Defending Non-Citizens in Illinois, Indiana, and Wisconsin

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"[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.

CHAPTER

8

Criminal Proceedings, Post-Conviction Relief, Illegal Reentry Cases, and Pardons

Pre-Plea Advisals about Immigration Consequences

The issue of whether a non-citizen must be advised prior to entering a plea in a criminal case has been hotly debated and litigated around the United States, particularly since the 1996 expansion of the aggravated felony definition and the restriction in remedies available to non-citizens who are the subject of criminal dispositions. As a result, legislatures and courts have been grappling with: 1. whether a non-citizen must be advised that he could face immigration consequences as a result of a plea in a criminal proceeding; 2. if a pre-plea advisal is required, whether the state court or defense counsel should give the non-citizen the advisal; 3. the form and content of the advisal; and 4. the remedy, if any, that should exist where an advisal was not provided or where affirmative misadvice was provided.

The question of the role of a defense attorney regarding the immigration consequences of criminal dispositions will be decided by the U.S. Supreme Court in its 2009-2010 term.[1151] In the *Padilla* case, two main questions are presented:

[1151] *See* Commonwealth v. Padilla, 253 S.W.3d 482 (Ky. 2008), *cert. granted,* 129 S. Ct. 1317 (U.S. Feb. 23, 2009) (No. 08-651). The petition for a writ of certiorari is available at Padilla v.

1. Whether the mandatory deportation consequences that stem from a plea to trafficking in marijuana, an "aggravated felony" under the INA, is a "collateral consequence" of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise; and

2. Assuming immigration consequences are "collateral", whether counsel's gross misadvice as to the collateral consequence of deportation can constitute a ground for setting aside a guilty plea which was induced by that faulty advice.[1152]

In the *Padilla* case, the non-citizen defendant pled guilty to trafficking in more than five pounds of marijuana, possession of marijuana, and possession of drug paraphernalia, for which he was sentenced to serve five of ten years in prison and five years on probation on October 4, 2002.[1153] He relied on his defense attorney's advice that he "did not have to worry about immigration status since he had been in the country so long," being that he had lived in the U.S. for decades as a lawful permanent resident and even served in the U.S. armed forces in Vietnam.[1154]

Following the lodging of a detainer by ICE, the non-citizen filed a motion for post-conviction relief under Kentucky law, arguing that his attorney rendered ineffective assistance of counsel by misadvising him about the immigration consequences of his guilty plea.[1155] The state circuit court denied the petition and then Kentucky Court of Appeals reversed; it found that such misadvice could constitute ineffective assistance of counsel and remanded the case for an evidentiary hearing on the post-conviction motion.[1156] The state then requested discretionary review by the Kentucky Supreme Court, which granted the request.[1157] The Kentucky Supreme Court held that immigration consequences are collateral consequences outside the scope of the Sixth Amendment right to counsel and therefore neither failure by defense counsel to advise a non-citizen of such consequences nor affirmative misadvice by defense counsel can constitute ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).[1158] The petition for a writ of certiorari to the U.S. Supreme Court then followed.

With the above overview of the current issue before the U.S. Supreme Court, it is recommended that counsel carefully review the case law and statutes cited in the following sections. While Indiana has seen the development of case law on the affirmative duty of

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Commonwealth of Kentucky, 2008 WL 4933628 (Appellate Petition, Motion and Filing) (U.S. Nov. 14, 2008). Padilla v. Commonwealth of Kentucky, 2008 WL 4933628 (Appellate Petition, Motion and Filing) (U.S. Nov. 14, 2008). An amicus brief in support of the petition for a writ of certiorari was submitted by Brief of Amici Curiae Criminal and Immigration Law Professors, Capital Area Immigrants' Rights Coalition, Washington Lawyers' Committee for Civil Rights and Urban Affairs, and Western Kentucky Refugee Mutual Assistance Society, Inc. and is available at 2009 WL 164242 (Appellate Petition, Motion and Filing) (U.S. Jan. 21, 2009).

[1152] The "Questions Presented" is available on the U.S. Supreme Court's website at http://origin.www.supremecourtus.gov/docket/08-651.htm.

[1153] *See* Commonwealth v. Padilla, 253 S.W.3d at 483.

[1154] *See* Commonwealth v. Padilla, 253 S.W.3d at 483.

[1155] *See* Commonwealth v. Padilla, 253 S.W.3d at 483.

[1156] *See* Commonwealth v. Padilla, 253 S.W.3d at 483-84.

[1157] *See* Commonwealth v. Padilla, 253 S.W.3d at 483.

[1158] *See* Commonwealth v. Padilla, 253 S.W.3d at 484-85.

counsel to provide accurate advice regarding immigration consequences of criminal dispositions as discussed below, the days of "don't ask about immigration status, don't tell about any potential immigration consequences" for counsel in Wisconsin and Illinois may soon be over with a decision in the *Padilla* case.

Following the grant of the petition for a writ of certiorari in *Padilla*, the U.S. Supreme the Court ruled that military courts, despite being Article I courts, have jurisdiction to grant a writ of coram nobis to a former service member who pled guilty as a lawful permanent resident in a special court-martial but who claimed that he was not advised about the immigration consequences of his guilty plea because his counsel rendered ineffective assistance of counsel.[1159] The Court remanded the case for consideration of the merits of the non-citizen's claim of ineffective assistance of counsel, among other issues.[1160]

State Criminal Proceedings

Although not all states require that non-citizens be advised about the immigration consequences of pleas in criminal cases, the trend is increasing to require such advisals, particularly in light of the draconian consequences for non-citizens on account of the 1996 amendments to the immigration law. As of May 2009, twenty-seven states (including Illinois and Wisconsin) as well as the District of Columbia and Puerto Rico have enacted statutes requiring that a non-citizen defendant be advised that he or she may suffer immigration consequences as a result of a plea bargain or a conviction,[1161] and others have developed case law allowing post-conviction relief for immigrants where they were not so advised.[1162] The other twenty-three states, however, do not require that the defendant be advised of potential immigration consequences prior to entering a plea.

Some state courts have held that no duty is owed by the criminal defense counsel to advise the non-citizen defendant that there could be immigration consequences, holding

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[1159] *See* U.S. v. Denedo, no. 08-267, 2009 U.S. LEXIS 4160 (Jun. 8, 2009).

[1160] *See id.* at *23-24.

[1161] *See* Ariz. R. Crim. P. 17.2(f); Cal. Penal Code § 1016.5; Conn. Gen. Stat. 54-1j; D.C. Code Ann. § 16-713; Fla. R. Crim. P. 3.172(c)(8); *In re* Amendments to Florida Rules, 536 So.2d 992 (Fl. Nov. 3, 1988); O.C.G.A. § 17-7-93(c); Haw. Rev. Stat. §§ 802E-1, 802 E-2, 802E-3; Idaho R. Crim. P. 11(d)(1) (2007); 725 ILCS 5/113-8; Iowa R. Crim. P. 2.8(2)(b); Md. Rules of Court § 4-242(e); Mass. Gen. L. Ch. 278, § 29D; Me. R. Crim. P. 11(B)(5); Minn. R. Crim. P. § 15.01, (10)(d) for felonies and § 15.02, (2) for misdemeanors; Mont. Code Ann. § 46-12-210(f); Neb. Rev. Stat. § 29-1819.02 (2002); N.J. Directive #13-05 (9/19/2005); N.M. Dist. Ct. R. Crim. P. 5-303(F)(5); N.Y. Crim. Proc. Law § 220.50; N.C. Gen. Stat. § 15A-1022(a)(7); Ohio Rev. Code Ann. § 2943.031 (2003); Or. Rev. Stat. § 135.385(2)(d); P.R. Rules Crim. P. 70 (Puerto Rico); R.I. Gen. Law § 12-12-22; Tex. Code Crim. Pro. Ann. Art. § 26.13(a)(4); Wash. Rev. Code § 10.40.200; Wis. Stat. § 971.08(1)(c); Vt. Stat. Ann. Tit. 13 § 6565; *see also*, U.S. Dist. Ct. for the Dist. Of Colo. Local Rules §3, App. K (form guilty plea notification requiring acknowledgement of possible deportation); Machado v. State, 839 A.2d 509 (R.I. Nov. 26, 2003) (where R.I. statute requires judge to inform defendant of three potential immigration consequences of his plea and he provides only one, conviction was vacated); Commonwealth v. Hilaire, 777 N.E.2d 804 (Mass. Oct. 18, 2002) (ordering new trial where judge failed to orally advise defendant during plea colloquy of possible immigration consequences); DeAbreu v. State, 593 So.2d 233 (Fla. 1st DCA Dec. 26, 1991) (reversing plea where judge failed to advise defendant pursuant to Florida regulation).

[1162] *See, e.g.,* Segura v. State, 749 N.E.2d 496 (Ind. Jun. 26, 2001); Sial v. State, 862 N.E.2d 702 (Ind. Ct. App. Mar. 28, 2007); State v. Green, 944 So. 2d 208 (Fla. Oct. 26, 2006).

immigration consequences to be merely collateral consequences for which a lack of an advisal does not prejudice the non-citizen defendant.[1163] Other state courts have found that failure to advise a non-citizen or affirmative misadvice by defense counsel regarding the immigration consequences constitutes ineffective assistance of counsel.[1164]

[1163] *See e.g.,* Commonwealth v. Padilla, 253 S.W.3d 482 (Ky. 2008), *cert. granted,* 129 S. Ct. 1317 (U.S. Feb. 23, 2009) (No. 08-651); United States v. Del Rosario, 920 F.2d 55, 59 (D.C. Cir. 1990)); United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000); Yong Wong Park v. United States, 222 F.d App'x 82 (2nd Cir. 2007); United States v. Yearwood, 863 F.2d 6 (4th Cir. 1988); Santos-Sanchez v. United States, 548 F.3d 327, 334 (5th Cir. 2008); Santos v. Kolb, 880 F.2d 941, 944-45 (7th Cir. 1989), *superseded by statute*, P.L. No. 101-649, tit. V, §505(b), 104 Stat. 5050, *cert. den.*, 493 U.S. 1059 (1990); Gumangan v. United States, 254 F.3d 701, 706 (8th Cir. 2001); United States v. Fry, 322 F.3d 1198 (9th cir. 2003); Broomes v. Ashcroft, 358 F.3d 1251, 1257 (10th Cir. 2004), *cert. den.*, 543 U.S. 1034 (2004); United States v. Campbell, 778 F.2d 764 (11th Cir. 1985); United States v. Sambro, 454 F.2d 918 (D.C. Cir. 1971); Oyekoya v. State, 558 So.2d 990 (Ala. Crim. App. 1989); Tafoya v. State, 500 P.2d 247, 251 (Alaska 1972), *cert. den.*, 410 U.S. 935 (1973); State v. Rosas, 904 P.2d 1245 (Ariz. Ct. App. 1995); Major v. State, 814 So.2d 424 (Fla. 2002); Williams v. Duffy, 513 S.E.2d 212 (Ga. 1999); People v. Huante, 571 N.E.2d 736 (Ill. Apr. 18, 1991) (holding that the failure of defense counsel to advise a non-citizen of the immigration consequences of a guilty plea did not render his plea involuntary and did not constitute ineffective assistance of counsel); Mott v. State, 407 N.W.2d 581, 583 (Iowa 1987); State v. Muriithi, 46 P.3d 1145, 1152 (Kan. 2002); Commonwealth v. Fuartado, 170 S.W.3d 384 (Ky. Aug. 25, 2005); State . Montalban, 810 So.2d 1106 (La. 2002); Alanis v. Minnesota, 583 N.W. 2d 573 (Minn. Aug. 6, 1998); Berkow v. Minnesota, 583 N.W.2d 562 (Minn. Aug. 6, 1998); State v. Zarate, 651 N.W.2d 215 (Neb. 2002); Barajas v. State, 991 P.2d 474 (Nev. 1999); State v. Dalman, 520 N.W.2d 860 (N.D. 1994); Commonwealth v. Frometa, 555 A.2d 92 (Pa. Mar. 6, 1989); Nokolaev v. Weber, 705 N.W.2d 72 (S.D. 2005); State v. McFadden, 884 P.2d 1303 (Utah Ct. App. 1994); Carson v. State, 755 P.2d 242 (Wyo. Jun. 2, 1988); State v. Santos, 401 N.W.2d 856 (Wis. App. Jan. 27, 1987) (failure to inform of JRAD); Lyons v. Pearce (Lyons II), 694 P.2d 969, 978 (Or. Jan. 29, 1985); State v. Ginebra, 511 So.2d 960 (Fla. Jul. 2, 1987) (disapproving of Edwards v. State, 393 So.2d 597 (3rd DCA Jan. 21, 1981) and holding that failure to advise is insufficient to invalidate plea); Bermudez v. State, 603 So.2d 657 (Fla. App. 3 Dist. Aug. 11, 1992) (finding that even where counsel gives misadvice to client, judge's colloquy informing person of immigration consequences vitiates any misadvice); *In re* Fortis, 14 I&N Dec. 576 (BIA Jan. 29, 1974).

[1164] *See* State v. Carlos, 147 P.3d 897 (N.M.Ct.App. Oct. 3, 2006) (holding that defense counsel must advise a non-citizen defendant of the specific federal immigration statutes that apply to the specific state charges contained in a proposed plea agreement and the immigration consequences as demonstrated in the federal statues that will result from a plea of guilty); Patterson v. State, 879 So.2d 1208, 1210 (Ala. Crim. App. 2003); State v. Paredez, 101 P.3d 799 (Ariz. Aug. 31, 2004) (holding that criminal defense attorneys are obligated to determine the immigration status of their clients and to advise them of the immigration consequences of a guilty plea and that failure to do so is ineffective assistance of counsel); People v. Garcia, 815 P.2d 937 (Colo. 1991); Hernandez v. Commissioner of Correction, 846 A.2d 889 (Conn. Ct. App. 2004); Roberti v. State, 782, 782 So.2d 919, 920 (Fla. Dist. Ct. App. 2001); Meier v. State, 337 N.W.2d 204, 207 (Iowa 1983); Aldus v. State, 748 A.3d 463 (Me. 2000); Yoswick v. State, 700 A.2d 251, 256, 347 Md. 228, 240 (Md. 1997); Bronson v. State, 786 S.2d 1083 (Miss. Ct. App. 2001); Pettis v. State, 212 S.W.3d 189, 194 (Mo. Ct. app. 2007); State v. Sharkey, 155 N.H. 638, 927 A.2d 519 (N.H. 2007); State v. Viera, 760 A.2d 840 (N.J. Super. Ct. 2000); People v. Ping Cheung, 186 Misc. 2d 507, 718 N.Y.2d 578 (N.Y. Sup. 2000); State v. Goforth, 503 S.E.2d 676, 678, 130 N.C.App. 603, 604 (N.C.App. 1998); Gonzalez v. Oregon, 83 P.3d 921 (Or. 2004); Hison v. State, 297 S.C. 456, 377 S.E.2d 338 (S.C. 1989); Williams v. State, 641 N.E.2d 44, 49 (Ind. App. 1994) (holding that defense counsel must advise non-citizen defendants of immigration consequences of their guilty pleas); State v. Sallato, 519 So.2d 605 (Fla. Jan. 28, 1988) (finding that where an attorney gave "positive misadvice" to a non-citizen, it could render plea involuntary); *In re* Resendiz, 19 P.3d 1171, 105 Cal. Rptr.2d 431 (Cal. Apr. 2, 2001) (finding that

A conviction that is vacated due to the failure of a state court or defense counsel to advise a non-citizen of immigration consequences for a plea may eliminate or reduce the immigration consequences. In *In re Adamiak*, the Board held that a non-citizen was not convicted for immigration purposes where a state court granted a motion to vacate a plea based on the failure of the state court to advise a non-citizen defendant of the immigration consequences of his plea as required by state statute.[1165] The Board found that the vacatur was granted as a result of a "defect in the underlying criminal proceedings."[1166]

Illinois and Wisconsin require by statute that a state court advise a non-citizen defendant prior to entering a plea that he could be subject to immigration consequences based on his plea to a criminal offense.[1167] For Illinois pleas entered prior to January 1, 2004, the state courts were not required to advise non-citizen defendants about the immigration consequences.[1168] Where a non-citizen has pled guilty on or after January 1, 2004 and did not receive the requisite advisal from the Illinois court, he may file a motion to withdraw his plea within 30 days of the entry of the plea or, if it is later than 30 days, he may file a petition for post-conviction relief.[1169]

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affirmative misrepresentations or erroneous advice can, in certain circumstances, constitute ineffective assistance of counsel if defendant can demonstrate he would not have otherwise pled guilty); People v. Soriano, 240 Cal. Rptr. 328 (Sept. 24, 1987); Commonwealth v. Mahedo, 397 Mass. 314 (Apr. 15, 1986); People v. Guzman, 172 Cal. Rptr. 34 (Ct. App. Feb. 24, 1981); People v. Correa, 485 N.E.2d 307 (Ill. Sept. 20, 1985) (holding that affirmative misadvice about immigration consequences of a guilty plea by defense counsel rendered his plea involuntary as it was not made intelligently and knowingly and upholding the order granting his petition for post-conviction relief to withdraw his guilty plea); Lyons v. Pearce, 694 P.2d 969, 977 (Or. 1985); Gonzalez v. State, 134 P.3d 955, 958-59 (Or. 2006) (reinterpreting Lyons v. Pearce 694 P.2d 969, 977 (Or. 1985) as based on Oregon's state constitution); State v. Malik, 680 P.2d 770 (Wash. Apr. 30, 1984); People v. Pozo, 746 P.2d 523 (Colo. Nov. 9, 1987) (finding that defense counsel has the duty to investigate relevant immigration law where he is aware that the client is a non-citizen); State v. Creary, No. 82767, 2004 WL 351878 at *2 (Ohio Ct. App. Feb. 26, 2004) (holding that counsel's failure to advise non-citizen defendant whom he knew to be interested in deportation consequences can constitute ineffective assistance of counsel); *see also*, United States v. Couto, 311 F.3d 179, 187-88 (2nd Cir. 2002), *cert. den.*, 544 U.S. 1034 (2005); Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979); Untied States v. Kwan, 407 F.3d 1005, 1016018 (9th Cir. 2005); Beavers v. Saffle, 216 F.3d 918 (10th Cir. 2000); Meyers v. Gillis, 142 F.3d 664 (3rd Cir. 1998); Czere v. Butler, 833 F.2d 59, 63 n. 6 (5th Cir. 1987); Sparks v. Sowders, 852 F.2d 882, 885 (6th Cir. 1988); Hill v. Lckhart, 894 F.2d 1009 (8th Cir. 1990); Downs-Morgan v. United States, 765 F.2d 1534, 1541 (11th Cir. 1985); Alguno v. State, 892 So.2d 1200 (Fla. Dist. Ct. App. 2005); Rollins v. State, 591 S.E.2d 796, 799 (Ga. 2004); Rubio v. State, 194 P.3d 1224, 1230-31 (Nev. 2008); State v. Garcia, 727 A.2d 97 (N.J. Super. Ct. App. Div. 1999); King v. State, No. M2006-02745-CCA-R3-CD, 2007 WL 3052854 (Tenn. Crim. App. Sept. 4, 2007); State v. Rojas-Martinez, 125 P.3d 930 (Utah 2005); Commonwealth v. Tahmas, No. 105254 & 105255, 2005 WL 2249587 (Va. Cir. Ct. Jul. 26, 2005); Valle v. State, 132 P.3d 181, 184 (Wyo. 2006); People v. McDonald, 745 N.Y.S.2d 276 (N.Y. Ct. App. 2002), *aff'd*, 802 N.E.2d 13 (N.Y. 2003).

