

“[T]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty -- at times a most serious one -- cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.”

Bridges v. Wixon, 326 U.S. 135, 154 (1945).

DISCLAIMER

This manual is NOT INTENDED to serve as legal advice on individual cases, but to give a general overview of the immigration consequences for criminal convictions to public defenders and criminal defense attorneys who are working with non-citizen clients. Due to the ever-changing nature of immigration law, almost weekly administrative immigration appellate decisions, and federal court rulings, attorneys are strongly urged to contact and collaborate closely with an immigration attorney who works on criminal immigration cases in every case involving a non-citizen defendant.

Introduction & Acknowledgments

Defending Non-Citizens in Illinois, Indiana, and Wisconsin is intended to provide public defenders and criminal defense attorneys with a basic overview of the immigration provisions that may have consequences for their non-citizen clients in state and federal criminal and civil courts. Where possible, rulings by the Seventh Circuit Court of Appeals and the Board of Immigration Appeals directly relating to Illinois, Indiana, and Wisconsin statutes have been noted. While this manual focuses on the immigration consequences of convictions under Illinois, Indiana, and Wisconsin law, it may also be helpful to legal advocates for immigrants, immigration attorneys, and community organizations in the tri-state area as well as other states.

This manual focuses on the changes in immigration law effected by the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and other major pieces of immigration legislation since September 11, 2001. Based on changes in federal law, pre-plea advisals, motions to vacate guilty pleas, motions to reduce sentences, post-conviction relief, and gubernatorial pardons will make the difference for many non-citizens who want to remain in the United States with their families or avoid possible persecution (including torture and death) in their countries of origin or nationality.

It has been eight years since *Defending Non-Citizens in Illinois Courts* was published. Since then, the interpretation of the Immigration and Nationality Act addressing the immigration consequences of criminal dispositions can be described as a rollercoaster ride, with the U.S. Supreme Court stepping in several times to overturn decisions issued by the federal circuit courts of appeals and the Board of Immigration Appeals. Since August 2007, the Seventh Circuit's case law has dramatically changed as well, particularly regarding the interpretation of crimes involving moral turpitude and evidence outside of the criminal record that can be used to establish deportability of a non-citizen. In a case arising out of Kentucky involving a state petition for post-conviction relief, the Supreme Court is expected to hold oral argument in the fall of 2009 to directly address the issue regarding whether defense attorneys have an obligation to advise their noncitizens about the immigration consequences of criminal pleas and if not, whether counsel's gross misadvice about those consequences can constitute grounds to set aside a guilty plea induced by the misadvice.¹

This manual would not have been possible without the generosity of Scott D. Pollock and Scott D. Pollock & Associates, P.C. which provided support for legal research, legal assistant Laura Litwiller, and technical support. I am grateful to Scott and the law firm for having allowed me to take on this project through August 2007. Following my departure from that firm, Greta Hendricks, Natasha Ruser, and Nandini Saldanha assisted with ongoing research to update the manual. Funding for their assistance came from my salary at another firm. Since June 2008, Maria Baldini-Potermin & Associates, P.C., has continued to underwrite the ongoing research and updating of this publication, a certain challenge in the economic downturn faced around the U.S.

Between September 2007 and May 2008, Anna Marie Gallagher and I co-authored *Immigration Trial Handbook*, published by Thomson Reuters/West. It is a step-by-step book for immigration practitioners, and it includes strategies about how to challenge the immigration consequences of criminal convictions in removal proceedings as well as forms of relief from removal. As I prepare annual updates every spring for the *Immigration Trial*

¹ *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008), cert. granted., 129 S.Ct. 1317 (U.S. Feb. 23, 2009) (No. 08-651).

Handbook, I will update this manual for defense attorneys in Illinois, Indiana, and Wisconsin to have access to a current publication as they advise noncitizens with cases pending before the state criminal courts. National Immigrant Justice Center will be responsible for announcing and publishing the updated versions. Any comments and suggestions for future editions are welcome and will be much appreciated

Many thanks are due to the following attorneys who contributed their time and talents to review the 2007 draft of the manual: Scott D. Pollock, Marta Delgado, Anne Relias, and Kathryn Weber with Scott D. Pollock & Associates, P.C.; Professor Sioban Albiol, DePaul College of Law; Susan Compornolle, Rubman and Compornolle; Robert Gevirtz, Gevirtz and Born; Andrew Krull, Indiana Public Defender Council; Bill Marsh, Chief Federal Defender, Federal Defender's Office, Indianapolis, Indiana; Maria Gloria Najera, Gaylan and Najera; Lee O'Connor, Indiana Legal Services; Lisa Palumbo, Legal Assistance Foundation of Chicago, Inc.; Charles Roth, National Immigrant Justice Center (NIJC); Thomas Ruge, Lewis & Kappes, P.C.; Susan Schreiber, Catholic Legal Immigration Network Inc. (CLINIC); Fred Tsao, Illinois Coalition for Immigrant and Refugee Rights (ICIRR); Erich C. Straub, Erich C. Straub Immigration Attorney LLC; and Professor Ellen Yee, Drake Law School. Thanks are due to Scott D. Pollock, Anne Relias, Kathryn Weber, Charles Roth, and Mary Meg McCarthy who reviewed the 2009 revised draft.

