

Jonathan Gradess, Executive Director
Manuel D. Vargas, Project Director,
Criminal Defense Immigration Project
Sejal R. Zota, Law Graduate on the Brief
NEW YORK STATE DEFENDERS ASSOCIATION
P. O. Box 20058, West Village Station
New York, New York 10014

Joshua L. Dratel
Joshua L. Dratel, P. C.
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
14 Wall Street
New York, New York 10005

Laura Johnson, Director,
Special Litigation Unit
Criminal Defense Division
THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK
90 Church Street
New York, New York 10007

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

----- X

In the Matter of

Miguel DEVISON-Charles

A45 382 757

In removal proceedings

----- X

BRIEF AMICI CURIAE

of the

NEW YORK STATE DEFENDERS ASSOCIATION
NEW YORK STATE CRIMINAL DEFENSE LAWYERS ASSOCIATION
THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK

in response to

SERVICE MOTION TO RECONSIDER

INTRODUCTION AND INTEREST OF *AMICI*

Amici offer this brief in response to the motion for reconsideration filed by the Immigration and Naturalization Service (INS) in Matter of Devison, Interim Decision #3435 (BIA 2000).

In Devison, the Board of Immigration Appeals (BIA), after *en banc* review, unanimously and correctly held that an adjudication of youthful offender status pursuant to Article 720 of the New York Criminal Procedure Law corresponded to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act, and therefore does not constitute a judgment of conviction for a crime under the immigration statute.

Subsequent to the Devison decision, *amici* organizations informed New York State defense lawyer that once again they and their teenaged noncitizen clients could rely on the assurance expressly given by the law that a youthful offender adjudication is a non-criminal disposition that does not subject a young noncitizen to the immigration consequences of a criminal conviction. Thus, New York State defense lawyers have been informing their current, as well as their past, young immigrant clients that a youthful offender disposition would not trigger these consequences.

Amici organizations have recently learned, however, of the INS' motion to reconsider the Board's decision in Devison. Although *amici* do not believe that the INS' motion raises any new significant arguments that were not previously considered by the Board, *amici* offer this response – should the Board need or wish it – because of the relevant expertise on New York criminal and juvenile law that *amici* have to offer, and because of the huge impact of the Board's final resolution of this issue on thousands of young immigrants other than the respondent.

The **New York State Defenders Association** (NYSDA) is a not-for-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and other persons throughout the State of New York. Its objectives are to improve the quality of public

defense services in the state, establish standards for practice in the representation of poor people, and engage in a statewide program of community legal education. Among other initiatives, NYSDA operates the Criminal Defense Immigration Project, which provides public defender, legal aid society, and assigned counsel program lawyers with legal research and consultation, publications, and training on issues involving the interplay between criminal and immigration law.

The **New York State Association of Criminal Defense Lawyers** is a non-profit membership organization of more than 1,100 attorneys who practice criminal defense law in the State of New York. Its purpose is to assist, educate and provide support to the criminal defense bar to enable them to better serve the interest of their clients and to enhance their professional standing.

The **Legal Aid Society of the City of New York** is a private, non-profit legal services agency that represents poor New York City residents who cannot afford to hire a lawyer. The Criminal Defense Division and the Juvenile Rights Division together employ more than 500 attorneys. Since 1965, the Society has been the primary public defender for indigent persons who are prosecuted for crimes and juvenile offenses in state courts in New York City. In addition, the Civil Division includes an Immigration Unit that represents noncitizens in matters relating to deportation. Because of the diversity of the New York City population, a large percentage of the Society's clients are not United States citizens.

Many of the current and past clients of the staff and members of amici organizations are young noncitizens who are understandably concerned about the threat of deportation arising from the INS' recent position on New York youthful offender dispositions. The youthful offender disposition option has existed under New York State law for decades and, over the years, thousands of teenaged immigrants have accepted such dispositions believing – as did the state

court sentencing judge and the prosecution -- that they would not suffer the consequences of a criminal conviction, and certainly not the consequence of removal from the United States. Since the Devison decision, yet other young immigrants have agreed to such dispositions with the same understanding. If these youthful offender dispositions were now to be deemed convictions for immigration law purposes, as the INS seeks, many of these immigrants will now be rendered deportable for alleged criminal conduct during their teenaged years, often without any hope of relief, no matter how long ago the youthful offender adjudication took place, and no matter what their understanding at the time of the disposition.