[1165] *See In re* Adamiak, 23 I&N Dec. 878 (BIA Feb. 8, 2006).

[1166] *See id.*

[1167] *See* Wis. Stat. § 971.08(1)(c); 725 ILCS 5/113-8 (advisal required for pleas of guilty, guilty but mentally ill, or nolo contendere for misdemeanor or felony offenses).

[1168] *See* 725 ILCS 5/113-8 (effective for pleas of guilty, guilty but mentally ill, or nolo contendere entered on or after January 1, 2004 for misdemeanor or felony offenses).

[1169] *See* 725 ILCS 5/122-1.

Where a non-citizen was not advised by the Illinois court as required by statute, the Appellate Court of Illinois has considered whether he can withdraw his plea. Two districts of the Appellate Courts which have thus far decided the issue have reached opposite conclusions. The First and Second Districts have found that because the statutory advisal is directory and not mandatory, a trial court can deny a motion to withdraw a guilty plea.[1170] In a separate decision, the First District has held that it is mandatory.[1171] The Illinois Supreme Court heard oral argument in this case on May 13, 2009 and a decision is expected.[1172]

In addition, affirmative misadvice by defense counsel regarding the immigration consequences of a plea may render the plea unintelligent and unknowing to support a granting of post-conviction relief.[1173] In contrast, the failure of defense counsel to advise a non-citizen about immigration consequences does not constitute a claim for ineffective assistance of counsel and a motion to withdraw the plea will not be granted.[1174]

Where a Wisconsin court failed to provide the requisite advisal about the immigration consequences under Wis. Stat. § 971.08(1)(c) and a non-citizen later demonstrates that his plea is likely to result in his deportation, exclusion from admission, or denial of naturalization, a non-citizen defendant may file a motion to vacate the judgment and withdraw his plea, which the court must grant.[1175] The motion to withdraw a plea may be brought by a non-citizen at any time.[1176] The presence of immigration warnings in a plea questionnaire alone is not sufficient to show that a non-citizen defendant was aware of the immigration consequences if he did not speak English at the time of his plea.[1177]

The requirements for the motion to withdraw a plea based on the failure of the state court to give the required pre-plea advisal under Wis. Stat. § 971.08(1)(c) depend upon the date of the plea and exhaustion of his direct appeal rights. In all motions to withdraw a plea based on Wis. Stat. § 971.08(1)(c), a non-citizen must demonstrate that: 1. the court did not give him the advisal required under Wis. Stat. § 971.08(1)(c) during the plea colloquy and 2. the plea is likely to have immigration consequences of deportation,

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[1170] *See* People v. De Leon, 387 Ill. App. 3d 1035, 901 N.E.2d 997, 327 Ill. Dec. 264 (Ill. App. Ct. 2d Dist. Jan. 15, 2009); People v. Bilelegne, 381 Ill. App. 3d 292, 887 N.E.2d 564, 320 Ill. Dec. 420 (Ill. App. Ct. 1st Dist. 2008), *appeal den.* by 229 Ill. 2d 632, 897 N.E.2d 255, 325 Ill. Dec. 7 (2008).

[1171] *See* People v. DelVillar, 383 Ill. App. 3d 80, 890 N.E.2d 680, 321 Ill. Dec. 958 (Ill. App. Ct. 1st Dist. Jun. 11, 2008).

[1172] *See* People v. DelVillar, No. 106909 (Ill.).

[1173] *See* People v. Correa, 485 N.E.2d 307 (Ill. Sept. 20, 1985) (holding that affirmative misadvice about immigration consequences of a guilty plea by defense counsel rendered his plea involuntary as it was not made intelligently and knowingly and upholding the order granting his petition for post-conviction relief to withdraw his guilty plea).

[1174] *See* People v. Huante, 571 N.E.2d 736 (Ill. Apr. 18, 1991) (holding that the failure of defense counsel to advise a non-citizen of the immigration consequences of a guilty plea did not render his plea involuntary and did not constitute ineffective assistance of counsel).

[1175] *See* Wis. Stat. § 971.08(2). In addition to the statutory violation, a non-citizen may also be able to argue that his plea was not knowing, voluntary or intelligent and was taken in violation of Wis. Stat. § 971.08(1) and (2), the Fifth Amendment of the U.S. Constitution, and Section 8, Article 1 of the Wisconsin State Constitution.

[1176] *See* Wis. Stat. § 971.08(2).

[1177] *See* State v. Issa, 186 Wis.2d, 519 N.W.2d 741 (Wis.Ct.App. Jun. 28, 1994).

exclusion or denial of naturalization.[1178] Where a non-citizen entered his plea and he exhausted his direct appeal rights before June 19, 2002, he must additionally demonstrate that the lack of the immigration consequences advisal by the court was not harmless error because he was actually unaware of the likely immigration consequences of his guilty plea.[1179] Where a non-citizen entered his plea and his right to file a direct appeal had not yet been exhausted before June 19, 2002, then the harmless error rule does not apply and he does not have to demonstrate that he was in fact unaware of the immigration consequences of his plea.[1180] Similarly, where a non-citizen pled guilty to an offense on or after June 19, 2002, he need only demonstrate that the state court did not give the requisite advisal and that he is likely to suffer immigration consequences as a result of his plea.[1181]

Indiana does not have a statute requiring that the state court advise non-citizen defendants about the immigration consequences of their pleas. The failure of defense counsel to advise a defendant that deportation may follow as a consequence of a conviction can constitute deficient performance sufficient to support an ineffective assistance of counsel claim under the Indiana Constitution and the Sixth Amendment to the U.S. Constitution.[1182] Whether defense counsel's performance was deficient depends on a number of factors, including counsel's knowledge of the defendant's status as a non-citizen, the defendant's familiarity with consequences of conviction, the severity of criminal penal consequences, the likely subsequent effects of deportation, and any other factors relevant in a particular circumstance.[1183] Relief is proper in such a claim of ineffective assistance of counsel. The Indiana Supreme Court further held that when ineffective assistance is

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[1178] *See id.*

[1179] *See* State v. Lagundoye, 268 Wis.2d 77, 674 N.W.2d 526 (Wis. Jan. 30, 2004) (holding the rule announced in State v. Douangmala, 253 Wis.2d 173, 646 N.W.2d 1 (Wis. Jun. 19, 2002), finding that the harmless error rule in Wis. Stat. § 971.26 did not apply to Wis. Stat. § 971.08(1)(c) and Wis. Stat. § 971.08(2), does not apply retroactively to a non-citizen defendant who had exhausted his direct appeal rights prior to the date of the Doungmala decision); State v. Douangmala, 253 Wis.2d 173, 646 N.W.2d 1 (Wis. Jun. 19, 2002) (overruling the harmless error requirement announced in State v. Chavez, 175 Wis.2d 366, 498 N.W.2d 887 (Wis.Ct.App. Mar. 16, 1993) for motions to withdraw pleas where the requisite pre-plea advisal under Wis. Stat. § 971.08(1)(c) was not given by the state court); State v. Chavez, 175 Wis.2d 366, 498 N.W.2d 887 (Wis.Ct.App. Mar. 16, 1993) (holding that a non-citizen defendant had to demonstrate the absence of the advisal by the state court, the likelihood of immigration consequences, and the fact that he was actually unaware of the immigration consequences of his plea). A conviction is deemed final where a prosecution is no longer pending, a judgment or conviction has been entered, the right to a state court appeal from a final judgment has been exhausted and the period in which to file a petition for a writ of certiorari in the U.S. Supreme Court has expired. *See* State v. Koch, 175 Wis.2d 684, 499 N.W.2d 152 (Wis. May 10, 1993).

[1180] *See* State v. Lagundoye, 268 Wis.2d 77, 674 N.W.2d 526 (Wis. Jan. 30, 2004).

[1181] *See* Wis. Stat. § 971.08(2); State v. Lagundoye, 268 Wis.2d 77, 674 N.W.2d 526 (Wis. Jan. 30, 2004).

[1182] *See* Segura v. State, 749 N.E.2d 496 (Ind. Jun. 26, 2001); *see also*, Sial v. State, 862 N.E.2d 702 (Ind. Ct. App. Mar. 28, 2007) (holding that a non-citizen's residence of 20 years in the U.S. and presence of his wife and child in his life constituted sufficient special circumstances to establish a reasonable probability that he would have proceeded to trial if his defense attorney had properly advised him of the immigration consequences of his guilty plea to a felony theft offense) .

[1183] *See id.* at 500 (agreeing with the decision of the Indiana Court of Appeals, Williams v. State, 641 N.E.2d 44, 49 (Ind. Ct. App. Oct. 11, 1994) which held that the failure of an attorney to advise a non-citizen defendant about the deportation consequences of a guilty plea constitutes ineffective assistance of counsel).

derived from a failure to advise as to a penal consequence (deportation), it should be inferred that the decision to plead guilty was driven by the ineffective advice of the attorney and that a hypothetical defendant in a similar situation would have elected to go to trial if properly advised.[1184]

Strategies used in other state jurisdictions may be useful to develop approaches for post-plea motions and petitions to assist non-citizens in Illinois, Indiana, and Wisconsin. Additional resources are available from other jurisdictions regarding withdrawal of guilty pleas, motions to reduce sentences, and post-conviction petitions.[1185]

Federal Criminal Proceedings

The Seventh Circuit Court of Appeals has held that non-citizens do not have a right to be advised of immigration consequences prior to entering a plea in a criminal case and that the lack of such an advisal does not give rise to a claim of ineffective assistance of counsel.[1186] The Seventh Circuit may, however, be persuaded to change its opinion. It recognized that states within its jurisdiction have found that it is a breach of the code of professional responsibility for a defense attorney to fail to discuss the immigration

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[1184] *See id.*

[1185] *See* Norton Tooby, *Post-Conviction Relief for Immigrants* (Law Offices of Norton Tooby, Oakland, CA 2004); *Criminal Defense of Immigrants, National Edition*, (Law Offices of Norton Tooby, Oakland, CA 2003) Ch. 10, "Post-Conviction Relief"; Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes*, (West Group), Ch. 4, "Amelioration of Criminal Activity: Post-Conviction Remedies"; *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Law* (Immigrant Legal Resource Center 2007); Manuel D. Vargas, *Representing Noncitizen Criminal Defendants in New York State*, 3d Ed. (New York State Defenders Association, Albany, New York 2003) Ch. 5, "Strategies for Avoiding the Potential Negative Immigration Consequences of a New York Criminal Case"; Donald E. Wilkes, Jr., *State Postconviction Remedies & Relief Handbook* (2007), Ch. 16, "Illinois," Ch. 17, "Indiana," Ch. 52, "Wisconsin."

[1186] *See* Santos v. Kolb, 880 F.2d 941 (7th Cir. Jul. 26, 1989) (holding that the trial attorney's failure to advise petitioner of immigration consequences to guilty plea is not ineffective assistance of counsel as such consequences are collateral), *cert. denied* 439 U.S. 1059, 110 S.Ct. 873, 107 L.Ed.2d 956 (1990); U.S. v. George, 869 F.2d 333 (7th Cir. Feb. 15, 1989) (same); U.S. ex rel. Durante v. Holton, 228 F.2d 827 (7th Cir. Jan. 11, 1956) (holding that a criminal court does not have a duty to inform a defendant about deportation consequences of a guilty plea and that the lack of an advisal regarding the immigration consequences is not a violation of due process under the Fourteenth Amendment), *cert. denied* 351 U.S. 963, 76 S.Ct. 1027, 100 L.Ed. 1484 (1956); *see also,* Resendiz v. Kovensky, 416 F.3d 952, 956-58 (9th Cir. Jun. 27, 2005) (holding that immigration consequences post-AEDPA and post-IIRIRA remain collateral and failure of counsel to properly advise respondent of immigration consequences is not a Sixth Amendment violation); Broomes v. Ashcroft, 358 F.3d 1251, 1247 (10th Cir. Feb. 17, 2004); U.S. v. Gonzales, 202 F.3d 20, 25 (1st Cir. Jan. 24, 2000); U.S. v. Del Rosario, 902 F.2d 55 (D.C. Cir. Apr. 24, 1990) (not vacating plea because information regarding immigration consequences is collateral); U.S. v. George, 869 F.2d 333 (7th Cir. Feb. 15, 1989) (same); U.S. v. Yearwood, 863 F.2d 6 (4th Cir. Dec. 19, 1988) (same); U.S. v. Campbell, 778 F.2d 764 (11th Cir. Dec. 23, 1985); Garcia-Trigo v. U.S., 671 F.2d 147 (5th Cir. Mar. 22, 1982); Fruchtman v. Kenton, 531 F.2d 946 (9th Cir. Feb. 27, 1976); U.S. v. Santelises, 509 F.2d 703 (2nd Cir. Jan. 9, 1975); U.S. v. Nagaro-Garbin, 653 F.Supp. 586 (E.D.MI Jan. 21, 1987).

consequences of a plea agreement with a non-citizen defendant.[1187]

The U.S. District Court for the Northern District of Illinois held that affirmative misadvice about immigration consequences by defense counsel constituted ineffective assistance of counsel and granted a petition for a writ of coram nobis, vacated the conviction, and ordered a new trial.[1188] Several federal circuit courts of appeals have also granted petitions for writs of habeas corpus or coram nobis, vacated convictions, and ordered further proceedings in the criminal cases.[1189]

Considerations in Federal Criminal Proceedings

Procedural Issues

A federal district court judge is not required to advise a non-citizen defendant during the plea colloquy that a prior conviction will be an important sentencing factor.[1190] Furthermore, the court is not required to make an explicit finding during the plea colloquy that a non-citizen defendant was previously convicted of an aggravated felony.[1191]

Where a non-citizen defendant was released on bond and then the DHS removed him from the U.S. prior to completion of the criminal proceedings, the district court may find that DHS's actions rendered his appearance for the criminal proceedings impossible and find that the bond has not been breached.[1192] Finally, deportation does not terminate a sentence of supervised release.[1193]

Aggravated Identity Theft

In a show of force, ICE conducted a mass worksite enforcement action in Postville, Iowa at the Agriprocessors on May 12, 2008, arresting 389 workers who constituted more than one-third of the meatpacker's workforce and nearly one-fifth of the town's population.[1194] After that raid, prosecutors used the threat of mandatory two-year

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[1187] *See* Jideonwo v. I.N.S., 224 F.3d 692, 700 (7th Cir. Aug. 23, 2000) (citing Williams v. State, 641 N.E.2d 44, 48-49 (Ind. App. Oct. 11, 1994); People v. Mehmedoski, 207 Ill.App.3d 275, 152 Ill. Dec. 202, 565 N.E.2d 735 (Ill.App.2d Dec. 31, 1990); Wis. Stat. § 971.08(1)(c) (requiring that state trial courts inform criminal defendants of the federal immigration consequences of a guilty plea)).

[1188] *See* U.S. v. Pascual, 2007 U.S. Dist. LEXIS 757 (N.D.IL Jan. 5, 2007) (discussing the requirements for a petition for a writ of coram nobis versus a petition for a writ of habeas corpus).

