04-3599-pr

To Be Argued By:
LISA E. PERKINS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-3599-pr

ALICJA NIVER,
Petitioner-Appellant,

-vs-

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE

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STATEMENT OF JURISDICTION

The district court (Janet C. Hall, J.) exercised subject matter jurisdiction over the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. The petitioner filed a timely notice of appeal within 60 days of the district court's judgment. *See* Fed. R. App. 4(a). This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the district court correctly dismiss petitioner's habeas petition for lack of subject matter jurisdiction based on petitioner's failure to exhaust administrative remedies?

II. Did the district court properly decline to adjudicate the merits of petitioner's nationality claim for lack of jurisdiction and further properly refuse to transfer the petitioner's nationality claim to this Court, in light of her failure to exhaust administrative remedies and her failure to satisfy the requirements of the transfer statute?

III. Did the district court properly decline to address the merits of petitioner's challenge to her underlying state convictions because the claim was not properly before the court by way of immigration habeas petition, and did the court further correctly decline to stay petitioner's removal pending a decision on her state habeas petition given that petitioner stands virtually no chance of success on the merits?

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BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE

Preliminary Statement

In this immigration habeas appeal, petitioner Alicja Niver, a lawful permanent resident alien subject to a final removal order based on her 1999 aggravated felony convictions, forfeited her opportunity for judicial review by failing to exhaust administrative remedies. Indeed, in the hearing before an Immigration Judge, petitioner through counsel conceded her alienage and that she was removable as an aggravated felon. Though petitioner filed

a timely appeal of her removal order with the Board of Immigration Appeals ("BIA"), she did not raise with the Immigration Judge or the BIA the claims that are the subject of this appeal: (1) that she is a "national of the United States" not subject to removal, and (2) that her underlying state convictions are invalid because her counsel failed to advise her of the immigration consequences of her guilty pleas, and was therefore ineffective. Rather, these claims were first raised through present appointed counsel in a belated amended habeas petition filed in district court.

Because petitioner's claims were not exhausted at the administrative level, the district court (Janet C. Hall, J.) correctly concluded it lacked subject matter jurisdiction to review them, under 8 U.S.C. § 1252(d)(1). Further, the district court properly declined to reach the merits of petitioner's nationality claim for lack of jurisdiction under 8 U.S.C. § 1252(b)(5), and correctly refused to transfer the claim to this Court due to petitioner's failure to exhaust and failure to meet the requirements of the transfer statute, 28 U.S.C. § 1631. Finally, the district court correctly declined to reach the merits of petitioner's attack on her underlying state convictions because the claim was not properly before the court under 28 U.S.C. § 2241. The court further properly denied petitioner's request for a stay of removal pending resolution of her state habeas petition because she has virtually no chance of success on the merits.

Statement of the Case

On October 9, 2002, petitioner filed a *pro se* petition for writ of habeas corpus in the United States District Court for the District of Connecticut (Alvin W. Thompson, J.) seeking relief from an Immigration Judge's order of removal from the United States. Petitioner simultaneously filed a motion for appointment of counsel. PA2.[1] On October 10, 2002, the district court granted the motion for appointment of counsel and ordered the government to respond to the petition.[2] PA2. After the government responded, and while awaiting a ruling by the court, the

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[1] Petitioner's counsel has filed an "Appendix to the Brief of Petitioner-Appellant, Alicja Niver," referred to herein as "PA," that includes the district court docket sheet, the court's ruling, judgment, and the notice of appeal. However, to make the record more complete, respondent-appellee is submitting a separate appendix, ("Government's Appendix," referred to herein as "GA") with additional documents including copies of the petitioner's naturalization applications, guilty plea transcripts, immigration hearing transcripts, the notice to appear and notice of appeal to the BIA. *See* Fed. R. App. P. 30(a)(1)(D). The Government has filed a motion with the district court to supplement the record on appeal to include the immigration hearing transcripts which were not originally included in the record.

[2] On December 18, 2002, the BIA affirmed the Immigration Judge's removal order. PA10; GA63-64.

Immigration and Naturalization Service ("INS")[3] received a travel document authorizing petitioner's removal to Poland. PA2-3. In response, on February 28, 2003, petitioner, through her appointed counsel, filed a motion to stay her removal wherein she first indicated her intent to file an amended petition asserting new claims that she had not raised at the administrative level. PA3. The district court granted a stay of removal and the case thereafter was transferred to United States District Judge Janet C. Hall for disposition. PA3-4.

On September 26, 2003, petitioner filed a motion for leave to amend her petition for writ of habeas corpus with a copy of the amended petition. PA4. By endorsement order, on October 8, 2003, the district court (Janet C. Hall, J.) granted the motion for leave to amend and the amended petition was accepted for filing. PA4. On May 12, 2004, the district court dismissed the amended petition by written ruling. PA5-6. Judgment entered on May 19, 2004. PA6.

On June 18, 2004, petitioner filed a timely notice of appeal. PA6. Petitioner remains in detention pending this appeal and her removal from the United States.

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[3] The INS was abolished effective March 1, 2003, and its functions transferred to three bureaus within the Department of Homeland Security pursuant to the Homeland Security Act of 2002. *See* Pub. L. No. 107-296, 116 Stat. 2135, 2178. The enforcement functions of the INS were transferred to the Bureau of Immigration and Customs Enforcement ("ICE"). *Id.* For convenience, respondent-appellee is referred to herein as the INS.

STATEMENT OF FACTS

A. Niver's Entry into the United States and Aggravated Felony Convictions.

Petitioner is a native and citizen of Poland. PA8. She entered the United States on July 10, 1979, as a visitor for pleasure and her status was adjusted in 1980 to that of a lawful permanent resident. PA8. Petitioner filed a naturalization application in June 1988. PA9; GA1-5.[4] Petitioner filed a second application for naturalization in August 1998. PA9; GA6-9. Petitioner was not naturalized.[5]

On December 3, 1999, petitioner was convicted by guilty plea in the Superior Court at Bantam, Connecticut, of third-degree robbery and third-degree larceny, in violation of Conn. Gen. Stat. §§ 53a-136 and 53a-124. PA9. She was sentenced to five years of imprisonment on

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[4] The district court inadvertently cited the date of the first naturalization application as 1979, *see* PA9, but petitioner had not by then become a permanent resident alien. *See* Pet. Brief at 4; GA1.

[5] Petitioner's alien file reveals that a Naturalization Document Request dated September 23, 1999, was sent to petitioner asking her to explain her previous criminal arrest record which she disclosed in her second naturalization application filed in 1998. *See* GA8. By June 1999, petitioner also had been arrested on the robbery and larceny charges that form the basis of her removal order. *See* GA10-11.

each count, the first suspended after three years, and the second suspended completely and to run consecutively to count one, to be followed by five years of probation. PA9. Petitioner completed her state sentence of imprisonment in June 2002 and was thereafter transferred to INS custody. PA9.

B. INS Removal Proceedings

Based on the above convictions, the INS initiated proceedings to remove petitioner from the United States. PA9. In this regard, petitioner was served with a Notice to Appear on May 16, 2001, which specifically charged, among other things, that petitioner was "not a citizen or national of the United States" but "a native . . . and citizen of Poland," and that she was subject to removal from the United States as an aggravated felon, under INA § 237(a)(2)(A)(iii); 8 U.S.C. § 1227(a)(2)(A)(iii), on the basis of the robbery and larceny convictions. GA29; PA9. On April 29, 2002, an Immigration Judge ("IJ") ordered petitioner removed to Poland. PA10. During the hearing before the IJ, at which time petitioner was represented by counsel, petitioner conceded her removability as charged in the Notice to Appear and conceded that she was not eligible for any form of relief from removal. *See* GA51-52.