BACKGROUND – NEW YORK YOUTHFUL OFFENDER DISPOSITIONS

In New York State -- unlike in the federal system and most other states -- young individuals who are accused of “criminal” conduct at age 16 or above are required to have the charges disposed of in adult criminal court, rather than in a family or juvenile court.¹ 18 U.S.C. § 5032; N.Y. Penal Law § 30.00(1). In fact, under New York State law, certain 13, 14, and 15-year-old individuals accused of certain offenses are also required, in the first instance, to have their cases heard in adult court. N.Y. Penal L. § 30.00(2). Nevertheless, New York law provides that, if the youth was under the age of 19 at the time of commission of the alleged offense, the adult criminal court may in some cases make a youthful offender finding and dispose of the case as a non-criminal adjudication, rather than as an adult criminal conviction. See generally N. Y. Crim. Proc. L., Article 720.²

¹ New York is one of only three states that designates the age of juvenile court jurisdiction as 15 or younger. Jeffrey A. Butts and Ojmarrh Mitchell, Brick by Brick: Dismantling the Border Between Juvenile and Adult Justice, in Criminal Justice 2000 186 (2000).

² A “youth” who might be eligible for a “youthful offender” finding under the New York law includes (1) “a person charged with a crime alleged to have been committed when he was at least sixteen years old and less than nineteen years old,” and (2) a person charged with being a “juvenile offender” as defined in N.Y. Crim. Proc. L. § 1.20(42), which includes 13, 14, and 15-year-old persons charged with certain offenses. See N.Y. Crim. Proc. L. § 720.10(1).

New York adult criminal courts may make such youthful offender findings and enter non-criminal dispositions only in certain, limited cases. A youth is ineligible if the alleged offense is any New York class A-I or class A-II felony, and is presumptively ineligible if the offense is one of several other violent felony offenses. See N.Y. Crim. Proc. L. § 720.10(2)(a). Furthermore, a youth is ineligible if he or she has previously been convicted of a felony, see N.Y. Crim. Proc. L. § 720.10(2)(b), or previously been adjudicated a youthful offender for a felony offense, or adjudicated a juvenile delinquent for a designated felony offense. See N.Y. Crim. Proc. L. § 720.10(2)(c). In addition, in many otherwise eligible cases, the adult court judge retains discretion to deny a youthful offender finding. See N.Y. Crim. Proc. L. § 720.20(1)(a).

In fact, most youthful offender findings are made in cases in which the adult court sentencing judge determines that the nature of the offense and the circumstances are such that no prison or jail sentence should be imposed. The overwhelming majority of persons found to be youthful offenders under New York State law are placed under supervision, rather than being incarcerated. In 1998, for example, New York State criminal justice data reveal that only about 15 percent of individuals (1,843 out of a total of 12,080) given youthful offender dispositions during that year received any prison or jail time; most received sentences of probation only (6,068) or conditional discharge (1562). See Sentences for Youthful Offenders, 1998 data, compiled by New York State Division of Criminal Justice Services, Office of Justice Systems Analysis, Bureau of Statistical Services, Albany, New York (attached to this brief for the convenience of the Board).

When an adult court sentencing judge makes a youthful offender finding, New York law provides that the adult court's adjudication is to be treated, like a family or juvenile court

disposition, as a non-criminal disposition. New York law expressly provides: "A youthful offender adjudication is not a judgment of conviction for a crime or any other offense . . ."³ N.Y. Crim. Proc. L. § 720.35(1). Thus, youthful offender adjudications may not be considered a criminal conviction for the purposes of New York sentence enhancement laws based on prior felony convictions. See N.Y. Crim. Proc. L. §§ 70.04 (sentence of imprisonment for second violent felony offender), 70.06 (sentence of imprisonment for second felony offender), and 70.08 (sentence of imprisonment for persistent violent felony offender). In addition, a youthful offender adjudication may not be used for the purpose of impeachment, again because such an adjudication is not deemed a conviction of a crime. See United States v. Canniff, 521 F.2d 565, 569 (2d Cir. 1975), cert. denied, 423 U.S. 1059 (1976); People v. Rahmig, 26 N.Y.2d 411 (1970); People v. Vidal, 26 N.Y.2d 249, 251-253 (1970).

New York State law further provides that all records of a youthful offender disposition "are confidential and may not be made available to any person or public or private agency, other than an institution to which such youth has been committed, the division of parole and a probation department of this state that requires such official records and papers for the purpose of carrying out duties specifically authorized by law . . ."⁴ N.Y. Crim. Proc. L. § 720.35(2). This rule of confidentiality is strictly construed in New York.⁴ See People v. Whitehurst, 167 Misc.2d 383 (Sup.Ct. 1996).