[1189] *See* Downs-Morgan v. U.S., 765 F.2d 1534 (11th Cir. Jul. 23, 1985); U.S. v. Couto, 311 F.3d 179, 183 (2nd Cir. Nov. 15, 2002); U.S. v. Kwan, 407 F.3d 1005, 1015 (9th Cir. May 12, 2005); U.S. v. Esogbue, 357 F.3d 532 (5th Cir. Jan. 16, 2004).

[1190] *See* U.S. v. Villareal-Tamayo, 467 F.3d 630, 633 (7th Cir. Oct. 30, 2006).

[1191] *See id*.

[1192] *See* U.S. v. Urquiza, 2006 U.S. Dist. LEXIS 67519 (E.D.WI Sept. 19, 2006).

[1193] *See* U.S. v. Akinyemi, 108 F. 3d 777, 780 (7th Cir. Mar. 7, 1997).

[1194] *See* M. Sherman, "Supreme Court Hears Immigrant's ID Theft Case," *Associated Press*, Feb. 22, 2009. Numerous articles have been written about the Postville and subsequent mass raid and arrests of non-citizens in Mississippi in August 2008; a congressional inquiry has also taken place into the raids. The American Immigration Law Foundation (AILF) maintains a webpage on ICE raids and resulting litigation; for more information, visit

sentences for aggravated identity theft under 18 U.S.C. § 1028A(a)(1) to pressure immigrant workers into signing plea agreements that reduced their jail sentences but required them to agree to immediate deportation without the opportunity to meet with a immigration lawyer or to go before an immigration judge. The aggravated identity theft statute, codified at 18 U.S.C. § 1028A(a)(1), imposes a mandatory two-year sentence on individuals convicted of certain crimes if, during the commission of those crimes, the individual "*knowingly* transfers, possesses, or uses, without lawful authority, a means of identification of another person." Of those charged with aggravated identity theft, 270 accepted plea agreements with removal from the U.S. in exchange for a lesser charge than aggravated identity theft. This raid arose within the jurisdiction of the Eighth Circuit Court of Appeals.

On May 4, 2009, the U.S. Supreme Court overruled the Eighth Circuit's decision.[1195] In its *Flores-Figueroa* opinion, the Supreme Court held that the government must prove that the criminal defendant *knew* that the means of identification at issue belonged to another person.[1196]

This decision is an important one as many states have enacted identity theft statutes similar to the federal statute and ICE continues enforcement actions to close down unlawful operations selling documents to non-citizens.[1197] Counsel should review the *Flores-Figueroa* decision carefully and use it to challenge state laws where the non-citizen did not know that an identity document belonged to an actual person.[1198]

Federal Sentencing Issues

In general, a sentencing court is not required to grant a downward departure for a non-citizen defendant who is deportable.[1199] Where a lawful permanent resident agrees to waive his rights to an administrative removal proceeding, the federal district court has the authority to downward depart on that basis.[1200]

Minor differences in confinement conditions at the end of sentences for non-citizens do not support the grant of a downward departure, and departures from the correct guideline range based merely on a defendant's status as a deportable non-citizen are not

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http://www.ailf.org/lac/clearinghouse_122106_ICE.shtml. A full-length documentary about the raid entitled "The Abused" has been produced; for more information, see http://www.abusedthepostvilleraid.com/.

[1195] *See* Flores-Figueroa v. Holder, no. 08-108, 129 S.Ct. 1886 (May 4, 2009).

[1196] *See id.*

[1197] *See, e.g.*, "U.S. Charges 21 defendants in alleged fraudulent identification document ring based in Chicago's Little Village Community," ICE, Sept. 19, 2008, available at http://www.ice.gov/pi/nr/0809/080919chicago.htm.

[1198] For additional discussion and arguments, see the Brief of Amici, available at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-108_PetitionerAmCu21Orgs.pdf.

[1199] *See* U.S. v. Gallo-Vasquez, 284 F.3d 780, 784 (7th Cir. Mar. 27, 2002).

[1200] *See* U.S. v. Jauregui, 314 F.3d 961, 963-64 (8th Cir. Jan. 3, 2003).

authorized.[1201] Rather, a downward departure is permissible only in exceptional circumstances and "a defendant's status as a deportable alien is relevant only insofar as it may lead to conditions of confinement, or other incidents of punishment, that are substantially more onerous than the framers of the guidelines contemplated in fixing the punishment range for the defendant's offense."[1202] A downward departure based solely on a non-citizen's loss of "end-of-sentence modifications" (i.e. a halfway house) "cannot be viewed as a term of imprisonment 'substantially more onerous' than the guidelines contemplated in fixing a punishment for a crime."[1203] Thus, the order of a district court to grant a downward departure based on alien status and the placement of non-citizens in certain Bureau of Prison facilities alone is not permissible.[1204]

However, non-citizens sentenced to terms of imprisonment in the U.S. may be eligible to be transferred to their home countries to serve their sentence, such as citizens of the United Kingdom may be transferred under the Convention on the Transfer of Sentenced Persons.[1205] Where a non-citizen is not eligible to be transferred to serve his sentence in his home country, then his status as a deportable non-citizen may support a downward departure based on ineligibility for transitional release, additional time in DHS custody pending removal from the U.S., and separation from family.[1206]

The fact that a defendant suffered abuse as a child and has resulting psychological damage are discouraged factors under the U.S. Sentencing Guidelines that would justify a departure only in extraordinary circumstances.[1207] To justify a downward departure, discouraged factors such as child abuse and psychological damage must be "present to an exceptional degree or in some other way [that] makes the case different from the ordinary case where the factor is present."[1208]

The Seventh Circuit has held that where a factor is not mentioned in the U.S. Sentencing Guidelines, it may be a basis for departure only if the factor places the case

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[1201] *See* U.S. v. Meza-Urtado, 351 F.3d 301, 305 (7th Cir. Dec. 8, 2003) (discussing that shortening the term of imprisonment for non-citizens based solely on deportation consequences but not for U.S. citizens will result in reverse discrimination).
[1202] *See id*. (quoting U.S. v. Guzman, 236 F.3d 830, 834 (7th Cir. Jan. 3, 2001)); *see also*, U.S.S.G. § 5K2.0.
[1203] *See* U.S. v. Meza-Urtado, 351 F.3d 301, 305 (7th Cir. Dec. 8, 2003).
[1204] *See* U.S. v. Macedo, 406 F.3d 778, 794-95 (7th Cir. Apr. 14, 2005) (reversing the district court's grant of a downward departure and remanding for resentencing). For a discussion regarding sentencing for convictions under 8 U.S.C. § 1326, see Illegal Reentry Prosecution, *infra* at 8-25.
[1205] *See* U.S. v. Mallon, 345 F.3d 943, 949 (7th Cir. Oct. 6, 2003) (discussing that citizens covered under the Strausburg Convention cannot complain about a denial of a downward departure based on their non-citizen status in the U.S. as a transfer to their home countries will locate them closer to their relatives and eliminate additional time in detention pending removal and also recognizing that those who are not eligible to be transferred to serve their sentences in their home countries may still request a downward departure).
[1206] *See id*.
[1207] *See* U.S. v. Pullen, 89 F.3d 368, 370-72 (7th Cir. Jul. 10, 1996).
[1208] *See* U.S. v. Pullen, 89 F.3d 368, 371 (quoting Koon v. U.S., 518 U.S. 81, 96 (Jul. 10, 1996)); U.S. v. Bautista, 258 F.3d 602, 608 (7th Cir. Jul. 12, 2001) (finding that the non-citizen's physical and emotional abuse suffered in childhood and the resulting personality disorders were not extraordinary compared to other cases to warrant a downward departure).

"outside the heartland of cases contemplated by both a specific, relevant guideline(s) and the Guidelines as a whole."[1209] Deportation of a non-citizen parent is not a factor ordinarily relevant to take the family ties and responsibilities and community ties out of the applicable sentencing guideline range.[1210] Risk of foreign prosecution has been held to be a discretionary factor for a district court to review in a motion for a downward departure.[1211]

Removal from the U.S. Following a Plea of Guilty and Conviction

Related to plea bargains, the Immigration and Nationality Act does not create a right for a non-citizen to be removed or deported from the U.S. after a final order of exclusion, deportation, or removal has been entered, unless another country agrees to accept his deportation.[1212] A non-citizen does not have any private right of action under the Immigration and Nationality Act to seek deportation before completing his sentence of incarceration.[1213] Where a non-citizen is serving a state sentence and already has a final administrative order of removal entered against him, he cannot obtain enforcement of the removal order through a petition for a writ of habeas corpus in federal district court.[1214]

Circumventing Immigration Consequences in Criminal Proceedings

A conviction which is invalid under state law is illegal *ab initio* and cannot sustain a deportation order.[1215] A judgment that is vacated eliminates the conviction *ab initio*, as having been illegal from the time it was imposed.[1216] However, under the 1996 changes in the law, special attention must be given to rehabilitative statutes as a non-citizen may not collaterally attack a conviction in a removal proceeding.

In light of the Board of Immigration Appeal's decision in *In re Roldan*,[1217] orders

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[1209] *See* U.S. v. Schulte, 144 F.3d 1107, 1109 (7th Cir. May 28, 1998).

[1210] *See* U.S. v. Hernandez, 325 F.3d 811 (7th Cir. Mar. 28, 2003) ("Although it is a sad fact that families are often separated by deportation, the situation in which one parent may remain in the country legally with children who are natural born American citizens, while the other parent is ordered deported, is by no means unique.").

[1211] *See* U.S. v. Abimbola-Amoo, 390 F.3d 937, 941 (7th Cir. Nov. 23, 2004) (holding that where the district court decided that foreign incarceration for an act committed in the U.S. was a matter for the foreign jurisdiction, the court of appeals lacked jurisdiction to review that discretionary decision); *cf.* U.S. v. Abimbola-Amoo, 390 F.3d 937, 943-44 (7th Cir. Nov. 23, 2004) (J. Wood, dissenting) (would hold that the risk of foreign prosecution is not a forbidden ground of departure but instead a discouraged ground).

[1212] *See* Leyva v. Meissner, 996 F.Supp. 831 (C.D.IL Feb. 9, 1998).

[1213] *See* U.S. v. Lopez, 938 F.Supp. 481 (N.D.IL Jun. 27, 1996).

[1214] *See* Aceves-Moreno v. DHS, 2006 U.S. Dist. LEXIS 42682 (E.D.WI Jun. 14, 2006) (finding no subject-matter jurisdiction to review the Attorney General's decision to execute a final removal order).

[1215] *See* U.S. v. Smith, 41 F.2d 707 (7th Cir. May 28, 1930), rehearing denied Jul. 3, 1930.

[1216] *See* Cruz-Sanchez v. I.N.S., 438 F.2d 1087 (7th Cir. Jan. 13, 1971), on reconsideration and rehearing, Mar. 19, 1971 (holding that where a conviction has been vacated, the order of deportation must be reconsidered); *In re* Kaneda, 16 I&N Dec. 677 (BIA Feb. 28, 1979); *In re* Sirhan, 13 I&N Dec. 592 (BIA June 19, 1970)

[1217] *See In re* Roldan, 22 I&N Dec. 512 (BIA Mar. 3, 1999), *reversed in part*, Lujan-Armendariz v. I.N.S., 222 F.3d 728 (9th Cir. Aug. 1, 2000) (reversing the Board's decision as it relates to the Federal

entered under state rehabilitative statutes, including orders of expungements for crimes involving moral turpitude, will no longer be given effect in immigration proceedings. Thus, an expungement for a misdemeanor offense based on completion of the terms imposed by the court under Wis. Stat. § 973.015 remains a conviction for immigration purposes.[1218] Similarly, an automatic conversion of a Class D felony to a Class A misdemeanor based on rehabilitation under IC 35-38-1-1.5 will remain a conviction as a Class D felony for immigration purposes.[1219] However, a successful direct appeal of a conviction based on the merits, an underlying statutory defect, or a constitutional defect will be given effect in immigration proceedings.[1220]

Therefore, motions to vacate pleas and convictions and to reduce sentences as well as petitions for post-conviction relief and gubernatorial pardons are extremely important.[1221] States have different time limitations for applying for relief from the entry of a plea, a sentence, and/or a conviction.

A conviction that has been vacated by a state court on grounds other than under a rehabilitative statute or for immigration hardship will be given effect.[1222] In *In re Pickering,* the Board of Immigration Appeals held that where a non-citizen's conviction is vacated for reasons solely related to rehabilitation or immigration hardship, rather than on the basis of a procedural or substantive effect in the underlying criminal proceedings, then the conviction is not eliminated for immigration purposes.[1223] Thus, for a vacatur of a plea to be valid for immigration purposes, the plea must be vacated for a procedural or substantive defect in the underlying criminal proceedings, not for reasons related solely to post-conviction events, such as rehabilitation or immigration hardships. Ineffective assistance of counsel

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First Offenders Act or state counterparts). Note: The Board of Immigration Appeals and the Immigration Judges must follow circuit court precedent arising in cases in the circuit. *See In re* Anselmo, 20 I&N Dec. 25 (BIA May 11, 1989). Where a circuit court has not reversed the Board, the decision of the Board is precedent. Thus, the Board's decision in *In re* Roldan, *supra,* is binding in cases arising in the Seventh Circuit.

[1218] *See* Wis. Stat. § 973.015.

[1219] *See* IC 35-38-1-1.5.

[1220] *See id*. *See also*, *In re* Rodriguez-Ruiz, 22 I&N Dec. 1378 (BIA Sept. 22, 2000) (holding that the New York statute under which the conviction was vacated was not an expungement statute or rehabilitative statute); *In re* Sirhan, 13 I&N Dec. 592 (BIA Jun. 19, 1970). An underlying defect in the criminal proceeding may include the failure of the trial court to properly admonish a defendant who pled guilty about his right to appeal and the procedures to perfect the appeal. *See, e.g.,* People v. Breedlove, 821 N.E.2d 1176, 1183-84 (IL Dec. 16, 2004) (holding that failure of the trial court to properly admonish a defendant under Illinois Supreme Court Rule 605(b) prohibits the dismissal of a defendant's appeal and requires remand for the proper admonishments).

[1221] *See* Mansoori v. I.N.S., 32 F.3d 1020, 1024 (7th Cir. Aug. 8, 1994); Palmer v. I.N.S., 4 F.3d 482, 289 (7th Cir. Aug. 26, 1993); Guillen-Garcia v. I.N.S., 999 F.2d 199, 204 (7th Cir. Jul. 2, 1993); Rassano v. I.N.S., 377 F.2d 971, 974 (7th Cir. Dec. 13, 1966).

[1222] *See In re* C-, 8 I&N Dec. 611 (BIA Mar. 28, 1960).

[1223] *See In re* Pickering, 23 I&N Dec. 621 (BIA Jun. 11, 2003); *see also,* Ali v. Ashcroft, 395 F.3d 722 (7th Cir. Jan. 11, 2005) (affirming the holding in *In re* Pickering and finding that the conviction was vacated for immigration purposes, not based on a procedural or substantive defect in the underlying proceedings); Sandoval v. I.N.S., 240 F.3d 577 (7th Cir. Feb. 12, 2001) (finding that the conviction had been vacated on constitutional grounds).

may constitute a violation of statutory and/or state or federal constitutional rights, for which the vacatur of a plea will be valid for immigration purposes.[1224]

Different standards apply to motions for post-conviction relief related to vacatur of a conviction based on a plea and a change in the sentence imposed. Sentence modifications granted for any reason, including for immigration purposes, will be valid and respected for immigration purposes.[1225] In many states, it may be easier to ask a court to reduce a non-citizen probationer's sentence by one or two days for a conviction while the non-citizen is still on probation without having to state that the reduction is for immigration purposes. For example, through a motion by counsel or the prosecution, a criminal court could reduce a sentence for a year and a day (366 days) to 364 days with a stay or suspension of execution of sentence. With a 364 day sentence, a non-citizen will no longer be convicted of an aggravated felony (such as theft) although he may still be deportable if the crime involves moral turpitude or another ground of deportation.[1226] This action may render him eligible for relief from removal.

Where a criminal court has vacated a conviction and a non-citizen who has been ordered removed by an Immigration Judge is still physically present in the U.S., he must file a motion to reopen with the Immigration Judge, or if the Board of Immigration Appeals denied his appeal, with the Board.[1227] An Immigration Judge and the Board have the authority to *sua sponte* reopen removal proceedings if the newly vacated conviction renders the removal order invalid.[1228]

State Laws and Procedures

States have different time limits for filing motions to withdraw guilty pleas, motions to reduce sentences, and petitions for post-conviction relief. It is important to evaluate the posture of each non-citizen defendant's case with respect to current as well as previous charges, pleas, and any resulting convictions for immigration purposes, including traffic

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[1224] *See e.g.* Segura v. State of Indiana, 749 N.E.2d 496 (Ind. Jun. 26, 2001); Sial v. State, 862 N.E.2d 702 (Ind. Ct. App. Mar. 28, 2007); People v. Correa, 108 Ill.2d. 541, 485 N.E.2d 307 (Ill. Sept. 20, 1985) (holding post-conviction relief may be granted where affirmative misadvice regarding the immigration consequences of a criminal conviction by defense counsel constitutes ineffective assistance of counsel and renders a guilty plea by an alien to not be knowing, intelligent, or voluntary as required by the U.S. Constitution); *cf.* People v. Huante, 571 N.E.2d 736 (Ill. Apr. 18, 1991) (holding that defense counsel has no affirmative duty to advise a non-citizen defendant of immigration consequences for a plea to a criminal offense).

