, non-invidious interest or purpose that is served through needlessly expending limited ICE resources on trying to deport any number of people whose erroneous convictions will be overturned through normal judicial process.

Ultimately, the lack of legislative intent to abolish the finality rule combined with the dramatic consequences of such annulment weighs heavily in favor of the rule's survival. The practical value of this principle—that innocuous legislation should not be read to make radical changes—is revealed when one considers the current legislative process; omnibus enactments, such as the 750-page bill that includes IIRIRA, are error-prone and are probably not written or read by those who vote on them.\(^{211}\) The omnibus budget bill that contains IIRIRA was passed in September 1996 just hours ahead of a deadline that


\(^{208}\) See Morales-Alvarado v. INS, 655 F.2d 172, 174–75 (9th Cir. 1981) (limiting finality rule to direct appeals available as-of-right and excluding discretionary appeals).


\(^{210}\) Id. at 490. The plaintiffs in this case were unquestionably removable due to overstaying visas and failure to maintain student status. Id.

\(^{211}\) See John M. Breen, Statutory Interpretation and the Lessons of Llewellyn, 33 Loy. L.A. L. Rev. 263, 282 n.66 (2000); see also Neal E. Devins, Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution, 1988 Duke L.J. 389, 399 (discussing a $603.9 billion appropriations bill passed without being read by members of Congress); Am.-Arab Anti-Discrimination Comm., 525 U.S. at 498 (Stevens, J., concurring) (noting that it is not surprising that IIRIRA contains an error); id. at 501 (Souter, J., concurring) (noting that IIRIRA manages to simultaneously grant and deny judicial review to certain aliens in deportation proceedings before April 1, 1997).
would have forced a government shutdown of the type that remained fresh in the minds of voters from the prior year.\textsuperscript{212} The potential for unintended and undesirable results when such bills are meshed into the ever-expanding opus that is the United States Code is high.\textsuperscript{213}

The absence of legislative intent or purpose in eliminating the finality rule is, in a mode of statutory interpretation that has attained prominence and increasing acceptance through the efforts of former Chief Justice Rehnquist and Justice John Paul Stevens, analogous to Sir Arthur Conan Doyle’s “dog that didn’t bark.”\textsuperscript{214} Doyle’s short story \textit{Silver Blaze} is famous for its exchange between Sherlock Holmes and a policeman as Holmes explains how he has solved a case of murder and horse theft:

[Inspector Gregory]: Is there any point to which you would wish to draw my attention?

[Holmes]: To the curious incident of the dog in the night-time.

[Inspector Gregory]: The dog did nothing in the night-time.

[Holmes]: That was the curious incident.\textsuperscript{215}

The stable watchdog’s failure to bark is the clue that tells Holmes that whoever took the horse from the stable was known to the dog; therefore, the horse had not been stolen in the manner previously


\textsuperscript{213} This fact was the deciding factor in a recent 8–1 Supreme Court decision applying this principle to reform an anomalous tax code provision. See Koons Buick Pontiac GMC, Inc. v. Nigh, 125 S. Ct. 460, 468–69 (2004) (analogizing lack of congressional intent to change tax code clause to Doyle’s dog that did not bark); id. at 470 (Stevens, J., concurring) (Congress is “fully capable” of enacting errors into law). This near-unanimous endorsement represents the strongest support for this rule yet. See id. at 470 (Stevens, J., concurring); Church of Scientology v. IRS, 484 U.S. 9, 17–18 (1987) (“All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle’s ‘dog that didn’t bark,’ that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill.”).

\textsuperscript{214} First appearing in dissents by Justices Rehnquist and Stevens, this rule gained much favor following the former’s ascension to Chief Justice. \textit{Compare Koons}, 125 S. Ct. at 468–49, and \textit{Church of Scientology}, 484 U.S. 9, 17–19, and Martinez v. Court of Appeal, 528 U.S. 152, 159 (2000), and Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991), and Am. Hosp. Ass’n v. NLRB, 499 U.S. 606, 613–14 (1991), with Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 589 (1982) (Stevens, J., dissenting), and Harrison v. PPG Indus., Inc., 446 U.S. 578, 596, 600, 602 (1980) (Rehnquist, J., dissenting). This principle, sans Sherlock Holmes references, has found its way into lower court decisions as well, including in the Seventh Circuit. Hays v. Sony Corp. of Am., 847 F.2d 412, 416 (7th Cir. 1988) (justifying continued application of the long-standing teacher exception to the copyright work-for-hire doctrine despite no mention of it one way or the other in the 1976 Copyright Act).

assumed. If Congress truly intended to eliminate the finality rule, surely some sound would have been heard.