On May 23, 2002, petitioner filed a timely appeal of the removal order with the Board of Immigration Appeals ("BIA"). PA10; GA57-62. In her BIA appeal, filed *pro se*, petitioner challenged only the finding by the IJ that she was removable as an aggravated felon. GA57. On December 18, 2002, the BIA summarily dismissed

petitioner's appeal, finding that she had conceded before the IJ that her convictions rendered her removable as charged. GA 63-64. The BIA noted it had "not issued a precedent decision which would alter [petitioner's] removability as an aggravated felon." GA64, n.1.

C. District Court Proceedings

On October 9, 2002, while in INS custody and prior to the BIA dismissing her appeal, petitioner simultaneously filed a state habeas petition challenging the validity of her convictions and a *pro se* habeas petition in the district court challenging the IJ's removal order on the ground that her convictions were not aggravated felonies. *See* Pet. Brief at 2; PA10. On December 10, 2002, the government moved to dismiss the petition for lack of jurisdiction, because petitioner's appeal was still pending before the BIA and she therefore had failed to exhaust her administrative remedies. *See* PA2. On December 18, 2002, the BIA dismissed petitioner's administrative appeal. GA63-64; PA10.

On February 28, 2003, through appointed counsel,[6] petitioner filed a motion for stay of removal in which she indicated her intent to file an amended petition in the district court. PA3. In her amended petition, filed September 26, 2003, with a formal motion for leave to amend, *see* PA4, petitioner raised for the first time the

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[6] Petitioner filed a motion for appointment of counsel with her initial habeas petition. The motion was granted on October 10, 2002, and counsel appointed on October 18, 2002.

following claims: (1) that she is not subject to removal because she is a "national of the United States" as defined in 8 U.S.C. § 1101(a)(22); (2) that her removal would violate various international laws; and (3) that her underlying state criminal convictions are invalid because of the government's failure to comply with the Vienna Convention on Consular Relations and because she received ineffective assistance of counsel. *See* PA11.[7]

On May 12, 2004, the district court dismissed petitioner's amended habeas petition for lack of subject matter jurisdiction because petitioner had failed to exhaust administrative remedies.[8] PA8, PA18. The court acknowledged that this Court has unambiguously held that the statutory exhaustion requirement of INA § 242(d)(1); 8 U.S.C. § 1252(d)(1) applies to "all forms of review [of removal orders] including habeas corpus." PA14 (quoting this Court's superseding opinion in *Theodoropoulos v. INS*, 358 F.3d 162, 171 (2d. Cir.), *cert. denied,* 125 S. Ct. 37 (2004)) (internal quotation marks omitted). Moreover, the district court determined that even if the administrative exhaustion requirement of § 1252(d)(1) were subject to the same limited exceptions that apply to judicially created exhaustion doctrines, petitioner would not qualify for any of them. PA15 (citing *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003)).

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[7] The district court granted petitioner's motion for leave to amend on October 8, 2003.

[8] In the amended petition, petitioner abandoned her original claim that her convictions do not constitute aggravated felonies.

Concluding that no exceptions to the judicial exhaustion requirement applied to petitioner's claims, the district court held that Niver's failure to exhaust precluded habeas review of her "international law claims [and] any application for relief from removal she might have brought based on these claims," PA15, as well as her state level "claims of ineffective assistance of counsel." PA16.

With respect to petitioner's nationality claim, the district court held that "even if exhaustion principles do not apply to nationality claims, an issue which this court does not reach, the court concludes that the court of appeals, rather than the district court, is the appropriate forum to adjudicate such claims." PA18 (citing 8 U.S.C. § 1252(b)(5)). The court additionally noted that Niver's nationality claim, based on having filed two naturalization applications, her family ties in the United States, and length of residence here, "seems to be foreclosed by the case law in this and other circuits." PA19, n. 6 (citing *Oliver v. INS*, 517 F.2d 426, 427-28 (2d Cir. 1975) and *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 965 (9th Cir. 2003)).

The court further declined to transfer the nationality claim to this Court because petitioner had not filed a timely, exhausted claim in the district court, as required by the transfer statute, 28 U.S.C. § 1631. PA20. Thus, the court concluded, "the claim is not reviewable by any court." PA20.

Finally, the district court declined to address the merits of petitioner's attack on her underlying state convictions, concluding that an immigration habeas petition under 28 U.S.C. § 2241 is not the appropriate vehicle for such

review. PA17. The district court further denied petitioner's request for a stay of removal pending resolution of her state habeas petition challenging her convictions. PA21. Noting that the transcripts of Niver's presentment on June 7, 1999, and "plea colloquy on October 5, 1999, reveal that the state court advised her 'that conviction of these offenses could result in deportation, exclusion from admission to the United States, and/or denial of naturalization,'" the district court concluded that "petitioner has virtually no likelihood of success on her state habeas claim." PA21 (citations to record omitted). Thus, the court concluded that petitioner could not satisfy the traditional stay analysis prescribed by this Court in *Mohammed v. Reno*, 309 F.3d 95, 100, 103 (2d Cir. 2002), which weighs "the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing the stay if one is issued, and the public interest." PA21.

On appeal, petitioner argues (1) that the district court had jurisdiction to determine her nationality claim; (2) that the district court should have transferred her "nationality" claim to this Court; and (3) that the district court should have considered petitioner's claim of ineffective assistance of counsel, or in the alternative, granted a stay of removal until the state court ruled on her state habeas petition.[9]

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[9] Petitioner does not pursue her international law claims nor does she argue the merits of her nationality claim on appeal.

SUMMARY OF ARGUMENT

I. Because petitioner did not raise her nationality and ineffective assistance of counsel claims before the IJ or the BIA, as statutorily required, the district court correctly concluded it lacked subject matter jurisdiction to review them. Though petitioner filed a timely appeal of the IJ's removal order to the BIA, she challenged only the IJ"s finding that her convictions constituted aggravated felonies. Petitioner's assertion that her nationality claim was exhausted because the IJ had to necessarily find that petitioner was not a national of the United States when he found she was a removable alien is without merit; petitioner was obliged, but failed, to object to such a finding in order to exhaust her administrative remedies as to this claim.

II. The district court properly found that it lacked jurisdiction to consider petitioner's nationality claim because this Court has exclusive jurisdiction to review such claims where the facts are undisputed. The district court further properly refused to transfer petitioner's nationality claim to this Court because petitioner had failed to exhaust the claim and because she did not meet the requirements of the transfer statute. More specifically, because petitioner's nationality claim arose in the context of removal proceedings, she was required to raise it at the administrative level, and then petition this Court for direct review of the claim within thirty days of the BIA's decision. There is no evidence that petitioner raised her nationality claim with the IJ or the BIA, as required under 8 U.S.C. § 1252(d)(1); to the contrary, the record shows that she conceded her alienage at the removal hearing.

Further, although the district court indicated its decision not to transfer petitioner's nationality claim to this Court was based on petitioner's failure to exhaust, even if the claim was not subject to exhaustion under § 1252(d)(1), it would have been untimely as petitioner did not file her claim in the district court within thirty days of the BIA's decision. Because 28 U.S.C. § 1631 permits transfer only if the underlying claim would have been timely when filed, had it been filed in the proper forum, the district court properly declined to transfer the nationality claim to this Court. Moreover, a transfer to this Court was not required under § 1631 "in the interest of justice" because the nationality claim is plainly without merit.