[1225] *See In re* Cota, 23 I&N Dec. 849 (BIA Nov. 18, 2005) (holding that where a sentence was modified *nunc pro tunc* expressly to avoid deportation for an aggravated felony, the Immigration Court and the Board must recognize the modified sentence; *In re* Pickering, 23 I&N Dec. 621 (BIA Jun. 11, 2003) distinguished); *In re* Song, 23 I&N Dec. 173 (BIA Sept. 5, 2001) (same); *In re* Martin, 18 I&N Dec. 226 (BIA Jun. 9, 1982) (sentence of confinement was reduced to sentence of probation). *cf.* State v. Dawson, 2004 WI App. 173 (Wis. App. Aug. 19, 2004) (holding that that a trial court does not have the authority to "re-open and amend" a prior conviction).

[1226] *See* Aggravated Felonies, *supra* at 3-34.

[1227] *See* Padilla v. Gonzales, 470 F.3d 1209 (7th Cir. Dec. 7, 2006) (holding that because the non-citizen did not exhaust his administrative remedies by filing a motion to reopen removal proceedings with the Board of Immigration Appeals, it did not have jurisdiction over the petition for review).

[1228] *See id.* at 1213-1215; 8 C.F.R. § 1003.2(a); 8 C.F.R. § 1003.23(b)(1).

offenses.

Motions to Withdraw Guilty Pleas

In analyzing the options to reduce or alleviate the immigration consequences for non-citizens with convictions meeting the immigration definition of conviction, a motion to withdraw a guilty plea may need to be considered. To bring a motion to withdraw a guilty plea, a legal or constitutional defect will need to be stated.

The time frame for filing a motion to withdraw a guilty plea, guilty but mentally ill, or nolo contendere varies by state. For example, in Illinois, a defendant must file a motion to vacate a plea of guilty or guilty but mentally ill within 30 days of the entry of the plea.[1229] In Indiana, a motion to withdraw a plea of guilty or guilty but mentally ill filed at any time prior to sentencing will be granted for any fair and just reason unless the state has been substantially prejudiced by reliance on the plea.[1230] The court can also grant a motion to withdraw a plea and vacate the judgment at any time (even after sentencing) where the defendant proves manifest injustice.[1231] In Wisconsin, a motion to withdraw a plea must be filed within 20 days of the date of sentencing or final adjudication of the case.[1232] Otherwise, a petition for post-conviction may be brought to attack the judgment or sentence imposed.[1233]

Motions to Reconsider or Reduce Sentences

To avoid certain aggravated felony convictions and certain convictions for crimes involving moral turpitude that bar admissibility, a motion to reduce a sentence by a few days or even a few months may need to be brought. For example, a non-citizen who is sentenced to a year and a day (366 days) for theft has an aggravated felony conviction. A successful motion to reduce the sentence to 364 days will mean that the non-citizen has been convicted of a crime involving moral turpitude but not of an aggravated felony, thus possibly rendering the non-citizen eligible for different forms of relief.[1234]

The last sentence imposed by a criminal court is the sentence that the DHS, the Immigration Court, or the Board of Immigration Appeals will deem to be the sentence imposed.[1235] Unlike a motion to vacate a plea or petition for post-conviction relief, a motion to reduce a sentence may be based on immigration consequences as well as a statutory or constitutional defect in the prior sentencing hearing or procedures.[1236] A state court may

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[1229] *See* Ill. S.Ct. R. 604(d).
[1230] *See* IC 35-35-1-4(b).
[1231] *See* IC 35-35-1-4(c) (stating that the motion will be considered as a post-conviction petition).
[1232] *See* Wis. Stat. § 974.02; Wis. Stat. § 809.30(2)(b).
[1233] *See* Wis. Stat. § 974.06; Wis. Stat. § 974.07.
[1234] *See, e.g.*, *In re* Martin, 18 I&N Dec. 226 (BIA Jun. 9, 1982) (holding that the sentence imposed upon resentencing is the sentence to be considered for immigration purposes).
[1235] *See In re* Martin, 18 I&N Dec. 226 (BIA Jun. 9, 1982); *In re* H-, 9 I&N Dec. 380 (BIA Jul. 26, 1961); *In re* Corso, No. A18 079 714 (BIA Dec. 29, 1999).
[1236] *See In re* Song, 23 I&N Dec. 173 (BIA Sept. 5, 2001); *In re* Cota, 23 I&N Dec. 849 (BIA Nov. 18, 2005) (holding that where a sentence was modified nunc pro tunc expressly to avoid deportation as for an aggravated felony, the Immigration Judge and Board of Immigration Appeals must recognize

vacate or set aside the previous sentence and impose a new sentence for clarity.[1237]

Under Illinois law, a motion to reconsider a sentence must be brought within 30 days of sentencing.[1238] A motion to withdraw a guilty plea may, however, be necessary in addition to a motion to reconsider or reduce a sentence. Where a plea has been fully negotiated, a non-citizen must file a motion to withdraw the guilty plea and vacate the judgment and show that the granting of the motion is necessary to correct a manifest injustice.[1239] Similarly, where the sentencing cap or range of sentence was negotiated in a partially negotiated plea, the non-citizen must move to withdraw the guilty plea.[1240] Where a non-citizen pleads guilty in sole exchange for the state's promise to dismiss additional charges, he can move the court to reconsider or reduce his sentence without filing a motion to withdraw his guilty plea.[1241]

Under Indiana law, a court may modify a sentence with notice to the prosecutor within 365 days of the date that an inmate begins to serve his sentence.[1242] If more than 365 days have passed since an inmate began serving his sentence, then the court may modify a sentence with the approval of the prosecutor or, if the person convicted is eligible, the court may place the person convicted in a community corrections program without the approval of the prosecutor.[1243]

Under Wisconsin law, a motion to modify a sentence must be brought within 90 days after the date of sentencing or an order is entered.[1244] Where an inmate has served the "applicable percentage" of a term of imprisonment in the Wisconsin Department of Corrections for certain classes of felonies, he may file a petition for a sentence adjustment

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the newly imposed sentence); *In re* Pickering, 23 I&N Dec. 621 (BIA Jun. 11, 2003) distinguished; *In re* Martin, 18 I&N Dec. 226 (BIA Jun. 9, 1982).

[1237] *See* Sandoval v. I.N.S., 240 F.3d 577, 582-83 (7th Cir. Feb. 12, 2001) (discussing the difference between a state rehabilitative statute and a modification of a sentence by a state court under the I.N.A.).

[1238] *See* 730 ILCS 5/5-8-1(c).

[1239] *See* People v. Evans, 174 Ill.2d 320, 673 N.E.2d 244, 220 Ill.Dec. 332 (Ill. Sept. 19, 1996), rehearing denied Dec. 2, 1996; People v. Meeks, 249 Ill.App.3d 152, 618 N.E.2d 1000, 188 Ill.Dec. 430 (Ill.App.3d Jun. 30, 1996); Ill.S.Ct. R. 604(d).

[1240] *See* People v. Linder, 186 Ill.2d 67, 708 N.E.2d 1169, 237 Ill.Dec. 129 (Ill.App.2d, Feb. 19, 1999), rehearing denied Mar. 29, 1999; People v. Didier, 306 Ill.App.3d 803, 715 N.E.2d 321 (Ill.App.3d Aug. 5, 1999), rehearing denied Aug. 30, 1999, appeal denied 186 Ill. 2d 575, 723 N.E.2d 1165, 243 Ill. Dec. 564 (1999); People v. Doguet, 307 Ill.App.3d 1, 716 N.E.2d 818 (Ill.App.3d Aug. 25, 1999), rehearing denied Sept. 24, 1999, appeal denied 191 Ill.2d 541, 738 N.E.2d 930, 250 Ill.Dec. 461 (Sept. 1, 2000).

[1241] *See* People v. Zarka-Nevling, 308 Ill.App.3d 516, 720 N.E.2d 334, 241 Ill.Dec. 879 (Ill.App.3d Nov. 8, 1999), appeal denied 189 Ill.2d 680, 731 N.E.2d 771, 246 Ill.Dec. 922 (May 31, 2000); People v. Lumzy, 191 Ill.2d 182, 730 N.E.2d 20, 246 Ill.Dec. 340 (Ill.App.2d Mar. 23, 1999), rehearing denied May 30, 2000; People v. Rogers, 846 N.E.2d 184, 194-95 (Ill.App.2d Mar. 31, 2006).

[1242] *See* IC 35-38-1-17(a). A notice of appeal to challenge the judgment or sentence imposed must be filed within 30 days of a final judgment or, where a motion to correct error is timely filed, within 30 days after the ruling on the motion. *See* Ind. Appellate Rule 9A(1).

[1243] *See* IC 35-38-1-17(b).

[1244] *See* Wis. Stat. § 973.19(1)(a). Unlike Illinois, there is no requirement in Wisconsin that a motion to reconsider be filed before filing an appeal to challenge either the finding of guilt or the sentence imposed where there are other appeal issues raised in the notice of appeal.

to modify his sentence.[1245]

Post-Conviction Relief

Whereas a motion to vacate pleas or reduce a sentence is decided by the criminal court, a post-conviction petition is a civil action in which a criminal defendant may collaterally attack his prior conviction and sentence.[1246] A non-citizen who files a petition for post-conviction relief must allege that there was a substantial denial of his rights under the U.S. Constitution, a state Constitution, or both in the criminal proceedings.[1247] For example, in Illinois, a post-conviction petition may be filed by a non-citizen who can assert that his conviction was a result of a substantial denial of his rights under the United States constitution or the Illinois constitution or both.[1248] Such claims may include the failure of the state court to fully admonish a defendant of his rights.[1249] Timing of the filing of a petition for post-conviction relief may be an issue in cases where a non-citizen has completed his term of imprisonment or probation.[1250]

In Illinois, there is a three stage process for a state court to adjudicate a petition for post-conviction relief. At the first stage of the proceedings and where a non-citizen has been sentenced to a term of imprisonment, the court must determine within 90 days of the filing and docketing of the petition and without any responsive pleading by the state,

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[1245] *See* Wis. Stat. § 973.195 (applicable percentage means 85% for a Class C to Class E felony and 75% for a Class F to Class I felony).

[1246] *See* People v. Johnson, 793 N.E.2d 591 (Ill. Apr. 18, 2002).

[1247] *See* 725 ILCS 5/122-1.

[1248] *See* 725 ILCS 5/122-1; People v. Coleman, 183 Ill. 2d 366, 378-79, 701 N.E. 2d 1063, 1070-71, 233 Ill. Dec. 789 (Oct. 1, 1998).

[1249] *See* People v. Whitfield, 217 Ill.2d 177, 840 N.E.2d 658 (Ill. Oct. 6, 2005) (discussing admonishments required under Illinois statute, voluntariness of pleas, differences between "open" guilty pleas and negotiated guilty pleas for a specific sentence, and the "benefit of the bargain" grounds for post-conviction relief and finding that the failure of the state court to advise a defendant about the period of mandatory supervised release to be added to the sentence following completion of a term of imprisonment in the Illinois Department of Corrections did not constitute substantial compliance with Illinois Supreme Court Rule 402, was an unfair breach of the plea agreement and violated due process).

[1250] *See* People v. Pack, 224 Ill.2d 144, 862 N.E. 2d 938 (Ill. Jan. 19, 2007) (holding that where a person is serving time for concurrent sentences in the Illinois Department of Corrections, he may proceed with a post-conviction to challenge the first sentence which he has completed while serving the second sentence); People v. Mrugalla, 371 Ill.App.3d 544, 868 N.E.2d 303 (Ill.Ct.App. 4th Feb. 20, 2007) (holding that a non-citizen who filed his petition for post-conviction relief after he finished serving his Illinois sentence and then was detained in DHS custody was not "imprisoned in the penitentiary" for purposes of the Post-Conviction Hearing Act, 725 ILCS 5/122-1 through 122-8 and dismissing his petition for post-conviction relief based on a claim of ineffective assistance of counsel where counsel allegedly affirmatively misinformed him about the immigration consequences of his guilty plea); People v. Tostado, 362 Ill.App.3d 949, 951-52, 841 N.E.2d 980, 982-83 (Ill.Ct.App.5th Aug. 30, 2005) (holding that the dismissal of a non-citizen defendant's post-conviction petition alleging affirmative misadvice about the immigration consequences of a guilty plea was proper where the petition was filed after completion of probation); People v. Thurman, 334 Ill.App.3d 286, 288-89, 777 N.E.2d 971, 972-73 (Ill.Ct.App.3d May 15, 2002) (post-conviction relief not available when the underlying sentence has already been fully served); People v. Collins, 161 Ill.App.3d 285, 288, 514 N.E.2d 499, 501, (Ill.Ct.App. Sept. 24, 1987).

whether the petition is frivolous or patently without merit.[1251] If the court does not dismiss the petition, then a court must determine in the second stage whether the petition and any accompanying documentation demonstrate a substantial showing of a constitutional violation.[1252] At this second stage, the state may answer the petition or may file a motion to dismiss it.[1253] If the court finds that a substantial showing of a constitutional violation has been made, then the court will conduct an evidentiary hearing in the third stage of the case.[1254]

In order for a non-citizen defendant to reach the third stage of an evidentiary hearing, the allegations set forth in the post-conviction petition as supported by the trial record and/or accompanying affidavits must make a substantial showing of a constitutional violation.[1255] The failure of defense counsel or the state court to advise a non-citizen of the immigration consequences of his plea will have different impacts on the possibility of post-conviction relief, depending upon the state law and the date of the plea. In Illinois, where a non-citizen defendant never asked for and defense counsel never gave advice about the immigration consequences for a plea of guilty to the charge, a claim of ineffective assistance of counsel will be denied and the post-conviction petition will also be denied unless other grounds for a claim of ineffective assistance of counsel support the claim.[1256] Irregularity in an arraignment shall not affect the validity of any proceeding in the case if the non-citizen pleads to the charge or proceeds to trial without objecting to such irregularity.[1257] Two Illinois Court of Appeals have held that immigration consequences of a criminal conviction are collateral consequences and therefore not "imprisonment" under 725 ILCS 5/122-1(a) for purposes of post-conviction relief.[1258]

For immigration purposes, state court orders granting post-conviction motions based on statutory and/or constitutional defects in the underlying criminal court proceedings have been deemed effective to eliminate the grounds of inadmissibility and deportability.[1259]

[1251] *See* People v. Coleman 183 Ill. 2d at 379; 725 ILCS 122/2.1(a)(2).

[1252] *See* People v. Smith, 326 Ill. App. 3d 831, 839, 856, 761 N.E.2d 306, 315, 327, 260 Ill. Dec. 462 (Dec. 7, 2001).

[1253] *See* 725 ILCS 5/122.

[1254] *See* People v. Smith, 326 Ill. App. 3d at 856, 761 N.E.2d at 327.

[1255] *See* People v. West, 187 Ill. 2d 418, 425, 719 N.E.2d 664, 670, 241 Ill. Dec. 535 (Sept. 23, 1999).

[1256] *See* People v. Bouzidi, 332 Ill. App. 3d 87, 95-96, 773 N.E.2d 699, 265 Ill. Dec. 935 (Ill. App. 3d Jun. 28, 2002) (finding that defense counsel's failure to advise a non-citizen defendant of the collateral consequences of his guilty plea did not rise to the level of ineffective assistance of counsel under the Strickland test and citing People v. Huante, 143 Ill. 2d 61, 68, 571 N.E.2d 736, 739, 156 Ill. Dec. 756 (Apr. 19, 1991).

[1257] *See* 725 ILCS 5/113-6.

[1258] *See* People v. Rajagopal, 381 Ill. App. 3d 326; 885 N.E.2d 1152 (Ill.Ct.App.1st Mar. 26, 3008) (denying non-citizen's petition for post-conviction relief filed eight years after his guilty plea and alleging ineffective assistance of counsel for failure to accurately advise about the immigration consequences of a guilty plea); People v. Tostado, 362 Ill. App. 3d 949, 841 N.E.2d 980, 299 Ill. Dec. 248 (Ill. App. Ct. 5th Dist. 2005).