³ The only instance in which a youthful offender adjudication is placed on the same terms as a criminal conviction is "for the purposes of transfer of supervision and custody pursuant to section two hundred fifty-nine-m of the executive law." This is necessary in order to provide a benefit to persons adjudicated as youthful offenders: N.Y. Executive Law § 259-m authorizes the governor of New York State to enter into a compact with any other state to permit persons "convicted" in New York to serve probation or parole in the other state where, for example, the person is a resident of the other state or has family residing there. See N.Y. Exec. L. § 259-m.

⁴ Indeed, under the confidentiality provisions, the INS should not even be able to access sealed youthful offender records, unless there has been both a proper application to disclose the records in front of the court that rendered the youthful offender finding and an authorization by that court to unseal the records. See Royal Globe Insurance

ARGUMENT

I. THE BOARD WAS CORRECT IN FINDING THAT A NEW YORK STATE YOUTHFUL OFFENDER DISPOSITION IS ANALOGOUS TO A FEDERAL JUVENILE DELINQUENCY DISPOSITION AND THEREFORE SHOULD NOT BE CONSIDERED A CONVICTION OF A CRIME UNDER THE IMMIGRATION STATUTE

In a well-reasoned decision that considered the broad similarity, as well as minor differences, between New York youthful offender procedures and the nature and purpose of the juvenile delinquency provisions in the Federal Juvenile Delinquency Act (FJDA), the Board found that New York youthful offender adjudications – like FJDA adjudications – should not be deemed convictions of crimes for immigration purposes. After considering the similarities and differences, the Board stated:

We find that the New York procedure under which the respondent was adjudicated a youthful offender in 1992 is sufficiently analogous to procedure under the FJDA to classify that adjudication as a determination of delinquency, rather than as a conviction for a crime. ... [T]he central issues before both the state and federal courts is the offender's status, not his guilt or innocence. Perhaps most importantly, under the New York procedures, a conviction precedent to a youthful offender adjudication is vacated, rendering it a nullity. All that is left, as in the federal system, is a civil determination of status, which may not be treated as a conviction under governing law. Applying the FJDA as a benchmark, we find that a youthful offender adjudication under Article 720 of the New York Criminal Procedure Law corresponds to a determination of juvenile delinquency under the FJDA.

Devison, at pp. 8-9 (citation omitted). The Board's decision is not only correct, see subpoint A below, but is consistent with earlier findings of the United States Court of Appeals for the Second Circuit, the circuit in which this case arises. See United States v. Canniff, 521 F.2d at 569-70 ("the proceeding in the federal courts most analogous to the New York youthful offender procedure is one for juvenile delinquency").

Company v. Mottola, 89 A.D.2d 907 (N.Y. App. Div. 1982); see also In re Lulgiuraj, A 18 712 781(BIA 2000)(Miller, P., concurring).

The INS motion to reconsider offers little but additional focus on procedural differences between the New York State and federal systems for adjudication of charges against young offenders. As discussed in subpoint B below, these procedural differences do not affect the Board's or the Second Circuit's findings regarding the overall analogous nature and purpose of the federal juvenile delinquency and New York State's youthful offender provisions.

Moreover, as described in subpoint C below, the INS' position, were it to be adopted by the Board, would create constitutional equal protection problems. This is because deeming New York youthful offenders to be convicted of crimes merely because they are ineligible to have their cases adjudicated in family court under New York State law, when they would be eligible for juvenile delinquency adjudications under federal law and the laws of other states, would result in disparate treatment of similarly situated individuals without any rational basis.

A. Like a federal juvenile delinquency determination, a New York youthful offender disposition represents a finding that, based on age and the nature of the crime, the offender will not be deemed convicted of a crime

The nature and purpose of a New York youthful offender adjudication is decidedly similar to the nature and purpose of an adjudication under the Federal Juvenile Delinquency Act (FJDA). This is apparent from the close similarity of the eligibility requirements relating to the age of the offender and the nature of the offense, as well as their virtually identical purpose and effect.

1. Both the New York youthful offender statute and Federal Juvenile Delinquency Act apply similar definitions of youths and juveniles

A "youth" who may be eligible for a youthful offender finding under the New York law includes "a person charged with a crime alleged to have been committed when he was at least sixteen years old and less than nineteen years old," and a person charged with being a "juvenile

offender,” which includes 13, 14, and 15-year-old persons charged with certain offenses. See N.Y. Crim. Proc. L. §§ 720.10(1), 1.20(42). Similarly, a “juvenile” under federal law is “a person who has not attained his eighteenth birthday” or a person who has not attained his twenty-first birthday and who committed a violation of the criminal law of the United States prior to his eighteenth birthday.⁵ 18 U.S.C § 5031.

