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Vera Zavin
Boston College Law School, vera.zavin@bc.edu

ONE STRIKE, YOU'RE OUT: THE NINTH CIRCUIT DENIES SECOND CHANCE FOR FIRST-TIME DRUG OFFENDERS

Vera Zavin*

Abstract: On July 14, 2011, in *Nunez-Reyes v. Holder*, the U.S. Court of Appeals for the Ninth Circuit filed an en banc opinion overruling *Lujan-Armendariz v. INS* in holding that, for immigration purposes, constitutional equal protection did not require treating state drug crime convictions that are expunged under state law the same as federal convictions expunged under the Federal First Offender Act. The court also overruled *Rice v. Holder*, holding that being under the influence of a drug is not a lesser offense than simple possession. In so doing, the Ninth Circuit frustrated Congress's intent in enacting the Federal First Offender Act, and hindered courts' ability to ensure equal protection of similarly situated aliens.

Introduction

Flavio Nunez-Reyes is a native and citizen of Mexico who illegally entered the United States in 1992.[1] In 2001, he pleaded guilty to possessing and being under the influence of methamphetamine.[2] Though the California state court dismissed both charges, the federal government placed Nunez-Reyes in proceedings to be removed from the United States.[3] An immigration judge (IJ) denied Nunez-Reyes relief, ordered him deported, and the Board of Immigration Appeals (BIA) affirmed.[4] Nunez-Reyes appealed, and the United States Court of Appeals for the Ninth Circuit concluded that Nunez-Reyes's expunged convictions did not render him ineligible for relief from removal.[5] Considering that every other circuit court of appeals addressing the issue had rejected the Ninth Circuit's holding, the Ninth Circuit reheard Nunez-Reyes's case en banc.[6] The Ninth Circuit en banc reversed prec-

* Staff Writer, Boston College Journal of Law & Social Justice (2011–2012).

[1] Nunez-Reyes v. Holder, 646 F.3d 684, 687 (9th Cir. 2011) (en banc).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See* Nunez-Reyes v. Holder, 602 F.3d 1102, 1104–05 (9th Cir. 2010) (per curiam), *superseded en banc*, 646 F.3d 684 (9th Cir. 2011).

[6] *See Nunez-Reyes*, 646 F.3d at 689.

edent on which the Ninth Circuit panel relied, and denied Nunez-Reyes's petition for review of the BIA's decision.[7] Nunez-Reyes therefore was ineligible for relief under the Federal First Offender Act (FFOA) and could be deported.[8] In so doing, the en banc court frustrated Congress's intent in enacting the FFOA, and hindered courts' ability to ensure equal protection of similarly situated aliens.[9]

I. Nunez-Reyes's Conviction and Appeals

In 2001, Flavio Nunez-Reyes, a Mexican citizen, pleaded guilty in a California state court to one felony count of possession of methamphetamine, and one misdemeanor count of being under the influence of methamphetamine.[10] Although Nunez-Reyes pleaded guilty to both counts, the court dismissed the charges under California Penal Code section 1210.1(e)(1).[11] This statute allowed California state courts to expunge drug possession convictions on the condition that the defendant successfully completes a drug treatment program and meets certain other conditions.[12] Nunez-Reyes completed the statutory requirements, and the judge expunged his convictions.[13] Nevertheless, the federal government issued a Notice to Appear and charged Nunez-Reyes with removability.[14]

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[7] *See id.* at 687–88, 690, 695; *Nunez-Reyes*, 602 F.3d at 1104–05.

[8] *See Nunez-Reyes*, 646 F.3d at 687, 695.

[9] *See id.* at 703–04, 714–15 (Pregerson, J., dissenting).

[10] Nunez-Reyes v. Holder, 646 F.3d 684, 687 (9th Cir. 2011) (en banc). The felony was later reduced to a misdemeanor. *Id.* at 705 (Pregerson, J., dissenting).

[11] *Id.* at 687 (majority opinion).