[1259] *See* Sandoval v. I.N.S., 240 F.3d 577, 580 (7th Cir. Feb. 12, 2001); *In re* Adamiak, 23 I&N Dec. 878 (BIA Feb. 8, 2006) (holding that a motion to vacate a conviction granted based on the failure of the state court to advise a non-citizen defendant of the possible immigration consequences of a guilty plea as required by Ohio statute was valid for immigration purposes). *See also*, Segura v. State, 749 N.E.2d 496 (Ind. Jun. 26, 2001); Sial v. State, 862 N.E.2d 702 (Ind. Ct. App. Mar. 28, 2007); People v. Correa, 108 Ill. 2d 541 (1985) (granting motion for post-conviction relief based on affirmative

Where post-conviction relief has been granted by a state court solely to eliminate the immigration consequences of a conviction without an underlying statutory or constitutional defect, the state court order has not been given full faith and credit for purposes of federal immigration law which deems the non-citizen as convicted of the offense vacated by the state court.[1260]

Thus, the pleadings of a motion for post-conviction relief and any discussion before the criminal court must be very clearly related to the statutory or constitutional procedural or substantive defect in the underlying criminal case for the state court order to be respected in the immigration context. All motions and attached evidence, affidavits, transcripts from the post-conviction proceedings, and orders of the state court are subject to review by the Immigration Court, Board of Immigration Appeals, and the Seventh Circuit Court of Appeals to determine whether the state court order eliminates the ground of deportability or inadmissibility. For example, where a stipulated motion to amend a conviction was presented by the state prosecutor and the defense attorney with the purpose of averting the deportation of a non-citizen from the U.S. during a hearing before the state court, the Seventh Circuit held that the non-citizen remained convicted of an aggravated felony, despite the state court's order granting the motion to amend the conviction to one which did not constitute an aggravated felony.[1261]

It may be possible to attack a conviction for which a juvenile pled guilty in a court other than a juvenile delinquency court based on a statutory defect. A person under the age of 18 years is not permitted to plead guilty or to waive the right to a trial by jury except where the penalty is only by fine unless she is represented by counsel in open court.[1262]

For illegal reentry cases prosecuted under I.N.A. § 276, 8 U.S.C. §1326, post-conviction relief may not be effective. Where a Wisconsin conviction was vacated following a non-citizen's deportation due to the failure of the state court to give the mandatory statutory advisals about immigration consequences for a guilty plea, the Seventh Circuit held that the non-citizen remained subject to the sentencing enhancement under §2L1.2(b) of the U.S. Sentencing Guidelines for an illegal reentry prosecution under I.N.A. § 276, 8 U.S.C. §1326.[1263] The Seventh Circuit found that the enhancement applied because the

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misadvice by defense counsel which was found to be ineffective assistance of counsel); 725 ILCS § 5/113-8; State v. Dawson, 2004 WI App. 173 (Wis.App. Aug. 19, 2004).

[1260] *See* Ali v. Ashcroft, 395 F.3d 722 (7th Cir. Jan. 11, 2005) (finding that where a Wisconsin conviction for drug trafficking was vacated solely for immigration purposes, non-citizen remained convicted of drug trafficking for immigration purposes).

[1261] *See id*. (distinguishing Sandoval v. I.N.S., *supra*, which presented a cognizable claim of ineffective assistance of counsel which related to the voluntariness of the non-citizen's guilty plea).

[1262] *See* 725 ILCS 5/113-5.

[1263] *See* U.S. v. Garcia-Lopez, 375 F.3d 586 (7th Cir. Jul. 12, 2004) (leaving open the question regarding whether the enhancement can be constitutionally applied when the conviction that resulted in the non-citizen defendant's deportation/removal was vacated on account of a constitutional defect). *See also*, U.S. v. Alcantara-Hernandez, 2006 U.S. Dist. LEXIS 48100 (E.D.WI Jul. 3, 2006) (holding that a conviction under Wis. Stat. § 948.07(3) for child enticement for which the state court failed to provide the immigration advisals prior to the guilty plea but which was not vacated prior to the non-citizen's deportation was an aggravated felony under I.N.A. § 101(a)(43)(A), 8 U.S.C. §1101(a)(43)(A) and served as a basis for sentencing enhancement, even if it is later vacated based on an underlying constitutional defect in the state criminal proceeding).

non-citizen was convicted of an aggravated felony at the time of his deportation.[1264] Thus, to determine the level of offense severity, the sentencing court will look at the status of the non-citizen defendant's conviction at the time of his deportation.[1265] The question regarding whether the enhancement can be constitutionally applied when the conviction that resulted in the non-citizen defendant's deportation/removal was vacated on account of a constitutional defect remains to be decided by the Seventh Circuit.[1266]

Vienna Convention on Consular Relations

The United States is a party to the Vienna Convention on Consular Relations.[1267] As a treaty entered into under the authority of the United States Constitution, the Vienna Convention on Consular Relations is a federal law and supreme law of the land.[1268] Under the Vienna Convention on Consular Relations, a non-citizen who is detained and/or charged with a crime must be informed by the authorities of his or her right to speak with a consular officer from his or her country.[1269] Consulates of foreign countries can appear in criminal cases as *amicus curiae*. Consulates have an interest in ensuring that the rights of their citizens are respected and can assist by bridging the cultural and language barriers faced by non-citizens in criminal proceedings in the U.S.[1270]

[1264] *See* U.S. v. Garcia-Lopez, 375 F.3d 586 (7th Cir. Jul. 12, 2004).

[1265] *See id.*

[1266] *See id.*

[1267] *See* Vienna Convention on Consular Relations and Optional Protocols, art. 36(1)(b), Apr. 24, 1963, 596 U.N.T.S. 262-512, ratified by the United States on Nov. 21, 1969.

[1268] *See* U.S. CONST. art. VI.

[1269] Article 36(1)(b) provides:

> If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody, or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Vienna Convention on Consular Relations and Optional Protocols, art. 36(1)(b), Apr. 24, 1963, 596 U.N.T.S. 262-512; 8 C.F.R. § 236.1(e); 8 C.F.R. § 1236.1(e); Breard v. Greene, 523 U.S. 371 (Apr. 14, 1998) (stating that Article 36 "arguably confers on an individual the right to consular assistance following arrest). For an excellent discussion of Article 36, see M. Kadish & C. Olson, "Sanchez-Llamas v. Oregon and Article 36 of the Vienna Convention on Consular Relations: The Supreme Court, The Right to Consul, and Remediation," 27 Mich. J. Int'l L. 1185, 1218 (2006); M. Kadish, Article 36 of the Vienna Convention on Consular Relations, "A Search for the Right to Consul," 18 *Mich. J. Int'l L.* 565 (Summ. 1997). *See also*, "The Right to Information about Consular Assistance within the Framework of the Guarantees of Due Process of Law," *Adv. Opn. OC-16/99*, Inter-Amer. Ct. Human Rights, Oct. 1, 1999; L. Springrose, "Strangers in a Strange Land: The Rights of Non-citizens under Article 36 of the Vienna Convention on Consular Relations," 14 *Geo. Immigr. L.J.* 185 (1999).

[1270] *See* L. Malone, *From* Breard *to* Atkins *to* Malvo: *Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty,* 13 Wm. & Mary Bill Rts. J. 363, 392-93 (2004); L. Springrose, Note, *Strangers in a Strange Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations,* 14 Geo. Immigr. L. J. 185, 195 (1999); W. Aceves, Murphy v. Netherland, 92 Am. J. Int'l L. 87, 89-90 (1998).

Arresting authorities are required to give the appropriate advisals to non-citizens regarding their rights under the Vienna Convention in a language they understand. Awareness of this obligation is increasing. In September 2000, the Chicago Police Department posted notices in the lockups and area detective headquarters in English, Polish, and Spanish.[1271] The Cook County state's attorney's office also began informing defendants they believed to be non-citizens of their right to notify their consulates.[1272]

The DHS and the U.S. Department of Justice (DOJ) both have implemented regulations which require their law enforcement officers to advise non-citizens of their right under Article 36 to have their consulate contacted upon their arrest.[1273] The DOJ regulation also provides that a non-citizen has a right to request that authorities in the U.S. not notify his home country, unless another treaty takes that right away from him.[1274]

In 2006, the U.S. Supreme Court held that the Vienna Convention does not require suppression of statements given by a non-citizen where law enforcement failed to advise him of his rights under the Vienna Convention.[1275] However, the Supreme Court specifically stated that a non-citizen could vindicate his rights under the Convention in by other means, such as part of a broader challenge to the voluntariness of a statement given under the Fifth Amendment of the U.S. Constitution and a claim of ineffective assistance of counsel under the Sixth Amendment.[1276]

Thus, the lack of an advisal or a delay in the advisal regarding the right to contact a consular officer may be a ground under which a motion to suppress statements given in violation of the Vienna Convention, to vacate a conviction, or to expunge a conviction can be brought. In the context of a motion to suppress statements given and evidence obtained, some courts have held that a non-citizen who alleges a violation of the Vienna Convention has the burden to establish prejudice resulting from the alleged violation.[1277] Other courts have held that the failure of a state authority to inform a non-citizen about his rights under the Vienna Convention does not warrant a suppression of evidence.[1278]

[1271] *See* Frank Main, "Police to Tell Foreigners They Can Call Consul," *Chicago Sun-Times*, Sept. 26, 2000, p. 10.

[1272] *See id.*

[1273] *See* 8 C.F.R. § 236.1(e); 28 C.F.R. § 50.5; U.S. Department of State, Pub. No. 10518, Consular Notification And Access: Instruction For Federal, State And Local Enforcement And Other Officials Regarding Foreign Nationals In The United States 13-15 (Jan. 1998) ("when foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified").

[1274] *See* 28 C.F.R. § 50.5; Jogi v. Voges, 480 F.3d 822, 835 (7th Cir. Mar. 12, 2007).

[1275] *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 350 (Jun. 28, 2006).

[1276] *See id*. at 336, 363-64.

[1277] *See e.g.*, United States v. Miranda, 65 F.Supp. 2d 1002 (D. Minn. Aug. 27, 1999) (holding that even though the government violated the non-citizen defendant's rights under the Vienna Convention, he failed to establish prejudice because he did not contact the Consulate after he was notified about his right to do so); *see also*, United States v. Kevin, 1999 U.S. Dist. LEXIS 5728, 1999 WL 194749 (S.D.N.Y. Apr. 7, 1999); United States v. Rodrigues, 68 F.Supp.2d 178 (E.D.N.Y. Sept. 28, 1999); United States v. Esparza-Ponce, 7 F.Supp.2d 1084 (S.D. Cal. May 18, 1998), *aff'd* 193 F.3d 1133 (9th Cir. Oct. 19, 1999), *cert. denied* Esparza-Ponce v. U.S., 121 S.Ct. 107, 148 L.Ed.2d 64 (2000); Zavala v. State, 739 N.E.2d 135 (Ind.Ct.App.2d Oct. 31, 2000).

[1278] *See* U.S. v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. Mar. 6, 2000); (holding that suppression of evidence is not an appropriate remedy for a violation of the Vienna Convention on Consular

To gain relief where the Vienna Convention on Consular Affairs has been violated, a non-citizen must demonstrate that his rights under the Convention were violated and that the violation had a "material effect on the outcome of the trial or sentencing procedure."[1279] In the context of a motion to suppress evidence in federal district court, the Seventh Circuit Court of Appeals has held that the exclusionary rule does not apply to violations of Article 36.[1280] Thus, the exclusion of evidence obtained in violation of a non-citizen's consular access rights under the Vienna Convention is not a proper remedy.[1281] The Seventh Circuit has also noted that the court has no obligation to inform a non-citizen defendant of his rights under the Vienna Convention.[1282]

Arguments may be made that a violation of Article 36 of the Vienna Convention is a *per se* violation of due process rights under the Fifth Amendment or the Fourteenth Amendment because the Vienna Convention establishes due process of law and procedural safeguards for non-citizens arrested in the U.S. A violation of the Vienna Convention may also be a ground under which a direct appeal, a motion to vacate a guilty plea, or a petition

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Relations); People v. Martinez, 372 Ill. App. 3d 750, 867 N.E.2d 24, 310 Ill. Dec. 711 (Ill.Ct.App.1st Feb. 22, 2007); People v. Villagomez, 313 Ill. App. 3d 799, 730 N.E.2d 1173 (Ill. App. 1st Dist., 5th Div. May 26, 2000) (holding that a non-citizen defendant must establish prejudice by showing that he did not know of his right to contact the consulate for assistance, that he would have availed himself of the right, and that there was a likelihood that the consulate would have assisted the defendant; even if the non-citizen defendant demonstrates prejudice, the exclusionary rule does not apply to violations of the Vienna Convention), appeal denied 191 Ill.2d 557, 738 N.E.2d, 250 Ill. Dec. 466 (Ill. Sept. 1, 2000); People v. Griffith, 334 Ill. App. 3d 98, 111, 777 N.E.2d 459 (Ill. App. 1st Dist. Sept. 11, 2002); People v. Hernandez, 319 Ill. App. 3d 520, 531, 745 N.E.2d 673 (Ill. App. 3rd Dist. Mar. 8, 2001).

[1279] *See* Madej v. Schomig, 223 F.Supp. 2d 968, *29-37 (N.D.IL Sept. 24, 2002) (discussing the interplay of the decisions by the International Court of Justice in the LaGrand Case (Germany v. U.S.), 2001 I.C.J. 104 (I.C.J. Jun. 27, 2001) and Breard v. Greene, 523 U.S. 371, 375 (Apr. 14, 1998)), *reconsideration den. by* U.S. ex rel. Madej v. Schomig, 2002 U.S. Distr. LEXIS 20170 (N.D.IL Oct. 21, 2002), *aff'd by* Madej v. Briley, 365 F.3d 568 (7th Cir. Apr. 21, 2004), opinion withdrawn, substituted opinion at Madej v. Briley, 370 F.3d 665 (7th Cir. May 28, 2004).

[1280] *See* U.S. v. Chaparro-Alcantara, 226 F.3d 616 (7th Cir. Aug. 21, 2000) (holding that because the Vienna Convention does not require application of the exclusionary rule to violations of Article 36 and that only the legislature can require that the exclusionary rule be applied to protect a statutory or treaty-based right, suppression is not an appropriate remedy for Article 36 violations), *aff'd* U.S. v. Chaparro-Alcantara, 37 F.Supp. 2d 1122 (C.D. Ill. Mar. 4, 1999), *cert. denied* Chaparro-Alcantara v. U.S., 121 S.Ct. 599, 148 L.Ed.2d 513 (2000); *see also*, Jogi v. Voges, 480 F.3d 822 (7th Cir. Mar. 12, 2007) (re-affirming U.S. v. Chaparro-Alcantara, 226 F.3d 616 (7th Cir. Aug. 21, 2000)); U.S. v. Lawal, 231 F.3d 1045 (7th Cir. Nov. 1, 2000); U.S. v. Felix-Felix, 275 F.3d 627, 635 (7th Cir. 2001); U.S. v. Carrillo, 269 F.3d 761, 771 (7th Cir. Oct. 18, 2001); U.S. v. Lawal, 231 F.3d 1045, 1048 (7th Cir. Nov. 1, 2000); U.S. v. Pagan, 196 F.3d 884 (7th Cir. Nov. 18, 1999); U.S. v. Arguijo, 2000 U.S. Dist. LEXIS 10209 (N.D. Ill. Jul. 7, 2000); U.S. v. Carrillo, 70 F.Supp. 2d 854 (N.D. Ill. Oct. 14, 1999) (holding that rights under the Vienna Convention are less substantive than rights under the Fourth and Fifth Amendments of the U.S. Constitution, that defendants did not suffer prejudice from the violation of Article 36 of the Vienna Convention, and that the exclusionary rule was not the appropriate remedy for treaty violations).

[1281] *See* Jogi v. Voges, 480 F.3d 822 (7th Cir. Mar. 12, 2007); U.S. v. Felix-Felix, 275 F.3d 627, 636 (7th Cir. Dec. 27, 2001); U.S. v. Carrillo, 269 F.3d 761 (7th Cir. Oct. 18, 2001); U.S. v. Lawal, 231 F.3d 1045 (7th Cir. Nov. 1, 2000) *cert. denied*, 531 U.S. 1182 (Feb. 20, 2001); U.S. v. Chaparro-Alcantara, 226 F.3d 616, 624-25 (7th Cir. Aug. 21, 2000).

[1282] *See* U.S. v. Barrios-Lopez, 2009 U.S. App. LEXIS 6132 at *3 (7th Cir. Mar. 26, 2009).

for post-conviction relief may be brought. In Illinois courts, arguments regarding violations of the Vienna Convention should be raised at the trial court level to preserve the issues for appellate review and within the statutory time limits in a post-conviction petition.[1283] Two Illinois appellate courts have ruled that the exclusionary rule does not apply to violations of the Vienna Convention, finding that suppression of evidence obtained by authorities is not an appropriate remedy where a non-citizen's right under Article 36 was violated.[1284]

Beyond the suppression issue, the Seventh Circuit has held that the failure of defense counsel to raise the lack of advisals under the Vienna Convention may constitute ineffective assistance of counsel under the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 558 (1984).[1285] A non-citizen must show that: "(1) his counsel's performance fell below an objective standard of reasonableness when measured against 'prevailing professional norms,' and (2) but for the deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different."[1286]

Under the first prong, the Seventh Circuit found that a reasonable lawyer practicing in Illinois would have known that the Seventh Circuit has always assumed that Article 36 of the Vienna Convention created individual rights and that the lawyer would have known to raise the Article 36 violations in the criminal proceeding in 2003.[1287] Thus, where counsel fails to raise the Article 36 violation before the district court, her performance falls below the required professional norm.[1288] Under the second prong of demonstrating prejudice, a non-citizen must explain the nature of the assistance that he could have received and demonstrate that his consulate would have provided it to him.[1289]

The Illinois state courts have differed in their approach to the Vienna Convention. Some courts have held that the issue must be raised at the trial court or else it is deemed waived, that a new trial is not the remedy for a violation of Article 36, and that a claim of

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[1283] *See* People v. Madej, 193 Ill.2d 395. 739 N.E.2d 423, 250 Ill.Dec. 660 (Ill. May 8, 2000) (holding that the non-citizen's petition for post-conviction relief based on a violation of the Vienna Convention must be denied because he failed to file his post-conviction petition within two years of the entry of conviction as required by the Illinois statute, that there was no basis to find that the reasonable limitation period imposed by Illinois statute 2-1401 violated international law, and that he could have also raised the claim at trial and on direct appeal).