Special thanks are due to Dan Kesselbrenner, Director of the National Immigration Project of the National Lawyers Guild. Dan reviewed the prior versions of the Minnesota and Illinois manuals, encouraged me to strive for a manual covering all three states in the jurisdiction of the Seventh Circuit Court of Appeals, and reviewed this manual in detail, particularly the sections on aggravated felonies and federal sentencing. Dan has always been willing to discuss the intricacies of criminal immigration issues with attorneys around the country and come up with creative strategies. Andy Krull, Thomas Ruge, and Lee O'Connor assisted with their expertise on Indiana criminal law. Erich C. Straub lent his expertise on Wisconsin criminal law. Chief Federal Defender Bill Marsh gave his expertise to the sections on federal offenses, procedure, and sentencing. Nancy Nemeth assisted with initial legal research.

On a personal note, I wrote the first Illinois manual during my pregnancy and maternity leave after giving birth to my daughter, Christine Marie Potermin. She was seven months old when the events of September 11, 2001 rocked the world and the state of immigration law. Now eight years old, Christine patiently endured the many weekends and evenings when I worked to draft and complete this manual. Answering her numerous questions about what the manual was about, how it could help to get people out of jail, and how it could help other parents stay in this country and not be sent away from their children permanently to other countries helped me to persevere to complete this manual, despite other obligations and events in the past two years.

For the last 19 years I have been involved with immigration law and the defense of non-citizens, and it never ceases to surprise or amaze me. As attorneys and advocates, we stand on the shoulders of those who have preceded us as well as those around us. I dedicate this book to those who have gone before us, to those advocating for due process, fundamental fairness, and human rights, and to those who will come after us to continue this struggle. May the world become a better and more just place on account of all of our individual and collective efforts.

Maria Theresa Baldini-Potermin
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About the Author:

Maria Baldini-Potermin is the founder of Maria Baldini-Potermin & Associates, P.C. in Chicago, Illinois. The firm focuses on removal/deportation defense, federal litigation and appeals, waivers, naturalization, consular processing, family-based applications and immigration consequences of criminal dispositions. She is the co-author of *Immigration Trial Handbook*, published by Thomson Reuters/West. She serves as an expert author-consultant for Thomson Reuters/West's *Interpreter Releases*, the leading weekly immigration law periodical. She is the author of Chapter 4: The Meaning of Conviction for Immigration Purposes, Advisements, Pleas and Sentences in the *A Judge's Guide to Immigration Law in Criminal Proceedings*, published by American Bar Association in 2004. She authored *Defending Non-citizens in Minnesota Courts: A Summary of Immigration Law and Client Scenarios* in 1998 and 2000. An active member of the American Immigration Lawyers Association (AILA), she serves currently as the vice-chair of the national AILA-Executive Office for Immigration Review Liaison Committee. In 2004, she received the Chicago AILA Chapter's Joseph Minsky Mentor Award. Since 2004, she has been recognized as an Illinois *Leading Lawyer* in immigration law.

Ms. Baldini-Potermin has worked with asylum seekers since 1990, beginning on the South Texas-Mexico border at the former INS' Port Isabel Service Processing Center. She was the recipient of two National Association for Public Interest Law (now Equal Justice Works) fellowships, including one at the National Immigrant Justice Center from 1999-2001. She previously taught as an adjunct professor at the University of Minnesota Law School's Immigration Clinic. Ms. Baldini-Potermin has written extensively on the intersection of criminal and immigration law as well as other litigation-related topics and is a regular speaker at national and local CLE programs. She is a member of the National Immigration Project of the National Lawyers Guild, Detention Watch Network, Chicago Bar Association, Illinois State Bar Association, and Federal Bar Association. She is fluent in Spanish.

About Scott D. Pollock & Associates, P.C.:

Scott D. Pollock & Associates, P.C. is a full-service immigration and nationality law firm in Chicago. Its attorneys provide legal services in the areas of immigrant and nonimmigrant visas, employment and family based immigration, deportation defense, immigration detention representation, political asylum, waivers of inadmissibility, employment authorization, employer immigration compliance, naturalization, federal litigation and appeals.

Scott D. Pollock, the firm's founder, has practiced immigration law since 1985. The firm has received Martindale Hubbell's AV rating (very high to preeminent), and several of its attorneys are recognized by Law and Politics and included in its Illinois Super Lawyer and Illinois Rising Star lists. The firm values scholarship, pro bono representation and service to the immigration bar, so as to protect individual rights and due process, and promote the progressive advancement of U.S. immigration law. All attorneys in the firm are active members of the American Immigration Lawyers Association

About National Immigrant Justice Center:

Heartland Alliance's National Immigrant Justice Center (NIJC) is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding nearly 30 years ago, NIJC has been unique in blending individual client advocacy with broad-based systemic change. In partnership with pro bono attorneys, NIJC provides legal services to more than 7,500 individuals each year and maintains a success rate of 90 percent in obtaining asylum for those fleeing persecution in their home countries. NIJC and its pro bono attorneys have been on the vanguard of federal impact litigation and advocacy, winning cases that set positive precedents to preserve human rights protections within our borders and achieving life-saving victories for hundreds of vulnerable immigrants, refugees and asylum seekers.

With the generous support of the Chicago Bar Foundation and the Chicago Area Foundation for Legal Services, NIJC initiated the Defenders Initiative, which provides legal consultations, trainings, and materials to criminal defense attorneys to understand the consequences of criminal convictions on immigration status.