[12] Cal. Penal Code § 1210.1(e)(1) (West 2006), *held unconstitutional by* Gardner v. Schwarzenegger, 101 Cal. Rptr. 3d 229 (Cal. Ct. App. 2009).

> At any time after completion of drug treatment and the terms of probation, the court shall conduct a hearing, and if the court finds that the defendant successfully completed drug treatment, and substantially complied with the conditions of probation, including refraining from the use of drugs after the completion of treatment, the conviction on which the probation was based shall be set aside and the court shall dismiss the indictment, complaint, or information against the defendant. In addition, except as provided in paragraphs (2) and (3), both the arrest and the conviction shall be deemed never to have occurred. The defendant may additionally petition the court for a dismissal of charges at any time after completion of the prescribed course of drug treatment. Except as provided in paragraph (2) or (3), the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted.

Id.

[13] *See Nunez-Reyes*, 646 F.3d at 687; *id.* at 705 (Pregerson, J., dissenting).

[14] *See id.* at 687 (majority opinion).

Nunez-Reyes applied for various forms of immigration relief.[15] He applied for adjustment of status based on his marriage to a U.S. citizen, cancellation of removal, and voluntary departure.[16] The IJ nonetheless deemed the expunged convictions to be convictions under federal immigration laws, denied all forms of relief, and ordered Nunez-Reyes removed.[17] The BIA affirmed, and Nunez-Reyes appealed to the Ninth Circuit.[18]

The Ninth Circuit panel considered whether Nunez-Reyes's expunged state convictions for possession and being under the influence constituted convictions under immigration laws.[19] The panel first looked to the FFOA because it governs whether a federal expungement for simple possession of drugs constitutes a conviction for immigration purposes.[20] Congress adopted the FFOA in 1970 as a "limited federal rehabilitation statute."[21] Under the FFOA, an alien cannot be deemed convicted for immigration purposes if he can show that he has not been previously convicted, has never received first offender relief, the conviction was for possession of drugs, and that the court expunged the conviction.[22] An alien satisfying FFOA conditions could avoid the harsh consequences of deportation usually following a drug conviction.[23] Yet it

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[15] *Id.* at 705 (Pregerson, J., dissenting).

[16] *Id.*; Nunez-Reyes v. Holder, 602 F.3d 1102, 1103 (9th Cir. 2010) (per curiam), *superseded en banc*, 646 F.3d 684 (9th Cir. 2011).

[17] *See Nunez-Reyes*, 646 F.3d at 687. The United States Code defines the term "conviction" in the immigration context as

> a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
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> (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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> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. § 1101(a)(48)(A) (2006).

[18] *See Nunez-Reyes*, 646 F.3d at 687.

[19] *Nunez-Reyes*, 602 F.3d at 1103–05. The court reviewed the BIA's decision de novo but limited its scope of review to the grounds relied on by the BIA, as required by law. *See id.* at 1103.

[20] *See id.* at 1104.

[21] Lujan-Armendariz v. INS, 222 F.3d 728, 735 (9th Cir. 2000).

[22] *See* 18 U.S.C. § 3607 (2006); *Nunez-Reyes*, 646 F.3d at 705 (Pregerson, J., dissenting). The Ninth Circuit's holding in *Cardenas-Uriarte v. INS* extended the applicability of the FFOA not only to drug possession, but also to lesser charges. *See* 227 F.3d 1132, 1137 (9th Cir. 2000) ("Congress intended to allow those convicted of the least serious type of drug offenses to qualify under the Act."), *overruled by Nunez-Reyes*, 646 F.3d 684 (9th Cir. 2011) (en banc).