2. Both the New York youthful offender statute and the Federal Juvenile Delinquency Act employ similar standards to determine whether a youth will be treated as a juvenile or adult

Both the New York and federal courts consider similar criteria to make a discretionary determination of whether an offender will be treated as a juvenile or as an adult, and likewise both mandate that, in certain circumstances, a youth must be treated as an adult.

In New York, restrictions on eligibility for youthful offender status are numerous. A youth is ineligible if the alleged offense is any New York class A-I or A-II felony, and is presumptively ineligible if the offense is one of several other violent felony offenses. See N.Y. Crim. Proc. L. § 720.10(2)(a). Furthermore, a youth is ineligible if he or she has previously been convicted of a felony, adjudicated a youthful offender for a felony offense, or adjudicated a juvenile delinquent for a designated felony offense. See N.Y. Crim. Proc. L. §§ 720.10(2)(b), 720.10(2)(c).

Likewise, under the federal system, if the juvenile is both age 16 or older and been convicted or adjudicated of a prior felony offense, then the individual *will* be transferred for prosecution as an adult for charges of violent felonies and controlled substance offenses. 18 U.S.C.

⁵ As the Board noted in Devison, there is a minor difference in the age range, as a youth must be under age 19 under the New York statute and less than 18 years of age under the federal statute at the time of commission of the alleged offense. However, given the general confluence of federal and state policies with respect to young offenders, the federal government should respect New York’s determination on what eligibility age range is appropriate to effectuate its policy goals. Otherwise, the state will be compelled to adopt alternative procedural mechanisms, e.g. not taking a guilty plea or avoiding a court-ordered penalty, in order to effectuate its policy. As Congress could not have intended to compel New York rigidly to adopt certain procedural mechanisms in order to effectuate a policy that is generally consistent with federal policies in this area, the federal government should not interfere with New York’s

§ 5032. However, as explained above, an individual is not generally eligible for youthful offender treatment in New York if that individual has a prior felony conviction or designated felony adjudication in family court. Thus, if a juvenile is mandatorily tried as an adult in the federal system, that individual would most likely have been accorded adult, not youthful offender, treatment in New York as well.

Under the New York system, once the court determines that a youth is eligible for youthful offender status, it then determines whether the eligible youth should receive youthful offender treatment. N.Y. Crim. Proc. L. § 720.20(1). If the eligible youth is determined to be a youthful offender, the court immediately vacates the conviction and substitutes a youthful offender finding. If the eligible youth is not found to be a youthful offender, his or her guilty plea is not vacated and he or she is sentenced like any other criminal defendant. *Id.* § 720.20(4).

Likewise, there are certain circumstances under which a juvenile in federal court may be tried as an adult. If the juvenile is age fifteen or older, the individual may, as a matter of discretion, be transferred for criminal prosecution as an adult for violent felonies and controlled substance offenses. 18 U.S.C. § 5032. In determining whether a juvenile should be transferred for adult prosecution, the court considers such factors as the age and social background of the juvenile, the nature of the alleged offense, the extent and nature of the juvenile's prior delinquency record, and the nature of the past treatment efforts and the juvenile's response to such efforts. 18 U.S.C. § 5032. These factors are similar to the standards employed by the New York courts in determining whether an "eligible youth" qualifies for youthful offender treatment. *See People v. Shrubbsall*, 562 N.Y.S.2d 290, 292 (App. Div. 1990).

3. **The purpose and effect of both statutes are the same**

New York law expressly provides: "A youthful offender adjudication is not a judgment of conviction for a crime or any other offense . . ." N.Y. Crim. Proc. L. § 720.35(1). The purpose of a youthful offender proceeding is to spare youth that have violated criminal laws from the stigma and adverse consequences that necessarily flow from a criminal conviction. See People v. Cook, 376 N.Y.S.2d 110 (1975); People v. Cruickshank, 484 N.Y.S.2d 328 (App. Div. 1985); People ex rel. Colvin v. New York State Bd. of Parole, 347 N.Y.S.2d 831 (Sup. Ct. 1973), aff'd 356 N.Y.S.2d 363, (App. Div. 1974); see also Tutrone v. Shaughnessy, 160 F. Supp. 433, 436 (S.D.N.Y. 1958). New York statutory and decisional case law makes abundantly clear that a youthful offender adjudication is not a conviction and that the policy of the state is that youthful offenders should not suffer the consequences of a criminal conviction. In order to prevent the individual from such a stigma, New York State law further provides that all records of a youthful offender disposition are strictly "confidential and may not be made available to any person or public or private agency. . ." N.Y. Crim. Proc. L. § 720.35(2). Thus, as discussed in the background section of the brief, youthful offender adjudications may not be considered a conviction for any other purpose, including for the purposes of New York sentence enhancement laws based on prior felony convictions or for the purposes of impeachment.