III. An immigration habeas petition under 28 U.S.C. § 2241 is not the proper vehicle for contesting an underlying state criminal conviction. Thus, the district court did not err in declining to reach the merits of petitioner's challenge to her underlying state convictions. In addition, a stay of petitioner's removal pending resolution of her collateral attack in state court was unwarranted under the traditional stay analysis employed by the district court and prescribed by this Court. The bases of petitioner's challenge to the validity of her state convictions -- that the government failed to comply with the Vienna Convention on Consular Relations and that her counsel rendered ineffective assistance because she allegedly was not advised of the deportation consequences of her convictions -- are without merit. This Court has held that a violation of the Vienna Convention is not sufficient to warrant even dismissal of a criminal indictment, much less vacatur of a final criminal conviction. Moreover, the record demonstrably refutes

petitioner's contention that she was not advised of the immigration consequences of her convictions. Rather, the transcripts show that petitioner was advised twice by the state court before her guilty plea that she might be deported as a result of these convictions. Thus, the district court correctly concluded that petitioner stands virtually no chance of succeeding on her state habeas petition. Moreover, despite petitioner's pending state collateral attack, her convictions are considered final for purposes of removal.

ARGUMENT

I. The District Court Properly Dismissed Petitioner's Habeas Petition For Lack of Jurisdiction Based on Petitioner's Failure to Exhaust Administrative Remedies

A. Relevant Facts

Petitioner is a native and citizen of Poland, who entered the United States in July 1979 as a visitor. Her status was adjusted to that of a lawful permanent resident in 1980. PA9. On December 3, 1999, petitioner was convicted by guilty plea of state charges of third-degree robbery and third-degree larceny. PA9.

Based on these convictions, petitioner was ordered removed from the United States as an aggravated felon. PA9. In a hearing before an IJ on April 29, 2002, petitioner through counsel conceded her removability as charged and conceded she was not eligible for any form of relief. PA10; GA51-52.

On May 23, 2002, petitioner filed a timely appeal of the IJ's removal order to the BIA. PA10. However, in her BIA appeal, filed *pro se*, petitioner challenged only the finding by the IJ that she was removable as an aggravated felon. GA57-58. Petitioner gave the following reason for her appeal to the BIA: "[Due] to recent [BIA decision], [i]t's not clear now whether my conviction (*sic*) constitute aggr[a]vated felonies. My conviction (*sic*) were state offenses that do not necessarily correspond to the federal definition of a felony." GA57. Although petitioner stated in her notice of appeal that she would file a separate brief, there is no evidence that a brief was filed. *See* GA58.

On December 18, 2002, the BIA dismissed petitioner's administrative appeal, finding that she conceded before the IJ that her convictions rendered her removable as charged. GA64. The BIA further noted it had not issued any precedent decisions "which would alter [petitioner's] removability as an aggravated felon." GA64, n.1.

On October 9, 2002, while in INS custody and prior to the BIA dismissing her administrative appeal, petitioner filed a *pro se* habeas petition in the district court challenging the IJ's removal order on the ground that her convictions were not aggravated felonies. On February 28, 2003, through counsel who was appointed shortly after the petition was filed, petitioner filed a motion for stay of removal in which she first indicated her intent to file an amended petition in the district court. PA3. In her amended petition, filed September 26, 2003, *see* PA-4, petitioner raised for the first time her claims (1) that she is not subject to removal because she is a "national of the United States" as defined in 8 U.S.C. § 1101(a)(22), and

(2) that her underlying criminal convictions are invalid because of the government's failure to comply with the Vienna Convention and because she received ineffective assistance of counsel. PA11.

On May 12, 2004, the district court dismissed petitioner's amended habeas petition for lack of subject matter jurisdiction because petitioner had failed to exhaust her administrative remedies as required by 8 U.S.C. § 1252(d)(1). PA8; PA18. The Court held that petitioner's failure to exhaust precluded habeas review of her "claims of ineffective assistance of counsel" during her criminal proceedings. PA16. The court additionally dismissed petitioner's nationality claim for want of jurisdiction, finding that this Court is the proper forum for review of such claims under § 1252(b)(5). PA18. Although the district court stated it could dismiss the nationality claim without deciding whether such a claim is subject to exhaustion principles, PA16, the court went on to conclude that the present claim is not reviewable by any court because of petitioner's failure to file a timely, exhausted claim. PA20.

B. Governing Law and Standard of Review

This Court reviews a district court's denial of a writ of habeas corpus *de novo* and any factual findings supporting the denial for clear error. *Kamagate v. Ashcroft*, 385 F.3d 144, 151 (2d Cir. 2004); *Theodoropoulos v. INS*, 358 F.3d 162, 167 (2d Cir.), *cert. denied*, 125 S. Ct. 37 (2004); *Wang v. Ashcroft*, 320 F.3d 130, 139-40 (2d Cir. 2003). The Court reviews the question "whether the district court

had subject matter jurisdiction in this case *de novo*." *Theodoropoulos*, 358 F.3d at 167.

It is well settled that before an alien can seek judicial review of a removal order, the alien is statutorily required to exhaust all administrative remedies available. *See* INA § 242(d)(1), 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right"). The statutory exhaustion requirement applies equally to direct petitions for review and habeas review of removal orders. *Theodoropoulos*, 358 F.3d at 168, 170 (alien's "failure to exhaust his administrative remedies deprived the district court of subject matter jurisdiction to entertain his habeas petition").

Moreover, each claim must be specifically raised below; generalized contentions at the administrative level are not sufficient to preserve specific claims for review by the courts. *See Foster v. INS*, 376 F.3d 75, 77-78 (2d Cir. 2004) (per curiam) (*pro se* petitioner's repeated general contentions to the IJ and BIA that he was not subject to removal did not preserve for review his claim that he was not aggravated felon; "the mere statement that one is not removable does not serve to raise a specific issue to the IJ"); *Arango-Aradondo v. INS*, 13 F.3d 610, 613-14 (2d Cir. 1994) (declining to consider constitutional claim for ineffective assistance of counsel that was not raised before the BIA). *See also United States v. Gonzalez-Roque*, 301 F.3d 39, 49 (2d Cir. 2002) (petitioner forfeited his due process claim by failing to raise it before the BIA).

This Circuit has repeatedly recognized the many important purposes of the administrative exhaustion doctrine, which include "ensur[ing] that the . . . agency responsible for construing and applying the immigration laws and implementing regulations, has had a full opportunity to consider a petitioner's claims before they are submitted for review by a federal court," *Theodoropoulos*, 358 F.3d at 171, "protecting the authority of administrative agencies, limiting interference in agency affairs, and promoting judicial efficiency by resolving potential issues," *Beharry v. Ashcroft*, 329 F.3d 51, 56 (2d Cir. 2003), as well as "preventing the 'frequent and deliberate flouting of administrative processes [that] could weaken the effectiveness of an agency.'" *Bastek v. Federal Crop Ins. Co.*, 145 F.3d 90, 93-94 (2d Cir. 1998) (quoting *McKart v. United States*, 395 U.S. 185, 193-95 (1969)).

Moreover, the Supreme Court and this Circuit have made clear that when statutorily required, exhaustion of administrative remedies is jurisdictional and must be strictly enforced, without exception. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required."); *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001) (holding "we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise"); *Bastek*, 145 F.3d at 94 ("Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them.").