[23] *See Lujan-Armendariz*, 222 F.3d at 735–36.

was federal convictions for simple possession to which the FFOA applied.[24] The panel thus had to determine (1) whether the FFOA also applied to expunged state convictions; and (2) whether being under the influence constituted a "conviction" for immigration purposes.[25]

The Ninth Circuit panel determined that the FFOA also applied to expunged state convictions.[26] In so deciding, the panel relied on its precedent in *Lujan-Armendariz v. INS*.[27] In *Lujan-Armendariz*, the Immigration and Naturalization Service (INS) sought removal of two aliens, even though state courts had expunged the aliens' convictions.[28] In determining whether the FFOA applied to expunged state convictions, the *Lujan-Armendariz* court recognized that Congress significantly amended federal immigration laws in 1996 to clarify when a "conviction" existed for immigration purposes.[29] Congress defined conviction with respect to an alien as either "a formal judgment of guilt," or a guilty plea where the judge ordered some form of punishment.[30] Prior to these amendments, the circumstances under which a conviction could be expunged differed by state.[31] The *Lujan-Armendariz* court determined that Congress passed the amendments to clarify at which point during the legal proceedings a conviction results, rather than abandon the rule that vacated convictions could not serve as the basis for deportation.[32] Constitutional equal protection required that state and federal drug convictions be treated similarly under the FFOA.[33] Therefore, the *Lujan-Armendariz* court held, and the Ninth Circuit panel in *Nunez-Reyes* agreed, that aliens could not be deported for first-time simple drug possession offenses that could have been tried under the FFOA but were expunged under a state statute.[34]

The Ninth Circuit panel also determined that being under the influence of a controlled substance qualifies for FFOA treatment because

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[24] *See Nunez-Reyes*, 602 F.3d at 1104.

[25] *See id.* at 1104–05.

[26] *See id.*

[27] *See id.*

[28] 222 F.3d at 732. One alien was convicted for attempted possession of narcotics, and the other for simple attempted possession of narcotics. *Id.*

[29] *See id.* at 736–37.

[30] *See* 18 U.S.C § 1101(a)(48)(A) (2006); *Lujan-Armendariz*, 222 F.3d at 742.

[31] *See Lujan-Armendariz*, 222 F.3d at 735–36.

[32] *Id.* at 745. The court determined that Congress did not reveal a clear intent to repeal the FFOA in the new definition of conviction. *See id.* at 746.

[33] *See id.* at 749.

[34] *See Nunez-Reyes*, 602 F.3d at 1104–05; *Lujan-Armendariz*, 222 F.3d at 744–45, 749. In *Lujan-Armendariz*, the state court had suspended the defendant's sentence pursuant to a state rehabilitative statute and instead ordered five years of probation. *See* 222 F.3d at 732–33.

it is a lesser offense than simple possession.[35] The panel relied on *Rice v. Holder*, a Ninth Circuit case with facts similar to those in *Nunez-Reyes*.[36] Rice, like Nunez-Reyes, was a Mexican citizen convicted of a felony for possession and a misdemeanor for being under the influence.[37] Although Rice was convicted and served almost two years of probation, the court dismissed the complaint and the resulting penalties.[38] The *Rice* court relied on *Cardenas-Uriarte v. INS*, which held that possession of drug paraphernalia constituted a lesser offense than simple possession because it was not a crime under any federal statute.[39] The *Rice* court found no important distinction between possession of drug paraphernalia and being under the influence of a narcotic.[40] Accordingly, the *Rice* court decided that a misdemeanor conviction for being under the influence of a controlled substance also constituted lesser offense than simple possession.[41] In light of this precedent, the Ninth Circuit panel held that Nunez-Reyes's conviction for being under the influence was not a conviction for immigration purposes.[42]

The panel concluded that under *Lujan-Armendariz*, equal protection required that state expungements of simple possession be treated the same as federal expungements.[43] As Nunez-Reyes's possession conviction would not have constituted a conviction for immigration purposes had it been expunged under the FFOA, it did not constitute a conviction despite being expunged under a state law.[44] Furthermore, in light of *Cardenas-Uriarte*, the panel concluded that Congress intended that crimes lesser than simple possession be given FFOA treatment.[45] As *Rice* held that being under the influence constituted a lesser offense than simple possession, Nunez-Reyes's conviction of being under the influence was also a lesser offense under the FFOA.[46] Therefore, his

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[35] *See Nunez-Reyes*, 602 F.3d at 1104–05.