[1284] *See* People v. Griffith, 334 Ill. App. 3d 98, 111 (1st Sept. 11, 2002) (citing People v. Hernandez, 319 Ill. App. 3d 520, 531, 745 N.E.2d 763 (Mar. 8, 2001); People v. Villagomez, 313 Ill. App. 3d 799, 809-12, 730 N.E.2d 1173 (2000)); People v. Kim, 743 N.E.2d 656 (Ill.App.5th Jan. 19, 2001).

[1285] *See* Osagiede v. U.S., 543 F.3d 399 (7th Cir. Sept. 9, 2008).

[1286] *See id*. at 408 (citing *Strickland*).

[1287] *See id*. at 409-12 (citing numerous decisions and its issuance of the *Madej* decision only months before the non-citizen was sentenced as well as continuing legal education materials for attorneys).

[1288] *See id*.

[1289] *See id*. at 413. In the context of challenging removal proceedings, the Board of Immigration Appeals has held that where a non-citizen has had a judgment of guilt entered against him in a general court-martial of the U.S. Armed Forces, he has been convicted as defined by 8 U.S.C. § 1101(a)(48)(A) and the lack of advisals under Article 36 of the Vienna Convention has no effect on the existence of the conviction or its use in removal proceedings. *In re* Rivera-Valencia, 24 I&N Dec. 484 (BIA Apr. 2, 2008).

ineffective assistance fails.[1290] However, these decisions do not discuss the Seventh Circuit's *Osagiede* decision, and counsel should review and consider whether a claim of ineffective assistance of counsel can be raised before the Illinois state courts.

Where a non-citizen claims in a habeas petition that his rights under the Vienna Convention were violated, care should be taken that the claim is timely raised. In 2008, the U.S. Supreme Court held that neither an order from the International Court of Justice ("ICJ") nor a Presidential Memorandum determining that the ICJ's decision should be enforced in a state court constitutes directly enforceable federal law that preempts a state's limitation on the filing of successive petitions for a writ of habeas corpus.[1291]

In the civil context, a violation of a non-citizen's rights under Article 36 may give rise to a civil action against the state or federal officers who failed to advise him as required by the Vienna Convention.[1292] The Seventh Circuit Court of Appeals held that Article 36 of the Vienna Convention does confer individual rights on detained non-citizens.[1293] It further found that a non-citizen may pursue a private right of action under 42 U.S.C. § 1983 against state law enforcement officers who violated his rights under Article 36.[1294] Such a claim will be subject to a statute of limitations and the issue of qualified immunity of the officials must also be addressed.[1295]

Two issues involving civil claims have not been resolved by the Seventh Circuit. The first is whether the Vienna Convention directly supports a private remedy.[1296] The second is whether the failure of police officers to notify a non-citizen of his rights under Article 36 is a type of tort covered by the Alien Tort Claim Act, 28 U.S.C. § 1350.[1297]

[1290] See People v. Montano, 365 Ill. App. 3d 195, 848 N.E.2d 616, 302 Ill. Dec. 317 (2006); People v. Najera, 371 Ill. App. 3d 1144, 864 N.E.2d 324, 309 Ill. Dec. 458 (Ill.Ct.App.2d Mar. 6, 2007); People v. Vasquez, 356 Ill. App. 3d 420, 824 N.E.2d 1071, 291 Ill. Dec. 821 (Ill.Ct.App.2d Dist. Jan. 28, 2005), (holding that trial counsel did not render ineffective assistance of counsel for failing to file a motion to suppress defendant's confession based upon a violation of the Vienna Convention) *reh'g den.* by People v. Vasquez, 2005 Ill. App. LEXIS 332 (Ill. App. Ct. 2d Dist., Apr. 8, 2005), *appeal den.* by People v. Vasquez, 216 Ill. 2d 729, 839 N.E.2d 1036, 298 Ill. Dec. 389 (2005), *pet. for a writ of cert. den.* by Vasquez v. Ill., 548 U.S. 908 (Jun. 26, 2006).

[1291] See Medellin v. Texas, 128 S.Ct. 1346 (Mar. 25, 2008), application to recall and stay mandate and application for stay of execution of death *denied*, 129 S.Ct. 360 (U.S. Aug. 28, 2008).

[1292] *See, e.g.*, United States v. Torres del Muro, 58 F.Supp. 2d 931 (C.D. Ill. Jul. 20, 1999) (holding that although suppression of evidence is not available as a remedy for a violation of the consular notification provision of the Vienna Convention, a defendant may be able to claim damages for a violation of his rights under the Vienna Convention through a Bivens action);

[1293] *See* Jogi v. Voges, 480 F.3d 822, 834-35 (7th Cir. Mar. 12, 2007).

[1294] *See id*. at 835-36.

[1295] *See id*. at 836 (also discussing that the additional issues of when a claim is deemed to have arisen, whether the discovery rule applies, and whether any tolling rules may apply will need to be addressed upon remand to the federal district court).

[1296] *See id*. at 825.

[1297] *See id*. at 826.

Pardons

A full and unconditional pardon by the President of the United States or the Governor of a state will eliminate the ground of deportability for a conviction for a crime involving moral turpitude, an aggravated felony, or high-speed flight near a border.[1298] Pardons will not eliminate immigration consequences for controlled substance, firearms, or domestic violence convictions.[1299] Pardons for convictions within the U.S. may also eliminate certain grounds of inadmissibility.[1300] Foreign pardons do not, however, eliminate either the ground of inadmissibility or deportability.[1301]

The possibility of a gubernatorial pardon may be the last resort for non-citizens in Illinois, Indiana, and Wisconsin and should be considered as pardons have been granted based on immigration consequences.[1302] Each state has its own procedures and deadlines for filing and hearings.[1303]

Illegal Reentry Prosecutions

Prosecutions of non-citizens who illegally reenter the U.S. following a prior deportation or removal order have increased.[1304] Section 276 of the I.N.A., 8 U.S.C. § 1326 applies to any non-citizen who illegally reenters the U.S. without permission after a deportation or removal order has been issued, regardless whether he self-executed the order by leaving the U.S. on his own accord or was physically removed from the U.S. by U.S.

[1298] *See* I.N.A. § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v)

[1299] *See id*; *In re* Suh, 23 I&N Dec. 626 (BIA Jul. 1, 2003) (holding that a pardon for a child abuse conviction did not pardon the domestic violence ground of deportability).

[1300] *See* I.N.A. § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v); *In re* B-, 7 I&N Dec. 166 (BIA 1956)

[1301] *See In re* F-y-G-, 4 I&N Dec. 717 (BIA Aug. 1, 1952); 22 C.F.R. § 40.21(a)(5). *See also,* Effects of a Presidential Pardon, Memo. Office of Legal Counsel (Jun. 19, 1995), at www.usdoj.gov/olc/pardon3.19.htm (opining that a full and unconditional pardon precludes the exercise of the authority to deport a convicted non-citizen under criminal deportation grounds).

[1302] *See* K. Semple, "Hip-hopper is Pardoned by Governor," *The New York Times*, May 24, 2008, available at http://www.nytimes.com/2008/05/24/nyregion/24pardon.html; "Va. Governor Pardons British Mother Who Faces Deportation for 1997 Credit Card Theft Offense," *FOXNews.com*, Aug. 13, 2008, available at http://www.foxnews.com/politics/2008/08/13/va-governor-pardons-british-mother-faces-deportation-credit-card-theft/; M. Colgate Love, "Relief from the Collateral Consequences of a Criminal Conviction," *The Sentencing Project,* Mar. 12, 2007, http://www.sentencingproject.org/tmp/File/Collateral%20Consequences/Washington(2).pdf, p. WA3 (reporting that at least one of the pardons granted in 2004 was in order to avoid deportation).

[1303] For more information, contact: the Illinois Prisoner Review Board, 319 East Madison Street, Suite A, Springfield, Illinois 62703, (217) 782-7273, fax: (217) 524-0012, http://www.state.il.us/prb/; the Wisconsin Pardon Advisory Board, Room 115 East, State Capitol, P.O. Box 7863, Madison, WI 53707, (608) 266-1212, http://www.wisgov.state.wi.us/appointments_detail.asp?boardid=114; the Indiana Parole Board, Indiana Government Center South, 302 W. Washington St., Indianapolis, IN 46204, (317) 232-5737, http://www.in.gov/indcorrection/paroleboard.htm. For an overview of private bills and pardons, *see* A. Gallagher, *AILA's Focus on Private Bills and Pardons in Immigration*, © AILA 2008, available at http://www.ailapubs.org/privatebills.html.

[1304] For statistics on the increase in prosecutions of non-citizens, visit the website of TRAC, the Transactional Records Access Clearinghouse, which provides detailed reports and analysis of prosecution trends, at http://trac.syr.edu/.

authorities.[1305]A non-citizen who was ordered deported or removed without having been convicted of an aggravated felony, left the U.S., and then reentered the U.S. without first obtaining permission from U.S. authorities faces a sentence of up to two years in the U.S. Bureau of Prisons.[1306] A non-citizen who was deported or removed after having been convicted of an aggravated felony, left the U.S., and then reenters the U.S. without permission faces a sentence of up to 20 years in the U.S. Bureau of Prisons.[1307]

Elements of an Offense under I.N.A. § 276, 8 U.S.C. § 1326

The offense of illegal reentry by a deported non-citizen under I.N.A. § 276, 8 U.S.C. § 1326 does not include a specific intent element but rather an implied mental state requirement; the affirmative defense is limited to a showing of reasonable belief on the part of the non-citizen defendant that he had received the prior permission of the Attorney General, not a state authority, to reenter the United States.[1308] A non-citizen's mistaken belief regarding his ability to reenter the U.S. after a certain time period following his deportation is not a defense to a prosecution under I.N.A. § 276, 8 U.S.C. § 1326.[1309] The Seventh Circuit has held that A-file records (including prior orders of deportation, exclusion, and removal) as well as certificates of nonexistence of record ("CNR") are non-testimonial business records and not subject to the requirements of the Sixth Amendment Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006).[1310]

A non-citizen is "found" within the meaning of I.N.A. § 276 when the DHS both discovers his presence in the United States and knows that his presence is illegal based on his identity and immigration status.[1311] A prosecution under I.N.A. § 276, 8 U.S.C. § 1326 may be brought wherever a non-citizen who has been removed by the former INS or the DHS and illegally reentered the United States is "found."[1312] The offense of an illegal reentry is a continuing one, and venue for the prosecution exists wherever he is "located in fact".[1313]

[1305] *See* Appendix 8A, I.N.A. § 276, 8 U.S.C. § 1326.

[1306] *See* I.N.A. § 276(a), 8 U.S.C. §1326(a).

[1307] *See* I.N.A. § 276(b), 8 U.S.C. §1326(b).

[1308] *See* U.S. v. Grieveson, 110 F.Supp.2d 880, 885 (S.D.Ind. Aug. 28, 2000) (citing and discussing U.S. v. Barrera-Paniangua, No. 98-CR-648, 2000 WL 246241 (N.D.IL Feb. 24, 2000), U.S. v. Gomez-Orozco, 188 F.3d 422, 425 (7th Cir. Aug. 5, 1999), U.S. v. Anton, 888 F.2d 53, 54 (7th Cir. Oct. 26, 1989), and U.S. v. Anderson, 64 F. Supp. 2d 870, 874 n.1 (S.D.Ind. Sept. 24, 1999), aff'd, 221 F.3d 1339 (7th Cir. June. 27, 2000) (table text)).

[1309] *See* U.S. v. Rea-Beltran, 457 F.3d 695, 702 (7th Cir. Aug. 10, 2006).

[1310] *See* U.S. v. Burgos, 539 F.3d 641 (7th Cir. Aug. 22, 2008). CNRs relate to the lack of evidence in the A-file demonstrating that the Attorney General has granted permission for a non-citizen to reenter the U.S. *See id.*

[1311] *See* U.S. v. Herrera-Ordones, 190 F.3d 504 (7th Cir. Aug. 19, 1999).

[1312] *See* U.S. v. Rodriguez-Rodriguez, 453 F.3d 458, 460 (7th Cir. Jul. 6, 2006).

[1313] *See id.* at 460-462 (holding that where a non-citizen was encountered by law enforcement in the Southern District of Texas but was not prosecuted under 8 U.S.C. § 1326 until he was again encountered by law enforcement authorities in Wisconsin, the lack of a fast-track program in Wisconsin did not entitle him to a reduction in his sentence for his conviction under 8 U.S.C. § 1326); *see also*, U.S. v. Contreras-Hernandez, 277 F.Supp.2d 952 (E.D.WI Aug. 7, 2003) (holding that where a non-citizen is "found" in prison for a conviction unrelated to his illegal reentry, he may be

Challenges to the underlying immigration proceedings can be brought in a prosecution under I.N.A. § 276, 8 U.S.C. § 1326 to collaterally attack the validity of a prior deportation (removal) order and the proceedings because the prior deportation (removal) order is a necessary element of the illegal reentry offense.[1314] A deportation order may not be used to establish the element of the criminal offense of illegal reentry after deportation where a non-citizen can show that the deportation hearing effectively foreclosed his right to direct judicial review of the deportation order, did not provide the non-citizen with due process of law, or was fundamentally unfair.[1315]

In *United States v. Mendoza-Lopez*, the U.S. Supreme Court held that "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding.[1316] Thus, where a non-citizen was not represented by counsel at his immigration hearing and the Immigration Judge failed to adequately advise him of his eligibility to apply for relief from removal, the non-citizen's waiver of his right to appeal is not considered to be voluntary or intelligent and the non-citizen was deprived of judicial review of the immigration proceeding. [1317] Some Courts of Appeals have held that the denial of the opportunity to apply for discretionary relief in the prior removal proceeding is a fundamental procedural error.[1318]

To challenge an illegal reentry charge may require close coordination with an immigration attorney who is well versed in immigration consequences for criminal convictions and removal defense.[1319] A person who believes that he is a non-citizen may actually be a U.S. citizen, having derived U.S. citizenship through one or both parents or

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sentenced to a term of imprisonment for a conviction under 8 U.S.C. § 1236 to run concurrently with the sentence for the other offense).

[1314] *See* 8 U.S.C. § 1326(d).

[1315] *See* U.S. v. Mendoza-Lopez, 481 U.S. 828, 837-39 (May 26, 1987); U.S. v. Espinoza-Farlo, 34 F.3d 469 (7th Cir. Sept. 1, 1994) (adopting the analysis of the U.S. Supreme Court in U.S. v. Mendoza-Lopez, 481 U.S. 828, 837-40, n.17 (May 26, 1987) (holding that a non-citizen defendant may collaterally attack the prior deportation order upon which a criminal charge under I.N.A. § 276, 8 U.S.C. § 1326 is predicated if procedural errors in the prior deportation hearing deprived him of judicial review)); U.S. v. Anderson, 64 F.Supp.2d 870 (S.D.Ind. Sept. 24, 1999); U.S. v. Santiago-Ochoa, 447 F.3d 1015 (7th Cir. May 19, 2006) (holding that where a non-citizen waived his right to contest the Notice of Intent to Issue a Final Administrative Removal Order issued by the DHS, he failed to exhaust his administrative remedies and did not meet his duty to exhaust under I.N.A. § 276(d)(1), 8 U.S.C. § 1326(d)(1) in a prosecution for illegal entry).

[1316] *See* U.S. v. Mendoza-Lopez, 481 U.S. 828, 837-38 (May 26, 1987).

[1317] *See id* at 840.

[1318] *See, e.g.*, U.S. v. Arrieta, 224 F.3d 1076, 1079 (9th Cir. Sept. 25, 2000); U.S. v. Calderon, 2003 U.S. Dist. LEXIS 224, at *6 (E.D.NY Jan. 9, 2003); U.S. v. Aguirre-Tello, 181 F.Supp.2d 1298, 1304 (D.N.M. Jan. 22, 2002); *cf.* U.S. v. Fernandez-Antonia, 278 F.3d 150 (2nd Cir. Jan. 29, 2002); U.S. v. Cottone, 244 F.Supp.2d 126, 130 (E.D.NY Feb. 14, 2003). Some courts have required that the non-citizen must demonstrate prejudice which means a showing that absent the procedural error that occurred in the underlying deportation proceeding, the result of that proceeding might have been different. *See* U.S. v. Fernandez-Antonia, 278 F.3d 150, 157-59 (2nd Cir. Jan. 29, 2002); U.S. v. Sanchez-Peralta, 1998 U.S. Dist. LEXIS 1660, at *12(S.D.NY Feb. 13, 1998); U.S. v. Jimenez-Marmolejo, 104 F.3d 1083, 1086 (9th Cir. Nov. 15, 1996) (requiring a showing of "plausible grounds for relief").