While stressing the mandatory nature of the statutory exhaustion requirement, this Court in *Theodoropoulos* acknowledged "[t]here may be some limited circumstances

in which an exception to the general rule [of statutory exhaustion] might apply," based on the Supreme Court's discussion in *Booth*, *supra*, suggesting "that a party cannot be required to exhaust a procedure from which there is no possibility of receiving any type of relief." 358 F.3d at 173 (citing *Booth*, 532 U.S. at 736 & n.4). Subsequently, this Court applied the extremely narrow exception gleaned from *Theodoropoulos* and held "notwithstanding a habeas petitioner's failure to exhaust his claims before the BIA, as required by section 1252(d), we nonetheless have jurisdiction to consider the petitioner's claim if it is necessary to avoid manifest injustice." *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 53 (2d Cir. 2004). Thus, administrative exhaustion of each and every claim raised in the course of removal proceedings is statutorily mandated in all but the most unusual circumstances and only when "manifest injustice" would otherwise result. *See id.* [10]

C. Discussion

Because petitioner failed to comply with the statutory exhaustion requirement of 8 U.S.C. § 1252(d)(1), the district court properly dismissed her claims for want of

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[10] *But see United States v. Calderon*, - - - F.3d - - -, 2004 WL 2728580, *4 (2d Cir. Dec. 1, 2004) (in context of criminal reentry after deportation charge, holding that defendant's failure to exhaust administrative remedies as required by 8 U.S.C. § 1326(d) did not bar collateral review of removal order where defendant's waiver of administrative review was not knowing and intelligent).

subject matter jurisdiction. *Theodoropoulos*, 358 F.3d at 168. Though the district court dismissed petitioner's claims for failure to meet the less stringent judicial exhaustion doctrine, this Court can and should affirm for the reason that petitioner failed to comply with the statutory exhaustion requirement. *See United States v. Morgan*, 380 F.3d 698, 701 n.2 (2d Cir. 2004) (Court of Appeals can "affirm the judgment of the district court on any ground with support in the record, even one raised for the first time on appeal"). *Accord United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003).

This Court, in *Bastek*, explained the important distinction between statutory and judicial exhaustion:

> Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them. Common law (or "judicial") exhaustion doctrine, in contrast, recognizes judicial discretion to employ a broad array of exceptions that allow a plaintiff to bring his case in district court despite his abandonment of the administrative review process.
>
> . . . .
>
> Faced with unambiguous statutory language requiring exhaustion of administrative remedies, "[w]e are not free to rewrite the statutory text."

Bastek, 145 F.3d at 94 (citing *McNeil v. United States*, 508 U.S. 106, 111 (1993), and *McCarthy*, 503 U.S. at 144 ("Where Congress specifically mandates, exhaustion is

required. But where Congress has not clearly required exhaustion, sound judicial discretion governs.")).

The Court emphasized in *Bastek* that "[o]nly in the absence of an explicit statutory exhaustion requirement may courts exercise discretion and 'balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.'" *Bastek*, 145 F.3d at 94 (quoting *McCarthy*, 503 U.S. at 146). Accordingly, when a statute requires administrative exhaustion, "courts are not free simply to apply the common law exhaustion doctrine with its pragmatic, judicially defined exceptions. Courts must, of course, apply the terms of the statute." *Bastek*, 145 F.3d at 94 n.3 (citation and internal quotation marks omitted). *See also Coit Independence Joint Venture v. Federal Savings & Loan Ins. Corp.*, 489 U.S. 561, 579 (1989) ("[E]xhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute."); *Booth*, 532 U.S. at 741 & n.6.

Section 1252(d)(1) of the INA expressly requires exhaustion of administrative remedies prior to seeking federal court review of a final order of removal. Though petitioner timely appealed the IJ's removal order to the BIA, she challenged only the IJ's finding that her convictions constitute aggravated felonies. *See* GA57. Indeed, petitioner does not argue that her claims are not subject to exhaustion, nor can she. *See Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002) (failure to raise nationality claim before IJ and BIA deprived district court of subject matter jurisdiction to consider claim); *Beckles v. Attorney General*, No. 03-CV-138, 2004 WL 2743430,

*1 (E.D. Pa. Nov. 23, 2004) (same); *Boyd v. ICE*, Nos. 04CV1203(NG)(ASC), 04CV1636 (NG)(ASC), 2004 WL 2598277, *2 (E.D.N.Y. Nov. 10, 2004) (failure to exhaust claim of derivative citizenship with IJ and BIA as required by § 1252(d)(1) deprived district court of habeas jurisdiction).

Moreover, petitioner's assertion that her nationality claim was exhausted because the IJ and BIA necessarily decided the issue in determining that she was an alien subject to removal, *see* Pet. Brief at 8, should be rejected. The record reveals that petitioner, who was represented by counsel during removal proceedings before the IJ, conceded her removability and all of the charges in the Notice to Appear, including that she is a citizen of Poland and *not a national or citizen of the United States*. *See* GA29, GA51-52. This Court has declined to consider an issue preserved when an alien appearing *pro se* made only "generalized protestations" that removal was improper, requiring instead that the alien have raised a specific issue administratively. *Foster*, 376 F.3d at 78. *See also Gonzalez-Roque*, 301 F.3d at 49. It follows that an issue conceded by the petitioner at the administrative level cannot be considered preserved for judicial review. Therefore, judicial review of the claims petitioner first raised in her amended habeas petition filed in the district court, including her nationality and ineffective assistance of counsel claims, was foreclosed by § 1252(d)(1).

Further, as the district court found, no judicially created exceptions to the exhaustion requirement, such as futility, apply. *See* PA15; *see also Booth*, 532 U.S. at 741 n.6 (observing that "futility exceptions" may not be read into

statutory exhaustion requirements); *Beharry*, 329 F.3d at 58 (same). Both questions at issue in this appeal could have and should have been addressed in the first instance by the IJ and the BIA as both are within their unique subject matter jurisdiction (even though the claims would have been resolved adversely to petitioner). *See, e.g.*, *In re Navas-Acosta*, 23 I. & N. Dec. 586, 587-88 (BIA 2003) (addressing nationality claim, and holding that United States nationality cannot be acquired through oath of allegiance pursuant to application for naturalization, but "only through birth or naturalization"); *In re Grabyelsky*, 20 I. & N. Dec. 750, 752 (BIA 1993) (addressing claim regarding impact of post-conviction challenges, holding that such challenges do not defeat finality of conviction for removal purposes unless and until convictions have been overturned); *cf. In re Punu*, 22 I. & N. Dec. 224, 229-30 (BIA 1998) (affirming IJ's conclusion that alien is removable as an aggravated felon because deferred adjudication under Texas law is a final conviction for immigration purposes).

Moreover, the narrow exception to statutory exhaustion suggested by the Court in *Theodoropoulos*, 358 F.3d at 173, and applied in *Marrero Pichardo*, 374 F.3d at 52-53, is not applicable in this case. In *Marrero Pichardo*, petitioner was subject to a removal order based on multiple New York state DUI convictions. 374 F.3d at 50. After the removal order became administratively final, this Court held in a separate case that such DUI convictions are not crimes of violence and therefore not aggravated felonies for purposes of removal. *See Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001). Despite petitioner's failure to timely raise this Court's decision in *Dalton* during habeas

proceedings in the district court, this Court found that application of the narrow exception gleaned from *Theodoropoulos* was necessary to avoid manifest injustice because of the unusual circumstances of an intervening change in the law. *Marrero Pichardo*, 374 F.3d at 52-53.