[36] *See id.*; Rice v. Holder, 597 F.3d 952, 954, 956 (9th Cir. 2010), *overruled by Nunez-Reyes*, 646 F.3d 684 (9th Cir. 2011) (en banc).

[37] *Rice*, 597 F.3d at 954; *see Nunez-Reyes*, 602 F.3d at 1104–05.

[38] *Rice*, 597 F.3d at 954.

[39] *See id.* at 956; Cardenas-Uriarte v. INS, 227 F.3d 1132, 1137 (9th Cir. 2000), *overruled by Nunez-Reyes*, 646 F.3d 684 (9th Cir. 2011) (en banc).

[40] *See* 597 F.3d at 956.

[41] *See id.* at 956–57.

[42] *See Nunez-Reyes*, 602 F.3d at 1104–05.

[43] *See id.* at 1104.

[44] *See id.* at 1104–05.

[45] *See id.* at 1104.

[46] *See id.* at 1104–05.

conviction for being under the influence of methamphetamine could not preclude him from receiving relief from removal.[47]

The Ninth Circuit reheard Nunez-Reyes's case en banc because every other circuit court of appeals that had addressed the issue had rejected *Lujan-Armendariz* and held the opposite—that state and federal expungements should not be treated equally for immigration purposes.[48] In conformity with the other circuits, the Ninth Circuit en banc reversed the panel's decision.[49] The court held that (1) "equal protection does not require treating, for immigration purposes, an expunged state conviction of a drug crime the same as a federal drug conviction that has been expunged under the FFOA[;]" (2) the new rule would apply prospectively only; and (3) being under the influence does not constitute a lesser offense than simple possession.[50] Therefore, Nunez-Reyes could not receive relief from removal.[51]

II. A New Interpretation of Congressional Intent

The two key differences between the Ninth Circuit panel and the en banc court are their interpretations of Congressional intent regarding the applicability of the FFOA to state convictions, and the meaning of an offense lesser than simple possession.[52] Unlike the panel, the en banc court concluded that Congress may not have intended for state and federal expungements to be treated equally.[53] In deciding whether Congress had "a rational basis for distinguishing between expunged federal convictions and expunged state convictions," the en banc court applied "[a] very relaxed form of rational basis review . . . ."[54] The court reversed *Lujan-Armendariz v. INS*, finding that Congress could have a rational basis for distinguishing between expunged state and federal convictions.[55] The en banc court reiterated the Third Circuit's reasoning in *Acosta v. Ashcroft*, explaining that Congress may not have

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[47] *Nunez-Reyes*, 602 F.3d at 1104–05.

[48] *See Nunez-Reyes*, 646 F.3d at 689.

[49] *See id.* at 689–90, 695.

[50] *See id.* at 690, 695.

[51] *See id.*

[52] *See* Nunez-Reyes v. Holder, 646 F.3d 684, 688–90, 695 (9th Cir. 2011) (en banc); Nunez-Reyes v. Holder, 602 F.3d 1102, 1104–05 (9th Cir. 2010) (per curiam), *superseded en banc*, 646 F.3d 684 (9th Cir. 2011).

[53] *See Nunez-Reyes*, 646 F.3d at 688–90 (citing Acosta v. Ashcroft, 341 F.3d 218, 227 (3d Cir. 2003)).

[54] *See id.* at 688–89.