[1319] For a list of immigration attorneys, see Appendix 9C, Resources.

even a grandparent, thus rendering the prior removal or deportation order invalid.[1320] A non-citizen may have been eligible for either discretionary or mandatory relief about which he was not informed or was misinformed by the Immigration Judge or the DHS. The Seventh Circuit has found that it is mandatory for an IJ to inform a non-citizen facing removal of his right to discretionary relief.[1321] Thus, a defense to a charge of illegal reentry under I.N.A. § 276, 8 U.S.C. § 1326 may be made where a non-citizen was incorrectly advised by the Immigration Judge and the Board of Immigration Appeals regarding his eligibility for relief from deportation or removal.[1322] The Immigration Judge or the DHS may also have failed to advise him of his statutory, regulatory, and Constitutional rights for his defense in the immigration proceeding, such as the right to obtain, inspect, and present evidence in his own behalf, to cross-examine witnesses, to apply for relief, and to appeal the decision of an Immigration Judge to the Board of Immigration Appeals[1323] Where a non-citizen was represented by counsel before the Immigration Court and/or the Board of Immigration Appeals, a claim of ineffective assistance of counsel against his former immigration counsel may be a viable basis to challenge a prior order of removal or deportation.[1324] Removal or deportation orders entered *in absentia* may also be challenged where the non-citizen did not receive a Notice to Appear due to INS or DHS error or did not receive notice of the removal hearing.[1325]

Thus, the underlying immigration proceeding should be reviewed carefully for arguments to collaterally attack the prior deportation, exclusion, and/or removal order(s). Through the discovery process and also a request under the Freedom of Information Act (FOIA), a copy of the underlying removal proceeding and copies of the tapes (if the

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[1320] *See* Appendix 1B, Naturalization/Citizenship Charts.

[1321] *See* Asani v. I.N.S., 154 F.3d 719, 727-28 (7th Cir. Sept. 3, 1998); s*ee also, Matter of* Cordova, 22 I&N Dec. 966, 970-71 (BIA Aug. 6, 1999); *Matter of* Ulloa, 22 I&N Dec. 725, 726 (BIA May 24, 1999).

[1322] *See* U.S. v. Lopez, 445 F.3d 90 (7th Cir. Apr. 4, 2006) (vacating his conviction and remanding to the district court for a determination whether the incorrect information provided by the Immigration Judge and the BIA rendered his deportation order fundamentally unfair under I.N.A. § 276(d)(3), 8 U.S.C. § 1326(d)(3)).

[1323] *See e.g.*, I.N.A. § 240(b)(4), 8 U.S.C. §1229a(b)(4); 8 C.F.R. § 1240.10(a)(4); 8 C.F.R. §§ 103.8, 103.10, 103.20, 103.21, 103.22(a); 8 C.F.R. § 1003.39 ("Except when certified to the [BIA], the decision of the [IJ] becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken, whichever occurs first."); 8 C.F.R. § 242.27(a) and 8 C.F.R. § 212.3(e)(1) (212(c) relief, removed 1998); Kerciku v. I.N.S., 314 F.3d 913 (7th Cir. Jan. 3, 2003); Podio v. I.N.S., 153 F.3d 506 (7th Cir. Aug. 25, 1998); Reno v. Flores, 507 U.S. 292, 306, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (Mar. 23, 1993) (Fifth Amendment entitles foreign persons in the United States to due process of law in deportation proceedings); Kerciku v. INS, 314 F.3d 913, 917 (7th Cir. Jan. 3, 2003); Pieniazek v. Gonzales, 449 F.3d 792 (7th Cir. Jun. 5, 2006) (holding that a non-citizen has a right to a continuance before the Immigration Court in order to obtain a copy of his file from DHS to review evidence in support of a motion to suppress); U.S. v. Ubaldo-Figueroa, 364 F.3d 1042 (9th Cir. Oct. 17, 2003) (finding that the underlying removal proceedings were constitutionally defective which resulted in a due process violation and reversing his conviction for illegal reentry under I.N.A. § 276, 8 U.S.C. § 1326).

[1324] *See In re* Compean, 25 I&N Dec. 1 (A.G. Jun. 3, 2009); *In re* Assaad, 23 I&N Dec. 553 (BIA Feb. 12, 2003) (reaffirming *In re Lozada*, 19 I&N Dec. 637 (BIA Apr. 13, 1988) and distinguishing U.S. Supreme Court precedent in the criminal context regarding deprivation of effective assistance of counsel from a non-citizen's right to due process under the Fifth Amendment of the U.S. Constitution in immigration proceedings); *Stroe v. INS*, 256 F.3d 498, 501 (7th Cir. Jun. 26, 2001).

[1325] *See, e.g.*, *In re G-Y-R-*, 23 I&N Dec. 181 (BIA Oct. 19, 2001).

proceedings were not transcribed for an appeal to the Board of Immigration Appeals) may be obtained from the Executive Office for Immigration Review (EOIR).[1326]

The Seventh Circuit has commented that where a non-citizen was erroneously informed about his eligibility to apply for a §212(c) waiver, was ordered removed, did not file an appeal of the Immigration Judge's decision or seek judicial review, and then was removed from the U.S., no due process violation in the underlying immigration proceeding arises as § 212(c) relief is a discretionary form of relief in which he did not have any property or liberty interest in being considered for such relief.[1327] This runs contrary to the U.S. Supreme Court's *St. Cyr* decisions:

> Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand. Eligibility that was "governed by specific statutory standards" provided "a right to a ruling on an applicant's eligibility," even though the actual granting of relief was "not a matter of right under any circumstances, but rather is in all cases a matter of grace."[1328]

As the U.S. Supreme Court noted in *St. Cyr*, over half of all § 212(c) applications had been granted.[1329] Based on the current split among the federal circuit courts of appeals in the context of non-citizens who were erroneously denied the opportunity to apply for discretionary relief, this issue involving § 212(c) waivers should be preserved for future litigation.[1330]

[1326] For information regarding the processing of a FOIA request with the DHS, *see* 8 C.F.R. §§ 103.8(a-d), 103.10, 103.20, 103.21, and 103.22(a). For information regarding the filing and processing of a FOIA request with the EOIR, *see* 5 U.S.C. § 522; 5 C.F.R. § 10310(s)(2); http://www.usdoj.gov/oip/04_1.html.

[1327] *See* U.S. v. Roque-Espinoza, 338 F.3d 724, 729 (7th Cir. Jul. 30, 2003) (finding that there was no due process violation in the underlying removal proceeding where the Immigration Judge erroneously informed him that he was not eligible for a §212(c) waiver); *see also*, Lara-Unzueta v. Monica, 2004 U.S. Dist. LEXIS 6860 (N.D.IL Apr. 20, 2004).

[1328] *See* 533 U.S. at 307-308 (quoting Jay v. Boyd, 351 U.S. 345, 353-54, 100 L. ed. 1242, 76 S. Ct. 919 (Jun. 11, 1956) (internal citation omitted)).

[1329] *See* I.N.S v. St. Cyr, 533 U.S. at 296 n.5.

[1330] *See* Roque-Espinoza, 338 F.3d 724, 729 (7th Cir. Jul. 30, 2003); *cf.* U.S. v. Pallares-Galan, 359 F.3d 1088 (9th Cir. Feb. 20, 2004) (finding that the Immigration Judge's decision that the non-citizen had been convicted of an aggravated felony and ineligible for cancellation of removal was erroneous and that the non-citizen's waiver of his right to appeal was not considered and intelligent and remanding the case to the district court for consideration of prejudice and dismissal of the indictment of illegal reentry) with U.S. v. Torres, 383 F.3d 92, 105-06 (3rd Cir. Sept. 7, 2004) (holding that because a non-citizen does not have a due process liberty interest in applying for a discretionary 212(c) waiver, there was no fundamental unfairness in the underlying proceeding for failure to consider a non-citizen for such relief); U.S. v. Copeland, 376 F.3d 61 (2nd Cir. Jul. 16, 2004) (collateral attack on prior proceedings related to eligibility for § 212(c) waiver allowed and remanding to the district court for an evidentiary hearing regarding prejudice to the non-citizen); U.S. v. Calderon, 391 F.3d 370 (2nd Dec. 1, 2004) (finding that misinformation by an Immigration Judge regarding a non-citizen's eligibility for a §212(c) waiver and affirmative misadvice by immigration counsel regarding the process by which to seek review of the Immigration Judge's decision rendered the underlying immigration proceedings fundamentally unfair for which the non-citizen suffered resulting prejudice and holding that the non-citizen's waiver of his administrative review was not knowing and

The Seventh Circuit upheld a district court's decision denying a motion to quash his arrest and suppress evidence where the DHS did not have an arrest warrant or consent to enter private property to arrest a non-citizen suspected of having illegally reentered the U.S.[1331] The Seventh Circuit relied on New York v. Harris, 495 U.S. 14, 18 (Apr. 18, 1990) in which the U.S. Supreme Court held that an unlawful entry by police into the home of a defendant does not make his subsequent detention unlawful if probable cause existed to arrest him. In a subsequent case, the Seventh Circuit held that the exclusionary rule does not apply where officers arrest a non-citizen believed to have unlawfully reentered the U.S. in the common hallway of a secured duplex building where the tenants are unrelated to each other.[1332] These broad rulings by the Seventh Circuit will make it difficult to move to quash an arrest and suppress evidence obtained where probable cause exists that a person is a non-citizen who has been deported and illegally reentered the U.S. It also provides no protection to the person (U.S. citizen or other status) whose property is entered by DHS agents without a warrant or consent.

Sentencing under I.N.A. § 276, 8 U.S.C. § 1326

In *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998), the Supreme Court considered the illegal reentry provisions under 8 U.S.C. § 1326(a) which prohibits a non-citizen who has been deported from the U.S. from returning again without special permission and carries a prison term of up to two years. However, if the deportation was for the commission of an aggravated felony, then 8 U.S.C. § 1326(b)(2) authorizes a prison term of up to 20 years. As 8 U.S.C. § 1326(b)(2) was found to be a penalty provision, and not an element of the offense, the Supreme Court held there was no need to charge that factor in the indictment.[1333] Thus, a non-citizen defendant does not have the right to a jury trial to determine whether he should receive an enhanced sentence as a recidivist.[1334]

In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the U.S. Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." The U.S. Supreme Court clarified its holding in *U.S v. Booker*,

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intelligent and therefore excused the requirement to exhaust all available administrative remedies in a prosecution under 8 U.S.C. § 1326); U.S. v. Ubaldo-Figueroa, 364 F.3d 1042, 1049 (9th Cir. Oct. 17, 2003) (finding that a non-citizen's waiver of his right to appeal was not considered and intelligent where the IJ failed to advise him of his eligibility for relief from removal); Oguejiofor v. A.G. of the United States, 277 F.3d 1305, 1309 (11th Cir. Jan. 2, 2002); Smith v. Ashcroft, 295 F.3d 425, 429-30 (4th Cir. Jul. 1, 2002).

1331 *See* U.S. v. Roche-Martinez, 467 F.3d 591 (7th Cir. Oct. 19, 2006) (stating that "our holding in no way sanctions Agent DeTolve's or Officer Poulakis' decision not to seek a search or arrest warrant" as there were no exigent circumstances and "ample opportunity to obtain either a search or arrest warrant").

1332 *See* United States v. Villegas, 495 F.3d 761 (7th Cir. 2007). *See also*, United States v. Villegas, 495 F.3d 761 (7th Cir. 2007) (J. Rovner, concurring but stating that the court of appeals did not need to reach the issue of a cognizable expectation of privacy in the hallway of the duplex because the officers had probable cause to arrest the non-citizen).

1333 *See* Almendarez-Torres v. U.S., 523 U.S. 224 (Mar. 24, 1998).

1334 *See* Almendarez-Torres v. U.S., *supra*; U.S. v. Williams, 410 F.3d 397, 401-02 (7th Cir. Jun. 9, 2005); U.S. v. Palomino-Rivera, 258 F.3d 656, 659 (7th Cir. Jul. 20, 2001).

543 U.S. 220 (Jan. 12, 2005). In that case, it held that a defendant has a right to a jury trial and to the reasonable-doubt standard in a sentencing proceeding if the judge's findings dictate an increase in the maximum penalty.[1335]

In *Shepard v. U.S.*, 544 U.S. 13 (2005), the U.S. Supreme Court held that "any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury."[1336] Sentencing courts considering factual issues related to prior convictions are "generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy and any explicit factual finding by the trial judge to which the defendant has assented."[1337] In reconciling the holdings in *Almendarez-Torres*, *supra*, and *Shepard*, *supra*, where a prior conviction is being used to enhance a defendant's sentence, the Seventh Circuit has held that where there is any doubt that the prior conviction does not relate to the defendant, then the district court will resolve it, not a jury.[1338]

In determining sentencing enhancement for illegal reentry into the United States after deportation for an aggravated felony in violation of I.N.A. § 276, 8 U.S.C. § 1326, the Seventh Circuit Court of Appeals has upheld sentencing enhancements.[1339] To determine

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[1335] *See* U.S. v. Booker, 543 U.S. 220, 244 (Jan. 12, 2005) (holding that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved by a jury beyond a reasonable doubt."); Blakeley v. Washington, 542 U.S. 296 (Jun. 24, 2004).

[1336] *See* Shepard v. U.S., 544 U.S. 13, 21 (Mar. 7, 2005) (holding that police reports could not be reviewed to determine the nature of prior convictions; rather only "conclusive records made or used in adjudicating guilt" could be considered).

[1337] *See* Shepard v. U.S., 544 U.S. 13, 16 (Mar. 7, 2005).

[1338] *See* U.S. v. Browning, 436 F.3d 780, 782 (7th Cir. Feb. 6, 2006) (reconciling Almendarez-Torres v. U.S., *supra*, with Shepard v. U.S., *supra*).

[1339] *See* Almendarez-Torres v. U.S., 523 U.S. 224, 140 L.Ed.2d 350, 118 S.Ct. 1219 (Mar. 24, 1998); U.S. v. Chavez-Chavez, 213 F.3d 420 (7th Cir. May 23, 2000) (holding that court's discretionary decision not to further downward depart in sentencing the defendant based on the seriousness of prior felony offense of aggravated criminal sexual abuse of a minor was not reviewable); U.S. v. Cruz-Guevara, 209 F.3d 644 (7th Cir. Mar. 23, 2000) (vacating the sentence and remanding to the district court for an explanation of the downward departure in sentencing in relation to the U.S. Sentencing Guidelines based on the defendant non-citizen's family circumstances); U.S. v. Gonzalez-Portillo, 121 F.3d 1122 (7th Cir. Aug. 19, 1997) (holding that deportable alien status is an inappropriate basis for departure from the Sentencing Guidelines range); U.S. v. Munoz-Cerna, 47 F.3d 207 (7th Cir. Feb. 7, 1995) (holding that the sentencing enhancement applies retroactively to crimes not considered aggravated felonies at the time of commission; thus, the guideline enhancement may be applied in cases to which the statutory enhancement is inapplicable); U.S. v. Gonzalez, 112 F.3d 1325 (7th Cir. May 6, 1997) (holding that the Sentencing Guidelines did not impose any age limit on domestic aggravated felonies that could be considered for sentencing enhancement); U.S. v. Jackson, 93 F.3d 335 (7th Cir. Aug. 15, 1996) (holding that the court lacks jurisdiction to review a district court's discretionary refusal to depart from the sentencing range in the guidelines unless the district court erroneously believed that it did not have discretion to do so), citing U.S. v. Blackwell, 49 F.3d 1232 (7th Cir. Mar. 1, 1995)); U.S. v. Samaniego-Rodriguez, 32 F.3d 242, 244 (7th Cir. Aug. 4, 1994) *rehearing and suggestion for rehearing en banc denied* Sept. 30, 1994 (holding that inaccurate information by the INS regarding sentencing penalties for unauthorized reentry does not violate due process); U.S. v. Shaw, 26 F.3d 700, 701-2 (7th Cir. Jun. 7, 1994); U.S. v. Korno, 986 F.2d 166 (7th Cir. Feb. 1, 1993) (affirming the upward departure for sentencing based on foreign convictions where Canadian justice system was found to be sufficiently close to the U.S. system to make the convictions

whether a prior conviction constitutes an aggravated felony for the purpose of sentencing enhancement, the sentencing court will look at the status of the non-citizen defendant's conviction at the time of his deportation.[1340] The sentence imposed for the prior conviction is what controls -- not time actually served.[1341] Two separate acts of illegal entry into the U.S. should not be grouped as a single course of conduct representing one composite harm under the U.S. Sentencing Guidelines § 3D1.2.[1342]

Where a conviction has been vacated following a non-citizen's deportation or removal from the U.S., the non-citizen is still subject to the sentencing enhancement under §2L1.2(b) of the U.S. Sentencing Guidelines for an illegal reentry prosecution under I.N.A. § 276, 8 U.S.C. § 1326 because he was convicted of an aggravated felony at the time of his deportation.[1343] The Seventh Circuit has not yet decided the possible due process concerns where a conviction is vacated based on an error of law, subsequently discovered evidence, actual innocence, a constitutional defect in the underlying criminal proceeding, or other areas of law.[1344]

In determining the sentence to be imposed, a district court must consider the following relevant sentencing factors under 18 U.S.C. §3553(a)(2), including: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed –(a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment; (b) to afford adequate deterrence to criminal conduct; (c) the need to protect the public from further crimes of the defendant; and (d) to provide for the defendant's rehabilitative needs; (3) the kinds of sentences available; (4) any pertinent policy statement issued by the Sentencing Commission; (5) the need to avoid unwarranted sentence disparities; and (6) the need to provide restitution to the victims of the offense. After a court has accepted all relevant evidence under 18 U.S.C.