In this case, there are no similar "dire consequences" compelling application of the exceedingly narrow exception to the statutory exhaustion requirement. *See id.* at 54. Petitioner's procedural default will not result in manifest injustice. Unlike in *Marrero Pichardo*, there has been no intervening change in the law that would affect petitioner's status as a removable aggravated felon. *See id.* In addition, her nationality claim appears to be foreclosed by the majority of cases that have decided this issue. *See e.g., Oliver v. INS*, 517 F.2d 426, 428 & n.3 (2d Cir. 1975) (primarily, an alien becomes a national only at birth, and "thereafter the road lies through naturalization, which leads to becoming a citizen and not merely a 'national'"); *Cabebe v. Acheson*, 183 F.2d 795, 797 (9th Cir. 1950) ("United States nationality depends primarily upon the place of birth . . . . Nationality may also be acquired by naturalization . . . ."); *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 965 (9th Cir. 2003) (holding petitioner did not become a national of the United States by signing pledge of allegiance in naturalization application; under the INA, a person may become a national of the United States only through birth or naturalization), *cert. denied*, 540 U.S. 1104.[11] Furthermore, as explained *infra*, at Point III,

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[11] *Accord Salim v. Ashcroft*, 350 F.3d 307, 310 (3rd Cir. 2003) ("[F]iling an application for naturalization does (continued...)

petitioner has little chance of success on her collateral attack of her underlying state convictions. *See Marrero Pichardo*, 374 F.3d at 54 (finding "significant that [petitioner's] claim refers not to a collateral matter, but to one going to the very basis of his deportation"). Accordingly, there is no evidence in the record "from which to conclude that petitioner's 'claim is virtually certain to succeed.'" *Boyd,* 2004 WL 2598277 at *2 (quoting *Marrero Pichardo*, 374 F.3d at 54).

In sum, no exception excuses petitioner's procedural default of her claims. Thus, this Court should affirm the district court's dismissal of petitioner's ineffective assistance of counsel and nationality claims for lack of jurisdiction on the ground that petitioner failed to comply with the statutory exhaustion requirement.

II. The District Court Properly Declined to Review the Merits of Petitioner's Nationality Claim and Properly Refused to Transfer the Claim to This Court

A. Relevant Facts

The relevant facts are found in the Statement of Facts, above.

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[11] (...continued)
not prove that one 'owes permanent allegiance to the United States.' [For] a citizen of another country, nothing less than citizenship will show 'permanent allegiance to the United States.'"); *United States v. Jimenez-Alcala*, 353 F.3d 858, 861 (10th Cir. 2003).

B. Governing Law and Standard of Review

Section 242 of the INA, 8 U.S.C. § 1252, governs judicial review of final orders of removal. Judicial review may proceed by way of direct petition for review in the court of appeals, *see* § 1252(a)(1) (authorizing judicial review), § 1252(b)(2) (establishing venue for (a)(1) petitions in courts of appeals) or, in certain circumstances where such review is not available under § 1252(a)(1), via habeas petition filed in the district court. *Calcano-Martinez v. INS*, 533 U.S. 348, 351-52 (2001); *INS v. St. Cyr*, 533 U.S. 289, 313-14 (2001). Under 8 U.S.C. § 1252(a)(2)(C), the courts of appeals lack jurisdiction to review a final order of removal entered against an alien who is removable as an aggravated felon. *Brissett v. Ashcroft*, 363 F.3d 130, 133 (2d Cir. 2004). Nonetheless, the Court retains jurisdiction to decide whether this jurisdictional bar applies. *Id.* Further, this Court has held that the question whether a petitioner "is an alien whose petition is unreviewable under § 1252(a)(2)(C) is co-extensive with the . . . argument that [petitioner] is a citizen and therefore not removable." *Brissett*, 363 F.3d at 133. Accordingly, the Court has reviewed such claims made in the context of petitions for review by aggravated felons. *See id.*

All requests for judicial review of removal orders pursuant to § 1252(a)(1) in the courts of appeals must be filed within thirty days of the date of the final order of removal. 8 U.S.C. § 1252(b)(1). Compliance with the thirty-day deadline is a "strict jurisdictional prerequisite" to review. *Malvoisin v. INS*, 268 F.3d 74, 75 (2d Cir.

2001) (dismissing untimely petition for review for lack of jurisdiction).

Nationality claims, when raised in the context of removal proceedings like these, are governed by the terms of 8 U.S.C. § 1252(b)(5). *See Austin v. INS*, 308 F. Supp. 2d 125, 127 (E.D.N.Y. 2004).

Section 1252(b)(5) provides in pertinent part:

> (A) Court determination if no issue of fact -- If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.
>
> (B) Transfer if issue of fact -- If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim . . . .

> (C) Limitation on determination -- The petitioner may have such nationality claim decided only as provided in this paragraph.[12]

A majority of courts to address § 1252(b)(5) have interpreted this provision to require judicial review of nationality claims in the courts of appeals in the first instance. *See Austin*, 308 F. Supp. 2d at 127; *Rodriguez v. Ashcroft*, 02 Civ.1188 (AGS) (GWG), 2003 WL 42018, *4 (S.D.N.Y. Jan. 6, 2003); *Boyd*, 2004 WL 2598277 at *2; *Dorival v. Ashcroft*, No. CV-02-6162 (DGT), 2003 WL 21997740, *6 (E.D.N.Y. Aug. 21, 2003) ("plain language of § 1252(b)(5) precludes a district court from considering, in the first instance, a nationality claim raised in the context of removal proceedings") (citations omitted); *Taniguchi*, 303 F.3d at 955 (§ 1252(b)(5) is "the exclusive means of determining U.S. citizenship for aliens in removal proceedings"); *cf. Langhorne v. Ashcroft*, 377 F.3d 175, 176 (2d Cir. 2004) (on appeal of citizenship

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[12] Outside the context of removal proceedings, nationality claims may be raised through an action for declaratory judgment in the district court. *See* 8 U.S.C. § 1503(a) ("no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such removal proceeding."). Based on the plain language of § 1503, an action for declaratory judgment on petitioner's nationality claim could not be pursued because it arose in the context of removal proceedings. *See Austin*, 308 F. Supp. 2d at 126.

claim, deeming the habeas petition to be transferred to the court of appeals for proceedings under INA § 242 in order to cure the "jurisdictional defect" of filing in the district court), *pet'n for cert. filed*, No. 04-7840 (Dec. 13, 2004).[13]

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[13] The Fourth Circuit has held, in *Dragenice v. Ridge*, 389 F.3d 92, 99 (4th Cir. 2004), that district courts retain habeas jurisdiction over nationality claims. This holding, however, was expressly premised on the conclusion that a court of appeals does *not* have jurisdiction to decide nationality claims when raised by a criminal alien. This Court expressly rejected that premise in *Brissett*, 363 F.3d at 133, and therefore the *Dragenice* court's conclusion is incompatible with binding circuit precedent. Other circuits have agreed with this Court. *See, e.g., Hughes v. Ashcroft*, 255 F.3d 752, 754 (9th Cir. 2001); *Fierro v. Reno*, 217 F.3d 1, 3 (1st Cir. 2000); *Wedderburn v. INS,* 215 F.3d 795, 797 (7th Cir. 2000).

Moreover, the Fourth Circuit's decision in *Dragenice* contradicts prior decisions within that circuit, which it failed to cite. *See, e.g., Bowrin v. INS*, 194 F.3d 483, 486 (4th Cir. 1999) (holding that court of appeals is stripped of jurisdiction to review criminal alien's order of removal, but retains jurisdiction to determine existence of jurisdictional facts, including whether petitioner is an alien); *Hall v. INS*, 167 F.3d 852, 855-56 (4th Cir. 1999) (acknowledging that "majority of circuits" have held that appellate courts retain jurisdiction to determine threshold questions of alienage in the wake of IRIIRA's jurisdiction-stripping provisions, and adhering to the majority view).

