**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
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**New York, NY 10014**

**Name: MEJIA PERALTA, RUBBEN GRE...** **A 047-445-437**

**Date of this notice: 9/27/2019**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Kendall Clark, Molly

Userteam: Docket





RV

File: A047-445-437 – New York, NY Date: SEP 27 2019

In re: Rubben Gregorio MEJIA PERALTA a.k.a. Rubben Mejiaperalta

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jin Sun Park, Esquire

ON BEHALF OF DHS: Steven Michael Nelson
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security (DHS) appeals an Immigration Judge's April 9, 2019, decision termination proceedings without prejudice. The respondent has filed an opposition. The appeal will be dismissed.

The respondent is a native and citizen of the Dominican Republic. He was admitted to the United States in 2000 as a lawful permanent resident. On December 11, 2017, he was convicted of criminal possession of a controlled substance in the third degree. As a result of this conviction, he was placed in proceedings and charged with removability under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i), for a controlled substance violation.

The respondent filed a motion to terminate on the ground that his conviction was not yet final for immigration purposes. *See Matter of J.M. Acosta,* 27 I&N Dec. 420 (BIA 2018). In support of his motion, he submitted evidence that he had filed an untimely Notice of Appeal, which the criminal court accepted, and that his criminal appeal is currently pending. In addition, the respondent submitted evidence showing that he was challenging the conviction on substantive grounds because, inter alia, he alleged that his former criminal attorney provided ineffective assistance of counsel for a number of reasons (Motion to Reconsider, Exhs. B and C). Based on this evidence, the Immigration Judge terminated proceedings without prejudice.

The Immigration Judge's decision is affirmed. Although the respondent did not file a timely appeal from the criminal conviction, he rebutted the presumption of finality by presenting evidence that his appeal had been accepted. *Matter of J.M. Acosta,* 27 I&N Dec. at 432. The DHS does not dispute that an appeal of the respondent's underlying conviction was accepted and is currently pending in the New York Supreme Court (DHS Br. at 4).

In addition, the respondent presented evidence that the appeal related to a substantive defect in his underlying criminal proceedings because, inter alia, he alleges that his former criminal attorney did not provide effective assistance of counsel. *Matter of J.M. Acosta,* 27 I&N Dec. at 432. *See e.g., Padilla v. Kentucky,* 559 U.S. 356 (2010); *Matter of Marquez Conde*, 27 I&N Dec. 251, 254-55 (BIA 2018) (convictions vacated for procedural or substantive defects in the underlying criminal proceedings are not valid for immigration purposes); *Matter of Pickering*, 23 I&N Dec. 621, 624-25 (BIA 2003) (distinguishing convictions that have been set aside for reasons related to

a defect in the underlying criminal proceedings, which are not final for immigration purposes, from those vacated because of rehabilitation or immigration hardship), *rev'd on other grounds*, 465 F.3d 263, 269 (6th Cir. 2006).

On appeal, the DHS argues that the Immigration Judge was bound by his initial decision denying the motion to terminate, and therefore could not further examine the evidence and decide differently. We disagree as an Immigration Judge has the authority to reconsider a decision sua sponte at any time unless jurisdiction is vested with the Board. 8 C.F.R. § 1003.23(b)(1) ("An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals.").

The DHS also argues that, given New York criminal appellate procedure, criminal defendants may avoid removal simply by submitting a notice of appeal of the underlying conviction to the Immigration Judge without perfecting the appeal of his criminal convictions. The DHS contends that in a state with appellate procedures like New York, an Immigration Judge cannot definitively discern the basis of a criminal appeal until the perfected appellate filing is reviewed. The DHS posits that New York criminal appellate procedure does not have a mechanism to dismiss outstanding, unperfected criminal appeals so *Matter of J.M. Acosta* has created a situation where criminal defendants may avoid removal in perpetuity by simply filing frivolous, unperfected criminal appeals. *See* DHS Brief at 11-13.

The DHS does not define what "perfected" means in the context of its argument. Moreover, DHS's argument, if taken to its logical conclusion, would obviate *Matter of J.M. Acosta*, a decision also involving the question of finality of a criminal conviction on appeal in the New York Supreme Court. Therefore, we decline to revisit *Matter of J.M. Acosta* at this time.

Further, *Matter of J.M. Acosta* sufficiently addresses DHS's concerns as an Immigration Judge must decide whether the pending appeal relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings. *Matter of J.M. Acosta*, 27 I&N Dec. at 432. Here, in accordance with *Matter of J.M. Acosta*, the Immigration Judge found that the respondent proved that his pending criminal appeal challenged his conviction on substantive grounds. Accordingly, the following order will be issued.

ORDER: The appeal is dismissed.

FOR THE BOARD