[55] *See id.* at 688–90.

wanted the FFOA to apply to state rehabilitative schemes.[56] Congress may have feared, for example, that dangerous offenders could easily plead down simple possession charges as a result of the heavy caseloads of state courts.[57] The en banc court also noted that not all states allow expungement.[58] A person convicted in one state may be eligible for relief, while someone in another state would not be eligible.[59] Rather than adopting the states' fragmented approach, Congress may not have wanted to recognize *any* state expungements in the interest of uniformity.[60] Therefore, although a federal conviction expunged under the FFOA "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law," the court held that state convictions expunged under state law could still be used to preclude immigration relief.[61]

The en banc and panel courts also reached different conclusions regarding what constitutes an offense lesser than simple possession.[62] Unlike the panel, the en banc court found that being under the influence could be a more serious crime than simple possession.[63] The court reasoned that "being under the influence alters one's sober state of mind and carries an immediate risk of dangerous behavior, which mere possession does not necessarily create."[64] The en banc court therefore overruled *Rice v. Holder* and concluded that "[t]he BIA did not err."[65] Consequently, Nunez-Reyes could not receive relief from removal.[66]

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[56] *See id.* at 689–90 (citing *Acosta*, 341 F.3d at 227).

[57] *See id.*

[58] *See Nunez-Reyes*, 646 F.3d at 690 (citing *Nunez-Reyes*, 602 F.3d at 1107 (Graber, J., concurring)).

[59] *See id.*

[60] *See id.*

[61] 18 U.S.C. § 3607 (2006); *Nunez-Reyes*, 646 F.3d at 688–90. After concluding that the equal protection guarantee did not require similar treatment of state and federal expungements for immigration purposes, the en banc court applied the rule prospectively only. *Nunez-Reyes*, 646 F.3d at 690.

[62] *See Nunez-Reyes*, 646 F.3d at 695; *Nunez-Reyes*, 602 F.3d at 1104–05.

[63] *See Nunez-Reyes*, 646 F.3d at 695; *Nunez-Reyes*, 602 F.3d at 1104–05.

[64] *Nunez-Reyes*, 646 F.3d at 695 (reasoning that someone could be guilty of simple possession for agreeing to hide drugs for someone else but "not create an immediate risk of dangerous behavior").

[65] *Id.*

[66] *Id.* at 687, 695.

III. The Impact of the Ninth Circuit's Decision

The Ninth Circuit's en banc decision in *Nunez-Reyes v. Holder* frustrated Congress's intent in enacting the FFOA, and hindered courts' ability to ensure equal protection of similarly situated aliens.[67] Congress adopted the 1996 amendments to federal immigration laws after the BIA's affirmation of its rule that state-expunged first-time drug possession offenses would be given FFOA treatment.[68] Judge Pregerson dissented in the en banc decision, explaining that Congress essentially adopted the BIA's interpretation, and that "when Congress adopts an agency interpretation, Congress intends the agency construction to be incorporated into the statute."[69] Therefore, "in enacting the 1996 amendment, [Congress] . . . had no intention of altering the longstanding rule that convictions that are subsequently expunged under either federal or state law 'no longer have any effect for immigration' purposes."[70] Congress instead intended that expunged state convictions be treated as expunged federal convictions under the FFOA.[71] The en banc court's reasoning undermines this intent by permitting different outcomes depending on whether an alien's conviction occurred in state or federal court.[72]

Congress also intended that the FFOA protect first-time drug offenders from the "harsh consequences" of deportation.[73] By allowing immigration relief only in federal cases, "the FFOA loses much of its efficacy because the relief it offers can be circumvented via the state criminal justice system."[74] Such a rule would create an incentive for prosecutors to try aliens in state courts, where any resulting expungement would be ineligible for FFOA treatment.[75] As Judge Pregerson argued in his dissent, "[w]ithout the equal treatment afforded under *Lujan-Armendariz*, this unfettered prosecutorial discretion may now

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[67] *See* 646 F.3d 684, 703–04, 709–11, 714 (9th Cir. 2011) (en banc) (Pregerson, J., dissenting).

[68] *See id.* at 711, 714.

[69] *See id.*

[70] *Id.* at 711 (quoting Lujan-Armendariz v. INS, 222 F.3d 728, 742 n.23 (9th Cir. 2000) *overruled by Nunez-Reyes*, 646 F.3d 684 (9th Cir. 2011) (en banc)).