Likewise, *Lee v. Ashcroft*, No. 01CV0997(SJ), 2003

(continued...)

If the district court could not assert habeas jurisdiction over petitioner's nationality claim, it was required to transfer the claim to this Court unless petitioner did not meet the standard for such transfers. *See Paul v. INS*, 348 F.3d 43, 46 (2d Cir. 2003). The applicable transfer statute, 28 U.S.C. § 1631, provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice,

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[13] (...continued)
WL 21310247, *6 (E.D.N.Y. May 27, 2003) (*Lee III*), incorrectly applied the "plain statement rule" of *St. Cyr* to hold that § 1252(b)(5) does not preclude habeas review of nationality claims. As this Court explained in *Theodoropoulos*, however, the "plain statement rule" was triggered in *St. Cyr* because to rule otherwise would have left a class of aliens without any forum for judicial review; application of § 1252(d)(1) to channel their claims into a particular forum (administrative proceedings and then the court of appeals) did not divest aliens of a forum, and hence should be construed to apply to certain habeas actions. 389 F.3d at 169-72.

Finally, *Shittu v. Elwood*, 204 F. Supp. 2d 876, 878-81 (E.D.Pa. 2002), is not instructive, because there the district court decided a nationality claim in the context of a habeas petition without discussing § 1252(b)(5).

> transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

This Court reviews the question "whether the district court had subject matter jurisdiction in this case *de novo*." *Theodoropoulos*, 358 F.3d at 167. The Court reviews a district court's refusal to transfer an action or claim pursuant to 28 U.S.C. § 1631 for abuse of discretion. *Paul*, 348 F.3d at 46-47.

C. Discussion

In this case, because petitioner's nationality claim arose in the context of removal proceedings, she was required to raise it at the administrative level, and then petition this Court for direct review of the claim within thirty days of the BIA's decision. 8 U.S.C. §§ 1252(b)(1), (b)(5), and (d)(1). *See Taniguchi*, 303 F.3d at 955-56; *Austin*, 308 F. Supp. 2d at 127; *Boyd*, 2004 WL 2598277 at *2; *Edwards v. INS*, No. 03CV1509(JG), 2004 WL 315233, *1-2 (E.D.N.Y. Feb. 17, 2004) (holding that district court did not have jurisdiction over nationality claim because under 8 U.S.C. § 1252(b)(5), nationality claims must be reviewed in the courts of appeals); *Alvarez-Garcia v. INS*, 234 F. Supp. 2d 283, 289-90 (S.D.N.Y. 2002) (holding that "[t]he sole and exclusive avenue for review of a claim of nationality is by direct petition for review to . . . Court of Appeals"); *Marquez-Almanzar v. Ashcroft,* No.

03Civ.1601(GEL), 2003 WL 21283418, *3-5 (S.D.N.Y. June 3, 2003) (same; also explaining that clear statement rule of *St. Cyr*, does not apply to 8 U.S.C. § 1252(b)(5) because the statute does not involve a complete preclusion of review of petitioner's nationality claim) (citations omitted); *cf. Langhorne*, 377 F.3d at 176. Thus, the district court properly declined to consider the merits of petitioner's nationality claim for want of jurisdiction.

The district court further correctly refused to transfer petitioner's nationality claim to this Court because the claim could not have been reviewed by this Court at the time it was filed. First, petitioner's claim was untimely as it was not filed within thirty days of the BIA's decision. *See* 8 U.S.C. § 1252(b)(1). *See also Edwards*, 2004 WL 315233 at *1-2 (declining to transfer petition to court of appeals because it was not timely filed within thirty days of the BIA's decision).[14] *Compare Paul*, 348 F.3d at 46 (district court abused its discretion in refusing to transfer *pro se* petition for review to court of appeals when it was timely filed in district court under § 1252(b)(1)). Although the initial habeas petition was timely filed under § 1252(b)(1), it did not raise the issue of nationality and it was subject to dismissal for lack of jurisdiction because petitioner's BIA appeal was still pending. The amended petition in which she first raised the nationality claim was not filed until September 26, 2003, nine months after the BIA's decision. Even if the Court construed petitioner's motion for stay of removal filed February 28, 2003 as an

[14] *But see Austin*, 308 F. Supp. 2d at 127-28 (transferring claim to court of appeals despite petitioner's failure to exhaust).

amended petition -- because she first indicated her intention of amending her petition to include the nationality claim -- the motion was not filed until nearly three months after the BIA's decision and thus could not be considered timely.

Petitioner further failed to exhaust her nationality claim with the IJ and the BIA as required under 8 U.S.C. § 1252(d)(1). *See Taniguchi*, 303 F.3d at 956 (affirming district court's order dismissing nationality claim for lack of habeas jurisdiction and refusing to transfer claim to court of appeals because petitioner failed to exhaust claim with BIA and claim was untimely); *Beckles*, 2004 WL 2743430 at *1 (dismissing nationality claim for failure to exhaust).[15] Consequently, the district court properly found that transferring the claim was not required as petitioner had failed to timely file an exhausted claim in the district

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[15] Petitioner relies upon *Lee v. Ashcroft*, 216 F. Supp. 2d 51, 58 (E.D.N.Y. 2002) ("*Lee I*"), for the proposition that the district court in this case could have asserted habeas jurisdiction over the nationality claim. However, as noted by the *Lee* court in its reconsideration of the issue, the petitioner in that case (unlike petitioner here) filed a timely direct petition for review of the order of removal which was then transferred to the Fifth Circuit. *See Lee III*, 2003 WL 21310247 at *5 n.2. The Fifth Circuit dismissed the petition for review for lack of jurisdiction on other grounds. *Id.* The petitioner in *Lee* also had exhausted his citizenship claim administratively. *Lee I*, 216 F. Supp. 2d at 53 (noting "petitioner filed [with the IJ] a *pro se* motion seeking derivation of citizenship through the naturalization of his father").

court and therefore it was not subject to review by any court. *See* 28 U.S.C. § 1631 ("the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought *at the time it was filed or noticed*") (emphasis added).

In the alternative, even if petitioner's nationality claim had been timely and exhausted, a transfer was not required under § 1631 "in the interest of justice" given the patent lack of merit of petitioner's nationality claim. *See Adeleke v. United States*, 355 F.3d 144, 152 (2d Cir. 2004) (declining to transfer case to Court of Claims where plaintiff "so plainly fails to allege" an enforceable right "that transfer would not serve 'the interest of justice'"); *Wigglesworth v. INS*, 319 F.3d 951, 959-60 (7th Cir. 2003) (declining to transfer petition for review of immigration matter to district court for habeas consideration, finding that claims were so insubstantial that transfer was not "in the interest of justice"); *Philips v. Seiter*, 173 F.3d 609, 610-11 (7th Cir. 1999) ("there is no reason to raise false hopes and waste judicial resources by transferring a case that is clearly doomed"); *Haugh v. Booker*, 210 F.3d 1147, 1150 (10th Cir. 2000).