C. Canons of Statutory Construction Weigh in Favor of the Finality Rule’s Survival

Although the use of rules of statutory construction and legislative intent as interpretive devices have been a commonplace factor in Supreme Court decisions over the last century, their use is not completely uncontroversial.216 Such considerations are generally favored by those who subscribe to intentionalist or dynamic theories of statutory construction.217 Textualists, led by Justice Antonin Scalia, tend to reject consultation of legislative history out of hand; they also tend to feel that the so-called canons of statutory construction are too vague and artificial to constitute a consistent theory and are so numerous as to support opposing interpretations of a single statute.218 Recent Supreme Court use of the Sherlock Holmes rule is anathema to textualists.219 Despite such issues, even the most hardened textualist is willing to apply certain rules as being fundamental.220 An array of canons of construction justify preservation of the finality rule, several of which are discussed in Judge Rosenberg’s concurring and dissenting opinion in Punu221 and other sections of this Note; this section highlights two whose use is longstanding and widely accepted even by those with differing viewpoints concerning interpretive canons.222

216. Eskridge, Jr. et al., supra note 131, at 240–41.

217. See generally id. The intentionalist theory of statutory interpretation seeks to give effect to legislative intent or purpose, while a dynamic theory takes into account normative considerations and the moral reality underlying statutory text. Textualist theories seek to give effect to the “plain meaning of the statutory text.” Id. at 213, 220, 223, 236–37.


220. Justice Scalia’s overall suspicion of canons of statutory construction has not prevented him from applying the long-established canons avoiding absurd results and constitutional issues, nor from endorsing the rule of lenity. See Eskridge, Jr. et al., supra note 131, at 260–61, 350; Scalia, supra note 218, at 29.


222. See supra note 213 and accompanying text.
1. A Statute May Not Be Construed So as to Render a Provision Superfluous

Finding that the finality rule no longer applies under the first prong of § 1101(a)(48)(A) risks rendering a portion of the second prong superfluous. It is a cardinal principle of statutory interpretation that statutes should be construed so that no provision is rendered superfluous. The first part of the definition refers to "conviction" as encompassing a "formal judgment of guilt," while the second part covers situations where "a judge or jury has found the alien guilty," and there is some punishment imposed. Fundamentally, this means that a "formal judgment of guilt" must mean something more than a finding of guilt by a judge or a jury; otherwise, this portion of the second prong is not needed. If they mean the same thing, the "finding of guilt by a judge or a jury" clause of the second prong could be removed without altering the meaning of the statute. Conversely, if no assumption that Congress intended to eliminate the finality rule is made, a construction that interprets "formal judgment of guilt" to mean a finding of guilt by a judge or a jury followed by exhaustion or waiver of the right to appeal will avoid violation of this cardinal principle by recognizing that the appeal is the "final step in the adjudication of guilt or innocence." Such a construction is in line with the Ozkok court's use of the term "formal judgment of guilt" to incorporate a finality consideration, an important factor since Congress has adopted a modified Ozkok test without indicating any intent to change the first part of the definition.

2. Rule of Lenity Requires Continued Application of the Finality Rule

The rule of lenity provides that any ambiguity in a criminal statute should be construed in favor of the defendant. The origins of this rule date to the very origins of English common law, allowing for
its embrace by textualists.229 While deportation is technically a civil proceeding, as opposed to a criminal matter,230 it has been recognized that its severity "surpasses all but the most Draconian criminal penalties," and that it may result in the loss of "all that makes life worth living."231 These considerations are particularly critical in the case of removal of a long-term legal permanent resident.232 There has been commentary calling for deportation to be treated as a criminal penalty dating to the founding of this nation.233 In addition, use of the rule in the immigration context may also stem from the recognition that noncitizens are particularly at risk for political scapegoating since they lack the right to vote, a consideration noted recently by the Supreme Court.234 Another theory posits that the immigration rule of lenity stems from the Supreme Court's reluctance to directly address constitutional challenges to immigration regulations due to its desire to avoid addressing the tensions between plenary power and competing constitutional mandates.235 For these reasons, it is long established that the rule of lenity applies in the immigration context, and that a court should therefore not construe an immigration statute against a noncitizen without unambiguous intent from Congress that it should do so.236

The rule of lenity comes into play when lingering ambiguity persists after consultation of the text of the statute, legislative history, and other canons of statutory construction; it thus serves as the "canon of