Similarly, an adjudication in federal court as a juvenile delinquent is not deemed a criminal conviction, see 18 U.S.C. § 5032, and may not be used to attack a defendant's credibility in a later proceeding. See Cotton v. US, 355 F.2d 480 (10th Cir. 1966); 18 U.S.C. § 5038. As with New York youthful offender adjudications, records of the juvenile proceedings are protected from disclosure except in specifically enumerated circumstances. See 18 U.S.C. § 5038. Furthermore, the purpose of a federal juvenile delinquency proceeding, like a New York

youthful offender adjudication, is to avoid imposing the stigma of a prior criminal conviction based on an offense committed at a young age. See 18 U.S.C. §§ 5031-42; see also United States v. Canniff, 521 F.2d at 569-570 (describing the “consistent policy running through both New York and federal law that youthful offender or juvenile delinquency adjudications are not to be treated as criminal convictions and that no stigma should attach to a young person so adjudicated”).

B. The INS motion to reconsider relies on irrelevant and insignificant procedural distinctions

1. The adjudication of cases involving New York youthful offenders in adult court is merely a reflection of the limited jurisdiction of New York family courts

In its motion to reconsider, the INS repeatedly highlights the fact that New York State has a family court procedure for juvenile delinquents, which is separate from its youthful offender procedure in adult criminal court. The INS then concludes that because New York has a separate juvenile delinquency procedure in family court, youthful offender adjudications cannot be deemed analogous to juvenile delinquency adjudications under the FJDA.

The INS’ argument elevates form and forum over substance. This argument completely ignores the fact that New York family court jurisdiction ends at age 16, see N.Y. Fam. Ct. Act §§ 301.2(1), 302.1, unlike the jurisdiction of the FJDA, which ends at age 18. The fact is that New York State has two types of procedures to regulate offenses committed by minors. One deals with youths under the ages of 16, and the other primarily involves youths between the ages of 16 and 19. However, the purpose and effect of both procedures is the same: a non-criminal adjudication to avoid the stigma of a criminal conviction. Thus, the procedures’ similar

substance, purpose, and effect make both New York procedures analogous to federal dispositions under the FJDA.⁶

The INS further asserts that if youthful offender status were the equivalent of juvenile delinquency status, there would be no need to have a process for removing potential youthful offender cases to family court when the individual is under the age of 16. As referenced in footnote 2 of the background section above, youths who are ages 13, 14, and 15 who commit certain serious designated offenses, also known as “juvenile offenders,” are by statute charged in adult court. Some of these cases tried in adult criminal court do result in youthful offender adjudications. The INS concludes that because a process exists by which these cases might have been removed to family court, youthful offender status is not equivalent to juvenile delinquency status. However, this conclusion is erroneous for two reasons.

First, unlike other states in which discretion is granted to juvenile court judges or prosecutors to determine in which forum a youth should be tried if charged with a specific offense,⁷ New York has in place only a system of statutory exclusion from family court.⁸ Such a provision grants criminal court original jurisdiction over a whole class of cases involving New

⁶ In fact, contrary to the INS argument that youthful offender dispositions are more akin to dispositions under the Federal Youth Corrections Act, the Second circuit has squarely found that the New York youthful offender procedure is more analogous to the Federal Juvenile Delinquency Act than to the now repealed Federal Youth Corrections Act. See United States v. Canniff, 521 F.2d at 569 n.2.

⁷ Forty-six states and the federal system provide for discretionary waivers, which give juvenile court judges the discretion to waive family court jurisdiction in individual cases after conducting a hearing. The prosecution generally bears the burden of proof in these discretionary waiver hearings. Several of these states also give prosecutors the discretion to go forward with the case in either forum. See Griffen, Patrick, Patricia Torbet, and Linda Szymanski. Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t of Justice, Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions 3, 7 (1998).

⁸ Four other states employ a similar system of statutory exclusion from juvenile court for certain serious offenses committed by persons at least age 13 or 14 (depending on the crime). However, these states use a combination of transfer provisions, including discretionary waiver hearings and filing through prosecutorial discretion. Other states also employ statutory exclusion laws, but on the basis of higher ages, more serious offenses and prior criminal history. See Griffen, Torbet, & Szymanski, supra at 8, 9.