As noted, *supra*, at Point I.C., and recognized by the district court, PA19-20 n. 6, petitioner's claim that she is a "national of the United States" based on having filed two naturalization applications is untenable in light of the substantial case law holding otherwise. *See Oliver v. INS*, 517 F.2d 426, 428 & n.3 (2d Cir. 1975) (primarily, an alien becomes a national only at birth, and "thereafter the road lies through naturalization, which leads to becoming a

citizen and not merely a 'national'"); *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 965 (9th Cir. 2003) (holding petitioner did not become a national of the United States by signing pledge of allegiance in naturalization application; under the INA, a person may become a national of the United States only through birth or naturalization), *cert. denied*, 540 U.S. 1104 (2004); *Salim v. Ashcroft*, 350 F.3d 307, 310 (3rd Cir. 2003) ("[F]iling an application for naturalization does not prove that one 'owes permanent allegiance to the United States.' [For] a citizen of another country, nothing less than citizenship will show 'permanent allegiance to the United States.'"); *United States v. Jimenez-Alcala*, 353 F.3d 858, 861 (10th Cir. 2003). *See also Miller v. Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting) ("Nationality and citizenship are not entirely synonymous; one can be a national of the United States and yet not be a citizen. 8 U.S.C. § 1101(a)(22). The distinction has little practical impact today, however, for the only remaining noncitizen nationals are residents of American Samoa and Swains Island.") (citation omitted).

Based on the foregoing, this Court should find that the district court properly declined to consider the merits of petitioner's nationality claim for want of jurisdiction and further properly exercised its discretion in declining to transfer the claim because this Court would not have had jurisdiction to review the claim at the time it was filed.

III. The District Court Properly Declined to Review the Merits of Petitioner's Collateral Attack on Her Underlying State Convictions and Correctly Denied a Stay of Removal Pending Resolution of Her Parallel State Habeas Petition

A. Relevant Facts

In June 1999, petitioner was arrested on charges of robbery and larceny in violation of Connecticut state law. At petitioner's initial presentment on June 7, 1999, in the Superior Court at Litchfield, Connecticut, petitioner was advised, "[i]f you are not a citizen of the United States . . . a conviction for the offense of which you have been charged [may] result in deportation, exclusion, from admission to the United States, or denial of naturalization pursuant to the laws of the United States." GA11. At the plea colloquy on October 5, 1999, the petitioner was advised again of the possible deportation consequences of her guilty plea, as follows:

> THE COURT: Ms. Niver, if you are not a citizen of the United States, you should understand that conviction of these offenses could result in deportation, exclusion from admission to the United States, and/or denial of naturalization pursuant to the laws of the United States.
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you understand that, Ms. Niver?
>
> THE DEFENDANT: Yes.

THE COURT: Have you discussed that with your attorney?

THE DEFENDANT: Yes.

THE COURT: Ms. Niver, have you understood my questions to you?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions?

THE DEFENDANT: No. I understand.

GA24. On December 3, 1999, petitioner was sentenced to more than one year in prison on each count. PA9.

Based on these convictions, on April 29, 2002, petitioner was ordered removed from the United States as an aggravated felon. PA10. At no time before the IJ or in her appeal to the BIA did petitioner challenge the validity of her underlying convictions.

On October 9, 2002, while in INS custody and prior to the BIA dismissing her appeal, petitioner simultaneously filed a state habeas petition challenging the validity of her convictions and a *pro se* habeas petition in the district court challenging the IJ's removal order on the ground that her convictions were not aggravated felonies. PA10.

Only in an amended habeas petition, filed September 26, 2003, did petitioner claim for the first time that her underlying state criminal convictions were invalid due to the government's alleged failure to comply with the

Vienna Convention on Consular Relations and because she received ineffective assistance of counsel primarily due to counsel's alleged failure to advise petitioner of the immigration consequences of her guilty plea. *See* PA11.

On May 12, 2004, the district court dismissed petitioner's amended habeas petition for lack of subject matter jurisdiction because petitioner failed to exhaust administrative remedies. PA8, PA18. The district court additionally held that an immigration habeas petition under § 2241 is not the proper vehicle for review of petitioner's underlying state convictions. PA17. The district court further denied petitioner's request for a stay of removal pending resolution of her state habeas petition challenging her convictions, because "petitioner has virtually no likelihood of success on her state habeas claim." PA21 (citing *Mohammed v. Reno*, 309 F.3d 100, 103 (2d Cir. 2002)).

B. Governing Law and Standard of Review

This Court reviews "whether the district court had subject matter jurisdiction in this case *de novo*." *Theodoropoulos*, 358 F.3d at 167. While this Court has not directly ruled on the availability of 28 U.S.C. § 2241 as a vehicle for collateral attack on a state conviction serving as the basis for a removal order, both Supreme Court precedent and the rulings of other circuits counsel against such a holding in this case. Congress has expressly provided a mechanism for challenging state convictions in federal court, in the form of 28 U.S.C. § 2254. The Supreme Court has barred collateral attack upon state convictions in other federal procedural settings, where

those convictions serve as the basis for sentencing enhancements. *Daniels v. United States*, 532 U.S. 374, 382 (2001) (extending bar to post-conviction challenges under 28 U.S.C. § 2255); *Custis v. United States*, 511 U.S. 485, 487 (1994) (applying bar to federal sentencing proceedings); *see also Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 403-404 (2001) (extending *Daniels* to challenge under 28 U.S.C. § 2254 to state sentence that was enhanced as a result of prior convictions). As the Supreme Court has explained, sentencing enhancements are based on the fact of conviction, and both ease of administration and the finality of convictions require a limit on allowing a prisoner to obtain a rehearing of the state's case. *Daniels*, 532 U.S. at 402.

This Court has squarely held that "[c]ollateral attacks are not available in a habeas petition challenging the BIA's removal decision." *Abimbola v. Ashcroft*, 378 F.3d 173, 181 (2d Cir. 2004) (summarily rejecting petitioner's claim that the state conviction which rendered him deportable was invalid, since such a "contention is nothing more than a collateral attack on his state conviction"). In doing so, this Court cited with approval the Tenth Circuit's decision in *Broomes v. Ashcroft*, 358 F.3d 1251, 1255 (10th Cir.), *cert. denied*, 73 U.S.L.W. 3353 (Dec. 13, 2004), which had found the reasoning of *Daniels, Custis* and *Coss*, *supra*, to be equally applicable in the immigration context. *See also Drakes v. INS*, 330 F.3d 600, 603-06 (3d Cir.) (holding petitioner cannot collaterally attack state conviction which serves as predicate to removal order in § 2241 habeas proceeding), *cert. denied*, 540 U.S. 1008 (2003); *Contreras v. Schiltgen*, 151 F.3d 906, 908 (9th Cir. 1997) ("when a

habeas petition attacks the use of a prior conviction as a basis for INS custody, and the prior sentence has expired, federal habeas review is limited").[16]

In any event, despite the pendency of a state collateral attack, a petitioner's state convictions are considered final under the INA for purposes of removal. Section 101(a)(48) of the INA, 8 U.S.C. § 1101(A)(48), defines the term "conviction" as follows:

> 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 --
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

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[16] District courts in this Circuit have likewise held that petitioners may not attack the state convictions on which their removal order is based in the context of immigration habeas proceedings under § 2241. *See, e.g., Harris v. INS*, No. 03 CV 2399(SJ), 2004 WL 951510, *2 (E.D.N.Y. Apr. 29, 2004); *Plummer v. Ashcroft*, 258 F. Supp. 2d 43, 45 (D. Conn. 2003); *Pietre v. Bintz*, No. 01-CV-0260, 2003 WL 1562273, *4 (N.D.N.Y. Mar. 25, 2003); *De Kopilchak v. INS,* 98CIV.7931, 2000 WL 278074, *1-2 (S.D.N.Y. Mar. 14, 2000).