[71] *See id.* at 704, 711, 714 (noting that the result of the majority's decision is that Nunez-Reyes "will be separated from his citizen wife and two American-born children because of a minor drug conviction" that had been expunged in state court after he successfully completed a rehabilitation program).

[72] *See Nunez-Reyes*, 646 F.3d at 708, 711, 714–15 (Pregerson, J., dissenting).

[73] *See id.* at 709–10.

[74] *Id.* at 710.

[75] *See id.* at 710, 715.

be exercised to dispositively determine whether an individual's first-time drug offense will yield extremely harsh immigration consequences; that is, whether any particular defendant will benefit from the FFOA."[76]

Furthermore, the majority only needed to consider whether Nunez-Reyes qualified for relief under the FFOA rather than question the viability of *Lujan-Armendariz*.[77] As Nunez-Reyes had not previously been convicted, had never received FFOA relief, and had his convictions expunged, he satisfied three of the four FFOA requirements.[78] Therefore, the court needed only to address whether his conviction for using or being under the influence constituted an equivalent or lesser charge than simple possession of narcotics.[79] According to the Ninth Circuit's decision in *Rice v. Holder*, being under the influence of a controlled substance qualified as a lesser offense than simple possession.[80] Judge Graber, concurring with the Ninth Circuit panel's decision, also recognized that no factual distinction existed between *Nunez-Reyes* and *Rice*.[81] Moreover, both Congress's and California's criminal schemes consider being under the influence a less serious type of drug offense.[82] Therefore, under Ninth Circuit precedent, Nunez-Reyes was eligible for FFOA treatment and immigration relief.[83]

The Supreme Court has stated that it has "long recognized that deportation is a particularly severe penalty . . . ."[84] In his dissent, Judge Pregerson correctly characterized the opinion of the Ninth Circuit en banc majority as a "harsh result, . . . repugnant to the values of kindness, compassion, and fundamental fairness."[85] The Ninth Circuit's new rule undermines Congressional intent, and ultimately hinders

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[76] *Id.* at 715.

[77] *See Nunez-Reyes*, 646 F.3d at 705–07 (Pregerson, J., dissenting). Because the BIA distinguished *Lujan-Armendariz* from Nunez-Reyes's case, it was improper for the circuit court to reach the issue of its viability. *See id.* at 709 (noting that the court must limit its review to grounds considered by the BIA).

[78] *Id.* at 705–06.

[79] *Id.* at 706.

[80] *Id.*; Rice v. Holder, 597 F.3d 952, 956 (9th Cir. 2010), *overruled by Nunez-Reyes*, 646 F.3d 684 (9th Cir. 2011) (en banc).

[81] *Nunez-Reyes*, 646 F.3d at 706 (Pregerson, J., dissenting) (citing Nunez-Reyes v. Holder, 602 F.3d 1102, 1105 (9th Cir. 2010) (Graber, J., concurring), *superseded en banc*, 646 F.3d 684 (9th Cir. 2011)).

[82] *Id.* at 707.

[83] *See id.* at 706.

[84] Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (internal quotations omitted) (citing Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).

[85] *See Nunez-Reyes*, 646 F.3d at 704 (Pregerson, J., dissenting).

courts' ability to ensure the equal protection of similarly situated aliens.[86] The en banc court should have upheld the panel's decision.[87]

Conclusion

Nunez-Reyes v. Holder raises important issues regarding expunged state convictions and whether they should receive FFOA treatment. The en banc court brought the Ninth Circuit into conformity with other circuit courts of appeals, overruling *Lujan-Armendariz v. INS* in holding that, for immigration purposes, constitutional equal protection does not require treating state expunged drug convictions the same as those expunged under the FFOA. The court also overturned *Rice v. Holder*, holding that being under the influence was not a lesser offense than simple possession. Unfortunately, the en banc's decision frustrated Congress's intent in enacting the FFOA and wrongly denied Nunez-Reyes immigration relief.

[86] *See id.* at 704, 711, 714–15.
[87] *See id.* at 706–08, 711, 714–16.