York juvenile offenders charged with a specific offense. These cases automatically begin in adult criminal court, and can be removed to family court only on motion by the defendant, the district attorney, or if the New York adult criminal court loses jurisdiction. See N.Y. Crim. Proc. L. §§ 180.75(4), 180.75(5), 210.43, 310.85, 330.25. Often, a removal to family court requires the recommendation of the district attorney. See N.Y. Crim. Proc. L. §§ 180.75(4), §210.43(1)(b). Thus, it is not easy to remove a case to family court in New York. However, judges can use their discretion to make a youthful offender finding at the final stages of the adult court process again in order that a juvenile offender not suffer the consequences of conviction of a crime.

Second, it should be noted that the possibility of removal to family court is necessary under New York law for those juvenile offenders who are not eligible for youthful offender treatment due to the severity of the crime they are alleged to have committed. See N.Y. Crim. Proc. L. §§ 120(42), 720.10(2)(a). Thus, to make allowance for when it is in the interest of justice that such a juvenile offender not suffer the consequences of being convicted of a crime, the law necessarily has to permit removal of such a case to family court.

2. The prosecution of certain youthful offenders by way of indictment is irrelevant

In its motion to reconsider, the INS also distinguishes adjudications under the FJDA and under the New York youthful offender statute on the basis of how individuals are prosecuted.

Again, the INS elevates form over substance. First, it should be noted that the INS is incorrect when it suggests that all youthful offenders are prosecuted by way of indictment, while all individuals charged as delinquents under the FDJA are charged by information. More importantly, the fact that some New York youthful offenders are prosecuted by way of

indictment is merely a reflection of the fact that proceedings were initiated as a criminal prosecution in adult court.

The Fifth Amendment of the United States Constitution provides a right to the grand jury indictment process to prosecutions of capital or infamous crimes. U.S. Const. amend. V. The federal government must abide by this provision in the Constitution. However, unlike most other provisions of the bill of rights, the right to a grand jury does not extend to defendants accused of state rather than federal crimes. See *Hurtado v. California*, 110 U.S. 516 (1994) (holding that the right to a grand jury indictment is not incorporated in the due process clause of the Fourteenth Amendment). Thus, in Washington, for example, defendants charged with felonies are generally prosecuted by way of information and not grand jury indictment. See *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997).

In New York, individuals charged with felonies in adult criminal court have a right to be prosecuted by indictment filed by a grand jury as a matter of state constitutional law. See N.Y. Const., art. I, § 6. However, if an individual waives his right to be indicted by a grand jury, he can be prosecuted for a felony by a Superior Court information. See generally N.Y. Crim. Proc. L., Article 195. In the case of misdemeanors, defendants are typically prosecuted by way of information, see N.Y. Crim. Proc. L §§ 100.05, 100.10 (1), but a defendant can be prosecuted by misdemeanor complaint if he waives prosecution by information. N.Y. Crim. Proc. L §§ 100.10(4), 170.65(3). In all of the above cases, individuals can be adjudicated as a youthful offender, as mandated by statute for misdemeanor offenses, see N.Y. Crim. Proc. L §720.20(1)(b), or pursuant to a judge's discretion where an individual meets the requisite criteria. See N.Y. Crim. Proc. L §720.20(1)(a). Thus, some youthful offenders will be prosecuted by indictment and others by information, but the method by which they are prosecuted is not

relevant to whether the disposition of their case is a criminal conviction or not. It merely reflects in what manner the case commenced, not how the case was ultimately disposed.

3. The fact that a small number of youthful offenders are committed to facilities where adults are also held is of no significance

The INS also attempts to distinguish New York youthful offenders from federal juvenile delinquents by asserting that youthful offenders are detained in the same facilities as adult criminals.⁹ The INS once again advances form over substance, and ignores several key points:

- a) Individuals between the ages of 13 and 16 who are adjudicated as youthful offenders are by law housed in secure juvenile detention facilities with other juvenile delinquents. See N. Y. Penal L. § 70.20(4)(a).
- b) Because individuals between the ages of 16 and 19 have been deemed as minors by the State of New York, see Practice Commentary, N.Y. Correction L. § 500(b), they, by statute, cannot be housed with inmates age 19 and older. See N.Y. Correction L. § 500(b)(4).
- c) In addition, New York City correctional facilities require that both individuals serving sentence and individuals awaiting trial who are between the ages of 16 and 18 inclusive must be housed separately. See New York City Department of Correction Directive, #4100 R.

What this information shows is that while a small number of individuals adjudicated as youthful offenders are housed in state and county correctional facilities where adults are also held, these individuals are generally required to be segregated from the adult population.