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

This Court has noted that the pendency of state collateral proceedings does not change the finality of convictions for removal purposes. *See Montilla v. INS*, 926 F.2d 162, 164 (2d Cir.1991) ("conviction is considered final and a basis for deportation when appellate review of the judgment -- not including collateral attacks -- has become final."). *See also Marino v. INS*, 537 F.2d 686, 691-92 (2d Cir. 1976) (holding, prior to enactment of § 1101(a)(48), that finality of conviction for immigration purposes occurs when "direct appellate review of the conviction (as contrasted with collateral attack) has been exhausted or waived").

With respect to a request for stay of removal, this Court has held that the heightened standard for stays under INA § 242(f)(2), 8 U.S.C. § 1252(f)(2), added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[17] does not apply to a request for a temporary stay of removal pending appeal of the denial of an immigration habeas petition.[18] *See Mohammed*, 309

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[17] Pub. Law. No. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996).

[18] INA § 242(f)(2), codified at 8 U.S.C. § 1252(f)(2), provides that "[n]otwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien (continued...)

F.3d at 100, 103 (vacating district court's stay order under traditional injunctive relief analysis where petitioner had virtually no chance of success on the merits of his claim for § 212(c) relief). The Court instead applies the traditional injunctive relief analysis which weighs the following four criteria: "the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing the stay if one is issued, and the public interest." *Mohammed*, 309 F.3d at 100.

This Court reviews a refusal to enter a stay of removal for abuse of discretion. *See Anderson v. McElroy*, 953 F.2d 803 (2d Cir. 1992) (reviewing BIA's denial of discretionary stay). *See also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (discussing four-part standard for issuing stay in context of grant of criminal habeas relief, and emphasizing district court's concomitant "broad discretion"); *Fair Housing in Huntington Committee Inc. v. Town of Huntington, New York*, 316 F.3d 357, 364-65 (2d Cir. 2003) ("we review a court's denial of a preliminary injunction for an abuse of discretion").

C. Discussion

Although petitioner currently has pending a state collateral attack on her convictions, she completed her state sentence and chose not to pursue direct appeal of that sentence while she was in state custody. Thus, her state

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[18] (...continued)
shows by clear and convincing evidence the entry or execution of such order is prohibited as a matter of law."

convictions are final for purposes of the removal order in this case. *See* 8 U.S.C. § 1101 (a) (48) (defining the term "conviction"); *Montilla*, 926 F.2d at 164 ("conviction is considered final and a basis for deportation when appellate review of the judgment -- not including collateral attacks -- has become final").

As with the sentencing enhancements at issue in *Daniels* and *Coss*, *supra*, the "statutory language which makes [an alien] deportable speaks only of the fact of conviction. Nothing in the statute requires or authorizes the INS to inquire into whether the conviction is valid." *Contreras v. Schiltgen,* 122 F.3d 30, 32 (9th Cir. 1997), *vacated on reh'g and holding re-affirmed*, 151 F.3d 906 (9th Cir. 1998).

Further, petitioner's unsupported argument that 28 U.S.C. § 2241 "should" serve as a vehicle for collateral attack of an underlying state conviction, *see* Pet. Brief at 9, is squarely foreclosed by *Abimbola*, 378 F.3d at 181. Moreover, allowing collateral attack of the underlying state conviction in this proceeding would "'sanction an end run around statutes of limitations and other procedural barriers.'" *Drakes*, 330 F.3d at 605 (quoting *Daniels*, 532 U.S. at 383). Petitioner had ample opportunity to directly challenge her state convictions. As in *Drakes*, petitioner in this case was notified of the intention of the INS to pursue deportation while she was still in state custody. *See Drakes*, 330 F.3d at 606. Petitioner, however, waited until she was in INS custody before challenging her state convictions, and thus missed her opportunity to gain

federal habeas review of the convictions through § 2254.[19] *Broomes*, 358 F.3d at 1254. Petitioner should not be permitted to open a new avenue of review through § 2241 upon being detained by the INS. *Contreras*, 151 F.3d at 98; *Broomes*, 358 F.3d at 1254-55.

Despite the inability of the district court to entertain a collateral attack upon petitioner's state convictions, the court did consider whether a stay of removal was warranted while her state habeas petition was pending. The court properly followed the standard of review applied

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[19] In any event, petitioner's procedural default in not appealing her state conviction precludes federal habeas review under § 2254. *See* 28 U.S.C. § 2254(b)(1)(A). *See also Wainwright v. Sykes*, 433 U.S. 72 (1977) (claims of error in criminal proceedings must first be raised in state court in order to form the basis for relief in federal habeas proceedings); *Breard v. Greene*, 523 U.S. 371, 375 (1998) (same; holding that petitioner's procedural default in not asserting a Vienna Convention claim in state court precludes him from raising the claim in federal habeas case). What's more, even if petitioner had not defaulted procedurally on her claims under the Vienna Convention, such claims have not been given the weight necessary to invalidate an indictment, much less a conviction. *See, e.g., United States v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001) (holding that dismissal of indictment would not be proper remedy for Vienna Convention violation). *See also United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001) (declining to suppress evidence on basis of Vienna Convention violation).

by this Court and concluded that a stay was not warranted.

Under the traditional stay analysis this Court has prescribed, four criteria are relevant: "the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing the stay if one is issued, and the public interest." *Mohammed*, 309 F.3d at 100. The court in *Mohammed* followed the approach adopted by the District of Columbia Circuit in applying this standard: "The necessary 'level' or 'degree' of success will vary according to the court's assessment of other [stay] factors." *Id.* (quoting *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (internal quotation marks omitted). The court further concluded that "the likelihood of success" factor in the context of a request for stay of removal "means something less than 50 percent." 309 F.3d at 102. In *Mohammed*, despite this threshold, the court vacated the stay entered by the district court finding that Mohammed had virtually no chance of success on his claim of eligibility for § 212(c) relief. *Id.* at 103.

As in *Mohammed*, based on the evidence in the record in this case, petitioner has virtually no chance of success on her state habeas claim. Petitioner was made aware of the possibility of deportation as a result of her plea, and thus her plea was knowing. The transcripts of the plea colloquy on October 5, 1999, show that the state court advised petitioner "that conviction of these offenses could result in deportation, exclusion from admission to the United States, and/or denial of naturalization . . . ." GA24. In fact, the transcript reveals that petitioner confirmed that she had discussed this possibility with her attorney. GA24.

She was likewise advised at her initial presentment on June 7, 1999. GA11. *See State v. Irala*, 792 A.2d 109, 123-25 (Conn. App. 2002) (the rule providing for instruction on deportation consequences is designed to "put defendants on notice that their resident status could be implicated by the plea").

Applying the traditional injunctive relief standard to the facts of this case, the district court properly concluded that the petitioner's claims in the state court have virtually no chance of success and as such, a stay of removal was unwarranted. PA21. Based on the foregoing, this Court should likewise affirm the district court's decision to decline to issue a stay.[20]

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[20] While this Court granted a stay of removal in *Arango-Aradondo v. INS*, 13 F.3d 610, 614-15 (2d Cir. 1994), the case is distinguishable from the instant case. There, the alien raised an ineffective assistance of counsel claim directly challenging his representation in the removal proceedings. In this case, petitioner is mounting a collateral attack on her underlying convictions. As explained above, the case law makes clear that such a collateral attack does not change the finality of the conviction for removal purposes.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: January 5, 2005

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,359, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes, and this Certification.

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ADDENDUM OF STATUTES

8 U.S.C. 1252 Judicial Review of Orders of Removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

* * *

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

* * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

* * *

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been

brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

8 U.S.C. § 1503(a)

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this or any other act, or (2) is in issue in any such removal proceeding.

28 U.S.C. § 1631

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.