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reliable); *cf.* U.S. v. Galvan-Zermeno, 52 F.Supp.2d 922, 924-25 (C.D.IL May 21, 1999) (holding that a downward departure was warranted when the sentence was enhanced because the non-citizen was "found" to be an alien while in custody for another offense committed after his illegal reentry into the U.S.).

[1340] *See* U.S. v. Garcia-Lopez, 375 F.3d 586 (7th Cir. Jul. 12, 2004).

[1341] *See* U.S. v. Cordova-Beraud, 90 F.3d 215 (7th Cir. Jul. 19, 1996) (holding that the maximum potential term of imprisonment imposed by the sentencing judge for an indeterminate sentence controls, not the time actually served).

[1342] *See* U.S. v. Bahena-Guifarro, 324 F.3d 560, 563-565 (7th Cir. Apr. 1, 2003) (finding that a non-citizen who had been deported several times and then convicted for additional state crimes upon each illegal reentry had not demonstrated that the offenses were part of a single course of conduct or that the illegal reentries were not separate and distinctive sentences that could not be grouped together and likening the two illegal reentries to two counts of escape from prison and finding that no evidence had been demonstrated to show that the motives for returning to the U.S. each time illegally were part of a common scheme or plan where it was the non-citizen's burden to prove such common scheme or plan).

[1343] *See* U.S. v. Garcia-Lopez, 375 F.3d 586 (7th Cir. Jul. 12, 2004). *See also*, U.S. v. Alcantara-Hernandez, 2006 U.S. Dist. LEXIS 48100 (E.D.WI Jul. 3, 2006) (holding that a conviction under Wis. Stat. §948.07(3) for child enticement for which the state court failed to provide the immigration advisals prior to the guilty plea but which was not vacated prior to the non-citizen's deportation was an aggravated felony under I.N.A. § 101(a)(43)(A), 8 U.S.C. §1101(a)(43)(A) and served as a basis for sentencing enhancement, even if it is later vacated based on an underlying constitutional defect in the state criminal proceeding).

[1344] *See* U.S. v. Garcia-Lopez, 375 F.3d 586, 589 (7th Cir. Jul. 12, 2004).

§3553(a), the court must explain its sentencing decision.[1345] A sentence which falls within the properly calculated guidelines range is presumed reasonable.[1346] The presumption may be rebutted by a showing that the factors outlines in 18 U.S.C. § 3553 compelled a lower sentence.[1347]

The Seventh Circuit Court of Appeals has rejected the contention that deportation itself is a form of punishment that justifies a departure.[1348] Although deportation itself does not provide a basis for departure, a defendant may be able to "point to individualized circumstances that…make deportation extraordinarily harsh for him…forbids consideration of extralegal consequences that follow a sentence as grounds for departure."[1349] As long as the defendant's alien status is not accounted for in the applicable guideline (as where the offense is one of unlawful reentry following deportation)[1350] district courts are free to consider whether this factor causes "unusual or exceptional hardship in his conditions of confinement," justifying a departure.[1351] A departure may not be based on conditions of confinement that would be present if the defendant were a U.S. citizen.[1352]

The non-citizen defendant must then establish hardship aside from the fact of his removal. First, he can show that his conditions of confinement will be substantially more onerous than the commission intended in setting the applicable sentence.[1353] However, the

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[1345] *See* U.S. v. Garner, 454 F.3d 743, 751 (7th Cir. Jul. 26, 2006).

[1346] *See* U.S. v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. Jul. 7, 2005); U.S. v. Castro-Suarez, 425 F.3d 430 (7th Cir. Oct. 3, 2005) (remanding to the district court for further explanation where the sentence imposed was above the advisory guideline range); U.S. v. Arzola-Casas, 207 Fed. Appx. 667 (7th Cir. Nov. 29, 2006) (noting that the U.S. Supreme Court has granted a petition for writ of certiorari in a Fourth Circuit case (U.S. v. Rita, 177 Fed. Appx. 357 (4th Cir. May 1, 2006), *cert granted*, 127 S.Ct. 551 (U.S. Jan. 5, 2007)) to determine whether according a presumption of reasonableness to a sentence within the guidelines range is consistent with U.S. v. Booker, 543 U.S. 220 (Jan. 12, 2005)).

[1347] *See* U.S. v. Lange, 445 F.3d 983, 987 (7th Cir. Apr. 28, 2006). A "Paladino remand" is for the district court to inform the Seventh Circuit whether the "sentence would have been different had the Guidelines been applied as advisory rather than mandatory." U.S. v. Santiago, 428 F.3d 699, 705-06 (7th Cir. Nov. 3, 2005); U.S. v. Paladino, 401 F.3d 471 (7th Cir. Feb. 25, 2005). In the remand, the district court considers the sentencing factors in 18 U.S.C. §3553(a), which include the nature and circumstances of the offense, the history and characteristics of the defendant, the need to promote respect for the law, the need to provide just punishment for the offense, the need to afford adequate deterrence to criminal conduct, and the need to protect the public from further crimes of the defendant. *See* 18 U.S.C. §3553(a); U.S. v. Alburay, 415 F.3d 782, 786 (7th Cir. Jul. 29, 2005).

[1348] *See* U.S. v. Guzman, 236 F.3d 830, 834 (7th Cir. Jan. 3, 2001).

[1349] *See* U.S. v. Bautista, 258 F.3d 602, 606, 852 (7th Cir. Jul. 12, 2001).

[1350] *See* U.S. v. Gonzalez-Portillo, 121 F.3d 1122, 1125 (7th Cir. 1997) (holding that status as a deportable alien is not a proper basis for departure when the crime of conviction is one involving illegal presence in the U.S.); U.S. v. Martinez-Carillo, 250 F.3d 1101, 1106-07 (7th Cir. May 17, 2001), cert. denied, 122 S. Ct. 285 (Oct. 1, 2001) (re-affirming Gonzalez-Portillo in light of Farouil and Koon).

[1351] *See* U.S. v. Farouil, 124 F.3d 838, 847 (7th Cir. Aug. 26, 1997); *See also* U.S. v. Gallo-Vasquez, 284 F.3d 780, 784 (7th Cir. Mar. 27, 2002) (reiterating reiterated that "Farouil contains no language that mandates sentencing courts to enter downward departures every time a defendant is a deportable alien" and declining to overrule United States v. Farouil, 124 F.3d 838 (7th Cir. Aug. 26, 1997)).

[1352] *See* U.S. v. Gallo-Vasquez, 284 F.3d at 784-85.

[1353] *See* U.S. v. Ferreria, 239 F. Supp. 2d 849 (Nov. 6, 2002).

court should not depart if the defendant would be ineligible for more favorable prison conditions notwithstanding his deportable status. Second, the non-citizen can show that his individual circumstances make removal extraordinarily harsh, as, for example, where he will be sent to a country he does not know and/or will be separated from his family and friends. For example, cultural assimilation, which may speak to a non-citizen defendant's offense of illegal reentry and his character, may be a basis for a downward departure.[1354] Factors to be considered include the length of time that he lived in the U.S., his level of familiarity with his country of origin, his family ties in the U.S. and abroad, his motive for returning to the U.S., and what he did and where he lived upon reentry.[1355] Finally, the district court must make specific findings justifying the departure.[1356]

Fast-track programs allow the U.S. Attorney to request a downward departure in the offense level for convictions under I.N.A. § 276, 8 U.S.C. § 1326 cases in districts where the program is authorized by the U.S. Attorney General and the U.S. Attorney.[1357] Fast-track programs do not exist in the federal district courts within the jurisdiction of the Seventh Circuit. The absence of a fast-track program for prosecutions under 8 U.S.C. § 1326 does not result in an unfair sentencing discrepancy.[1358] The Seventh Circuit has held that the district court may not depart below the guidelines range to compensate for disparities created by the selective use of fast-track programs.[1359]

There are restrictions on where non-citizens may be placed to serve their federal sentences. First, deportable non-citizens[1360] must be housed in at least a low security level

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[1354] *See* U.S. v. Martinez-Alvarez, 256 F.Supp.2d 917 (E.D.WI Apr. 14, 2003).
[1355] *See id*. at 920; *see also*, U.S. v. Arguijo-Cervantes, 551 F.Supp.2d 762 (E.D.WI Mar. 6, 2008); U.S. v. Campos-Cervantes, 2007 U.S. Dist. LEXIS 62998 (E.D.WI Aug. 27, 2007); U.S. v. Salazar-Hernandez, 431 F.Supp.2d 931, 935 (E.D.WI 2006); U.S. v. Peralta-Espinoza, 383 F.Supp.2d 1107, 1112 (E.D.WI 2005); U.S. v. Galvez-Barrios, 355 F.Supp.2d 958, 964 (E.D.WI 2005).
[1356] *See* U.S. v. Ferreria, 239 F. Supp. 2d 849 (Nov. 6, 2002).
[1357] *See* U.S.S.G. § 5K3.1; U.S. v. Martinez-Martinez, 442 F.3d 539, 542 (7th Cir. Mar. 23, 2006); *see generally* Jane L. McClellan and Jon M. Sands, "Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on 'Fast-Track' Sentences," 38 Ariz. St. L.J. 517 (Summer 2006); Erin T. Middleton, "Fast-Track to Disparity: How Federal Sentencing Policies Along the Southwest Border are Undermining the Sentencing Guidelines and Violating Equal Protection," 2004 Utah L. Rev. 827 (#3).
[1358] *See* U.S. v. Galicia-Cardenas, 443 F.3d 553, 555 (7th Cir. Feb. 8, 2006) (holding that a sentence in a district without a fast-track program must not be reduced); U.S. v. Martinez-Martinez, 442 F.3d 539, 542 (7th Cir. Mar. 23, 2006) (holding that a sentence in a district without a fast-track program need not be reduced).
[1359] *See* U.S. v. Rodriguez-Rodriguez, 453 F.3d 458, 462 (7th Cir. Jul. 6, 2006) (clarifying its ruling in U.S. v. Martinez-Martinez, 442 F.3d 539 (7th Cir. Mar. 23, 2006)); U.S. v. Galicia-Cardenas, 443 F.3d 553, 555 (7th Cir. Mar. 24, 2006) (holding that a downward departure is not authorized where a non-citizen has been convicted in a district court where the fast-track program is not available); U.S. v. Martinez-Martinez, 442 F.3d 539 (7th Cir. Mar. 23, 2006). For a discussion regarding why the Seventh Circuit's precedent regarding sentencing and the fast-track programs should be revisited, *see* United States v. Sanchez-Gonzalez, 2009 U.S. Dist. LEXIS 9160 (N.D.IL Feb. 9, 2009).
[1360] The BOP defines a "deportable alien" as an "inmate who is a citizen of a foreign country, rather than the U.S." *See* Federal Bureau of Prisons, Security Designation and Custody Clarification Manual, Program Statement 5100.07, ch. 7, (1999) [hereinafter "PS 5100.07"], available at www.bop.gov.

institution.[1361] Second, they are usually precluded from serving the final portion of their sentences in a halfway house or community correctional center. Title 18, U.S. Code § 3624(c) provides that, to the extent practicable, the BOP shall assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10% of his term in such a facility or in home confinement. A deportable non-citizen may participate in such a prerelease program only if he can establish: (1) a verifiable history of stable, full-time employment for at least five years prior to incarceration; (2) a verified history of domicile in the United States for at least five years prior to incarceration; and (3) verified strong family ties in the United States.[1362] These requirements may make it difficult for many non-citizens to qualify for prerelease programs.[1363] Moreover, if the non-citizen has been ordered deported or removed following incarceration, then he will be denied access to community confinement even if he meets the above three requirements."[1364]

Petition for a Writ of Habeas Corpus

A non-citizen who is "in custody in violation of the Constitution or laws or treaties of the United States" may file a petition for a writ of habeas corpus with the federal district court.[1365] Two types of petitions for writs of habeas corpus may be filed in the federal district courts. In the first type, a non-citizen challenges his custody by the DHS. Where an action is taken which has the effect of "holding" a prisoner for a future custodian at the end of his current confinement, such as the filing of a detainer by the DHS with the Bureau of Prisons, this action serves to establish custody for purposes of habeas corpus.[1366]

In the second type of petition for a writ of habeas corpus, a non-citizen who has been convicted of a federal crime may file a petition for post-conviction relief to vacate, set aside, or correct a sentence imposed where the sentence imposed was allegedly in violation of the U.S. Constitution or laws of the United States.[1367] Such relief is available, however, only where there was "an error of law that was jurisdictional, constitutional, or constitutes a

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[1361] *See* PS 5100.07, ch. 7, at 3. The shock incarceration or "boot camp" program is available only to those defendants sentenced to between twelve and thirty months imprisonment, 18 U.S.C. § 4046(a), below defendant's range, and the BOP also possesses considerable discretion in making placement decisions under this program. *See* Gissendanner v. Menifee, 975 F. Supp. 249, 251 (W.D.N.Y. Aug. 27, 1997).

[1362] *See* PS 5100.07, ch. 7, at 3.

[1363] *See id.* at n.13 (citing U.S. v. Smith, 307 U.S. App. D.C. 199, 27 F.3d 649, 651 n.2 (D.C. Cir. 1994)).

[1364] *See id*. (citing PS 5100.07, ch. 7, at 4).

[1365] *See* 28 U.S.C. § 2241(c)(3); Maleng v. Cook, 490 U.S. 488, 490-91 (May 15, 1989); *see also*, Samirah v. O'Connell, 335 F.3d 545, 549-51 (7th Cir. Jul. 2, 2003) (finding that because the non-citizen petitioner was outside of the U.S. when the petition was filed, the district court did not have jurisdiction over the petition for a writ of habeas corpus).

[1366] *See* Vargas v. Swan, 854 F.2d 1028, 1031 (7th Cir. Aug. 12, 1988); *see also* Setharatsomphou v. Reno, 1999 U.S. Dist. LEXIS 14839 at *10-14 (N.D.IL Sept. 2, 1999) (finding that the existence of a final order of deportation plus a detainer filed by the former INS was sufficient to evidence intent of the INS to take custody).

[1367] *See* 28 U.S.C. § 2255.

'fundamental defect which inherently results in a complete miscarriage of justice.'"[1368] In reviewing a petition for post-conviction relief, the district court must review the record and draw all reasonable inferences in favor of the government.[1369] Thus, the burden is on the non-citizen to show that he is entitled to release under 28 U.S.C. § 2255.[1370]

For purposes of a petition for a writ of habeas corpus, a final judgment upon which a preclusive effect could be based is deemed to have been entered once a non-citizen defendant has been sentenced and the judgment has been entered on the court's docket.[1371] Where the state court reaches the merits of an issue, the issue will not be considered waived for a habeas petition under 28 U.S.C. § 2254 even though the defendant may have failed to adequately argue it in his briefs before that court.[1372]

Ineffective assistance of counsel may be found to constitute "cause" for a procedural default.[1373] To establish such a claim, the defendant must demonstrate that counsel's conduct fell below an objective standard of reasonableness, that "but for counsel's unprofessional error, the result of the proceeding would have been different", and that counsel's deficient performance rendered the proceedings fundamentally unfair or unreliable.[1374]

[1368] *See* Bischel v. United States, 32 F.3d 259, 263 (7th Cir. Aug. 8, 1994); Boyer v. U.S., 55 F.3d 296, 298 (7th Cir. May 24, 1995).
[1369] *See* Carnine v. United States, 974 F.2d 924, 928 (7th Cir. Jul. 24, 1992).
[1370] *See* Haines v. Kerner, 404 U.S. 519, 520 (Jan. 13, 1972).
[1371] *See* Clay v. U.S., 537 U.S. 522 (Mar. 4, 2003); *see also*. U.S. v. Jimenez-DeGarcia, 2007 U.S. Dist. LEXIS 25376 (E.D.WI Apr. 4, 2007) (denying request for a downward departure and a non-guidelines sentence based on the lost opportunity to serve a sentence for illegal reentry concurrently with a state sentence and on the disparity between fast-track districts and the Eastern District of Wisconsin on account of the non-citizen defendant's numerous illegal reentries, lengthy criminal history, prior deportations, and the need the promote deterrence and respect for the law).
[1372] *See* Robertson v. Hanks, 140 F.3d 707, 709 (7th Cir. Mar. 30, 1998), *cert. denied*, 525 U.S. 881 (Oct. 5, 1998).
[1373] *See* Murray v. Carrier, 477 U.S. 478, 488 (Jun. 26, 1986).
[1374] *See* Rodriguez v. Young, 906 F.2d 1153, 1159 (7th Cir. 1990); Strickland v. Washington 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). For a discussion regarding the parameters of claims of ineffective assistance of counsel and the legal means by which such a claim may be pursued for a federal conviction, *see* U.S. v. Rezin, 322 F.3d 443 (7th Cir. Mar. 4, 2003).

I.N.A. § 276, 8 U.S.C. § 1326

(a) In general

Subject to subsection (b) of this section, any alien who –

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. [sic] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this ittle who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2)[sic] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other

penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) of this section or subsection (b) of this section unless the alien demonstrates that –

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.