⁹ It is noteworthy that the overwhelming majority of young persons whose criminal charges are disposed of by a youthful offender adjudication are not detained in any prison or jail. See attached Sentences for Youthful Offenders, 1998 data, compiled by New York State Division of Criminal Justice Services, Office of Justice Systems Analysis,

Moreover, it should be noted that these state and county correctional facilities are also responsible for the confinement of persons committed in civil process or for contempt. Like juveniles, these individuals must be housed separately. See N.Y. Correction L. § 500-b(2). Considering that persons committed in civil process are also confined in these facilities, it becomes all the more clear that youthful offender adjudications are not transformed into criminal convictions merely because a small number of youthful offenders are confined in such facilities.

C. Deeming New York youthful offenders to be convicted of crimes merely because they are ineligible to have their cases adjudicated in family court under New York State law, when they would be eligible for juvenile delinquency treatment under federal law and the laws of other states, would violate equal protection

If they had been prosecuted under federal law, many of the youths adjudicated as youthful offenders in New York would have been placed in juvenile delinquency proceedings under 18 U.S.C. §§ 5031 and 5032, or would have had their cases dismissed under the first offender or youth offender provisions of 18 U.S.C. § 3607. Such federal dispositions may not be considered criminal convictions for immigration purposes. See Matter of Ramirez-Rivero, 18 I&N Dec. 135 (BIA 1981) (act of juvenile delinquency is not a conviction of a crime for immigration purposes), and 18 U.S.C. § 3607(b) (§ 3607 disposition “shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose”). A ruling that would have the result of treating a youthful offender in New York State differently from one prosecuted under federal law (or under the law of another state where a youthful offender would be prosecuted in a juvenile delinquency proceeding, or under some youthful offender procedure which does not require the defendant to plead guilty or for some other procedural reason would not be deemed a conviction) would be

Bureau of Statistical Services, Albany, New York (reporting that only about 15 percent of individuals granted youthful offender dispositions in 1998 received any prison or jail time).

subject to challenge under the equal protection clause of the U.S. Constitution. See Garberding v. INS, 30 F.3d 1187 (9th Cir. 1994) (found no rational basis for treating an alien in a state without an "exact counterpart" to the federal first offender statute differently from an alien whose drug "conviction" was "expunged" under a state statute considered to be an exact counterpart).

For example, if a 16 year-old individual was convicted of a misdemeanor charge in New York, and he had no prior felony convictions or delinquency adjudications, he would be eligible for youthful offender treatment in New York, which according to the Service should have possible deportation consequences. If that same individual had been prosecuted by federal authorities or lived in one of the 47 states where 16 year-olds may be tried as juveniles,¹⁰ he clearly would automatically be charged with a juvenile delinquency. Such disparate treatment of similarly situated individuals, without any rational basis, violates constitutional equal protection guarantees.

II. A YOUTHFUL OFFENDER DISPOSITION DOES NOT MEET THE IMMIGRATION STATUTE DEFINITION OF CONVICTION IN ANY EVENT

As the Board's analysis in Devison suggests, there is an additional and independent basis for supporting the Board's decision that a New York State youthful offender disposition does not constitute a conviction for immigration purposes -- that is that a youthful offender disposition simply does not meet the immigration statute definition of conviction in any event. See Devison at 14 ("... the adjudication of a person determined to be a ... youthful offender is not a conviction ab initio, nor can it ripen into a conviction at a later date).

¹⁰ As of 1997, only three states, including New York, excluded all 16-year-olds from jurisdiction of the juvenile courts, and only ten states excluded all 17-year-olds from the jurisdiction of juvenile courts. See Jeffrey A. Butts and Ojmarrh Mitchell, Brick by Brick: Dismantling the Border Between Juvenile and Adult Justice, in Criminal Justice 2000 186 (2000).

The immigration statute, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), provides that a disposition may be considered a conviction for immigration purposes in the following two circumstances: (1) a *formal judgment of guilt* of the alien has been *entered* by a court, or (2) *adjudication of guilt has been withheld*, but 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 the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. See INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), added by section 322 of IIRIRA (emphasis added).