229. Scalia, supra note 218, at 29 (the rule of lenity is "validated by sheer antiquity"); United States v. Wilberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.").
231. Lennon v. INS, 527 F.2d 187, 193 (2d Cir. 1975); Ng Fung Ho v. White, 259 U.S. 276 (1922); see also Delgadillo v. Carmichael, 322 U.S. 388, 391 (1947) (stating that deportation is the "equivalent of banishment or exile").
232. See Valerie Neal, Note, Slings and Arrows of Outrageous Fortune: The Deportation of "Aggravated Felons," 36 Vand. J. Transnat'l L. 1619, 1621-23 (2005) (outlining the story of Jose Velasquez, who was deported in 1998 and thus separated from his wife of thirty-four years and three children for referring a friend to a man potentially selling cocaine at a party in 1980).
235. Id.
236. Id at 521-22; INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("Since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.").
last resort." The text of § 1101(a)(48)(A) certainly gives no insight into whether it affects the finality rule, and the legislative history is similarly unilluminating. Other rules of statutory construction weigh towards finding finality rule survival, but an analysis that construes the finality rule as within the Ozkok definition of "conviction" leads to the conclusion that it has been displaced. Contrasting the Montenegro court's offhand dismissal of the rule with the Sixth Circuit's continued application of it just months later in Garcia-Echaverria further demonstrates the ambiguity concerning the survival of the finality rule. The language discussing the finality rule in these two decisions indicates that each court viewed its treatment of the rule as uncontroversial, even obvious. That there is ambiguity within an IIRIRA provision is not surprising. Given the harsh nature of deportation and the bars to reentry into the United States that result, courts should resolve this ambiguity in favor of noncitizens and continue to apply the finality rule.

237. Slocum, supra note 234, at 520 n.21.
239. This is shown in the dueling Punu concurring and dissenting opinions. Compare In re Punu, 22 I. & N. Dec. 224, 248-50 (Rosenberg, J., concurring in part and dissenting in part) (arguing that "sound principles of statutory construction" counsel against silent abrogation of finality rule, even where there is a deferred adjudication), with id. at 232 (Grant, J., concurring) (arguing that the enactment of the IIRIRA conviction definition "eraclates" the underpinnings of Pino). It is of course the position of this Note that enactment of the IIRIRA conviction does not affect the underpinnings of Pino. See supra Part II.B.1.a. It bears repeating that the concurring Punu opinion is careful to note that the court does not reach the question of finality rule survival in a case arising under the first part of the definition. Punu, 22 I. & N. Dec. at 234 n.1 (Grant, J., concurring). This suggests that the concurrence would still construe a finality rule within the first part of the definition, despite taking the view that finality is not a separate requirement in determining whether there is a conviction. Id. at 232.
240. The Garcia-Echaverria court states the finality rule, cites Pino, and applies the facts to the rule, not even considering the possibility that the finality rule has been abolished in a case such as the one before it. United States v. Garcia-Echaverria, 374 F.3d 440, 445 (6th Cir. 2004).
241. The IIRIRA as a whole has been greatly criticized in this regard. See, e.g., Linda Greenhouse, Justices Uphold Selective Deporting of Aliens, N.Y. TIMES, Feb. 25, 1999, at A22 (noting "widespread confusion over how to interpret the densely worded, internally contradictory" IIRIRA); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 498 (Stevens, J., concurring) (noting that it is not surprising that IIRIRA contains an error); id. at 501 (Souter, J., concurring) (noting that IIRIRA manages to simultaneously grant and deny judicial review to certain aliens in deportation proceedings before April 1, 1997).
243. While this Note takes the view that the overwhelming weight of evidence shows that the finality rule survives IIRIRA, this argument is included so as to show a basis for finding finality rule survival even if arguments that the Galarza-Solis interpretation of Montenegro is permissible can be mustered despite the issues outlined herein.
Conclusion

The Sixth Circuit's post-Montenegro application of the finality rule in *Garcia-Echaverria*\(^{244}\) constitutes an emerging circuit split that creates the possibility that similarly situated noncitizens will be treated completely differently under federal immigration law depending on which circuit's jurisdiction they are located within. This difference in treatment is arbitrary and serves no purpose, thereby raising equal protection problems.\(^{245}\) Other circuit courts of appeal that face the question of whether to apply the finality rule to the IIRIRA definition of "conviction" will have a choice in which interpretation to follow. Such courts should follow the lead of the Sixth Circuit's decision in *Garcia-Echaverria* because it deals with a standard state criminal conviction that arises under the first part of the IIRIRA definition covering a formal adjudication.\(^{246}\)

More importantly, courts should interpret IIRIRA in a manner that is consistent with congressional intent and the rules of statutory construction, avoiding an interpretation that raises serious constitutional questions and upsets the standard of guilt set by states. An individual contesting guilt by seeking appellate review as-of-right of a trial conviction is different in kind from someone who pleads guilty and is granted mitigation of the consequences of having a criminal record due to public policy choices by state legislatures.\(^{247}\) Such a person should not be banished before that appeal is even heard. The Seventh Circuit, which has recently displayed a lack of stomach for the severe interpretations of immigration regulations introduced by the DHS as part of the post-September 11 war on terror, should clarify its ruling in *Montenegro* at the earliest opportunity.\(^{248}\)

244. 374 F.3d at 445.
245. See *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Garberding v. INS*, 30 F.3d 1187, 1190 (9th Cir. 1994) ("When the INS distinguishes one class of aliens for different treatment there must be some rational basis for doing so; otherwise, its classification is wholly irrational").
246. See *Garcia-Echaverria*, 374 F.3d at 445.
247. See supra note 26, note 109, and accompanying text.