The first prong of the statutory definition of conviction for immigration purposes simply does not apply to a New York youthful offender adjudication. No "formal judgment of guilt" has been "entered by a court." To the contrary, when the New York State criminal court decided to adjudicate Mr. Devison as a youthful offender, it immediately vacated the opening plea of guilty and declined to enter a judgment of guilt, and instead substituted a youthful offender finding. See N.Y. Crim. Proc. L. § 720.10(4) ("Youthful offender finding" means a finding, substituted for the conviction of an eligible youth, pursuant to a determination that the eligible youth is a youthful offender"); N.Y. Crim. Proc. L. § 720.20(3) ("Upon determining that an eligible youth is a youthful offender, the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding; . . ."). Such a finding is final and cannot be revoked. As New York State's highest court has stated: "[W]hile the determination of whether an eligible youth is to be accorded youthful offender treatment is left to the court's discretion [citation omitted], absent evidence of fraud or misrepresentation there is no inherent power in the court to revoke a youthful offender finding once the proceeding is terminated by *entry of judgment*." People v. Calderon, 79 N.Y.2d 61, 66-67 (1992)(emphasis added). Thus, the youthful offender finding and non-criminal disposition

constituted the formal judgment of the court. See Black’s Law Dictionary, Fifth Edition (West Publishing company, 1979) (a judgment is “[t]he law’s last word in a judicial controversy, it being the final determination by a court of the rights of the parties upon matters submitted to it in an action or proceeding”). In short, the vacated guilty plea simply may not be deemed a “formal judgment of guilt of an alien entered by a court.”

The second prong of the statutory definition of conviction for immigration purposes also does not apply to a New York youthful offender adjudication. A youthful offender disposition is not a “withholding of an adjudication of guilt.” To the contrary, a youthful offender finding entails a present and immediate court decision not to enter a judgment of guilt, without any conditions or postponement of adjudication. Indeed, New York State’s highest court has found that a youthful offender finding has the practical and legal effect of a reversal. See People v. Floyd J., 462 N.E.2d 1194 (N.Y. 1994). Thus, New York youthful offender adjudications may be distinguished from the deferred adjudication schemes at issue in recent Board decisions such as Matter of Punu, Int. Dec. 3364 (BIA 1998) (Texas deferred adjudication statute), and Matter of Roldan-Santoyo, Int. Dec. 3377 (BIA 1999) (Idaho withholding of adjudication statute), neither of which involved an outright unconditional vacatur of a guilty plea, but rather only the possibility of a vacatur conditioned on successful completion of a probationary period. As the Board pointed out in Devison, a youthful offender finding is thus unlike the expungement or deferred adjudication procedures that the Board has found are convictions under the second prong:

Under the former [juvenile delinquency and youthful offender adjudications], proceedings are *civil* in nature and the adjudication of a person determined to be a juvenile delinquent or youthful offender is not a conviction *ab initio*, nor can it ripen into a conviction at a later date. In the case of an expungement or deferred adjudication, the judgment in the *criminal* proceeding either starts out as a ‘conviction’ that can be “expunged” upon satisfactory completion of terms of punishment and petition to the court, or as a judgment that is deferred pending similar satisfaction of conditions of punishment. In either case, however,

judgment of guilt may remain, or ripen into, a “conviction” under state law. This is a dispositive difference, because a juvenile adjudication cannot *become* a conviction based on the occurrence or nonoccurrence of subsequent events.

Devison, at p. 14.

In sum, the federal immigration statute simply does not transform a state disposition that is not a formal judgment of guilt into one, except under circumstances where the state has withheld or deferred entry of formal judgment. When a New York court enters a youthful offender finding, it does not defer adjudication and let a guilty plea stand; rather, at the outset, it eliminates the plea, rendering it a nullity, and unconditionally declines to enter formal judgment of guilt. As the Board has recently indicated, such a state court judgment should be accorded full faith and credit. See Matter of Rodriguez-Ruiz, Int. Dec. 3436 (BIA 2000).

CONCLUSION

For the reasons stated above, *amici* urge the Board to deny the INS' motion to reconsider based on its reasoning in Devison that a New York youthful offender disposition is analogous to a federal juvenile delinquency adjudication, and based additionally on the fact that, in any event, a New York State youthful offender disposition is not a conviction because it does not meet the statutory definition of conviction for immigration purposes.

Dated: November 29, 2000

Respectfully submitted,

NEW YORK STATE DEFENDERS ASSOCIATION
Jonathan E. Gradess, Executive Director
Manuel D. Vargas, Project Director
Criminal Defense Immigration Project
Sejal R. Zota, Law Graduate on the Brief
194 Washington Avenue, Suite 500
Albany, New York 12210

NEW YORK STATE CRIMINAL DEFENSE
LAWYERS ASSOCIATION
Joshua L. Dratel, Esq.
Joshua L. Dratel, P.C.
14 Wall Street
New York, New York 10005

THE LEGAL AID SOCIETY OF THE CITY
OF NEW YORK
Laura Johnson, Director,
Special Litigation Unit, Criminal Defense Division
90 Church Street
New York, New York 10007

By: _____

Manuel D. Vargas, Esq.
Project Director
Criminal Defense Immigration Project
P.O. Box 200, West Village Station
New York, New York 10014
(212) 367-9104