Avoiding the 'Secret Sentence': A Model for Ensuring that New Jersey Criminal Defendants are Advised about Immigration Consequences Before Entering Guilty Pleas

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AVOIDING THE “SECRET SENTENCE”1: A MODEL FOR ENSURING THAT NEW JERSEY CRIMINAL DEFENDANTS ARE ADVISED ABOUT IMMIGRATION CONSEQUENCES BEFORE ENTERING GUILTY PLEAS

Joanne Gottesman2

INTRODUCTION

After years of complaining to the police about her husband’s violence, Ana Flores found herself in deportation3 proceedings after she bit her husband during a fight. Her husband called the police, leading to her arrest. Following a brief hearing Ana pled guilty to simple assault and received a thirty day suspended sentence and probation. However, she soon learned that even as a lawful permanent resident of the United States with two United States citizen children, she is subject to deportation as a result of this relatively minor conviction.4

Ana’s situation has become increasingly common since the immigration laws were amended in 1996.5 Not only did the amendments expand the types of offenses that result in deportation and mandatory detention,6 but they also severely limited the relief available to immigrants in deportation proceedings,7 and the opportunities for judicial review of deportation orders.8 With new limits on discretionary relief, in many cases immigration judges are no longer

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3 Throughout this article I will use “deportation,” which is the term that was used in the pre-1997 immigration statutes, as well as colloquially.
5 The Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect on April 24, 1996, and most provisions of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) went into effect on April 1, 1997. These acts, combined with increased enforcement of immigration laws in the post 9/11 era have greatly expanded the negative immigration consequences of criminal convictions.
7 See for example, aggravated felony conviction bar to cancellation of removal in INA §240A(a), 8 U.S.C. §1229(b).
8 See INA §236, 8 U.S.C. §1226(e).
able to consider equities in determining whether an immigrant should be allowed to remain in the United States in spite of a criminal conviction.\footnote{See INA §237(a)(2)(A)(i), 8 U.S.C. §1227(a)(2)(A)(i).} As these amendments have restricted the role of judges and lawyers in deportation proceedings, the spotlight has turned back to judges and lawyers in the earlier criminal proceedings.

In order to protect the ability of immigrants convicted of crimes to preserve or obtain lawful status in the United States, especially those with significant family ties to the United States and relatively minor convictions like Ana’s it is necessary to look closely at what happens during criminal adjudications. The bulk of criminal adjudications are resolved through guilty pleas. Because over ninety percent of criminal convictions are entered after guilty pleas,\footnote{Chin and Holmes, at 697.} it is critical that immigrants and their counsel understand at the time of the plea what the potential future consequences to their immigration status are, and whether there are alternative pleas that would enable them to avoid these consequences.

The issue of how to ensure that proper immigration advice at the time of plea is ripe for discussion in New Jersey and is highlighted by the facts of McKnight v. Office of the Public Defender, a case that was granted certification by the New Jersey Supreme Court in April, 2008.\footnote{McKnight v. Office of the Public Defender, 397 N.J. Super 265, 936 A.2d 1036 (N.J. A.D. 2007), cert. granted by 195 N.J. 419, 949 A.2d 848 (2008).}\footnote{Id. at 268.} While the holding of the case focuses on the issue of when a criminal malpractice cause of action accures for statute of limitations purposes, the underlying facts involve a non-citizen criminal defendant who was not advised of immigration consequences prior to entering a plea to aggravated assault. After being placed in deportation proceedings, he successfully vacated the plea via a petition for post conviction relief. Subsequently, however, he brought a malpractice action against his criminal defense attorney. The testimony of his attorney regarding his completion of Mr. McKnight’s plea form on busy court day reveals the nature of the problems raised in this article.\footnote{Lea McDermid, “Deportation is Different: Noncitizens and Ineffective Assistance of Counsel,” 89 Cal. L. Rev. 741, 745.}

In spite of the critical importance of deportation consequences to criminal defendants, courts in most jurisdictions, including New Jersey, have determined that failure to advise a non-citizen defendant about the immigration consequences of a plea does not constitute ineffective assistance of counsel.\footnote{Id. at 268.} The ineffective assistance of counsel case law has not yet caught up with the changes that have taken place on the immigration front. These changes have meant that deportation is mandatory in many circumstances and that convictions vacated based on a rehabilitative statute may still have immigration consequences, while those vacated on the basis
of ineffective assistance of counsel would not.\footnote{See Dan Kesselbrenner and Lory Rosenberg, “Amelioration of Criminal Activity: Post-Conviction Remedies,” in Immigration Law and Crimes (West Group 2005).} In this climate, a finding that a lawyer has been ineffective may be the only way to keep a non-citizen in the United States, even if that non-citizen has significant family ties and other equities.

Part I of this article will discuss the developments in immigration law leading to the increased importance of properly counseling criminal defendants about the immigration consequences of criminal convictions. Part II provides two real world examples of how proper advice on immigration issues can lead to vastly improved outcomes for non-citizen clients. Part III examines the problems with the current state of the law and professional norms in New Jersey regarding the role of judges and criminal defense lawyers in advising criminal defendants about immigration consequences. Part IV recommends judicial, legislative, and professional changes to better guarantee that the rights of immigrant defendants are protected and that they are properly advised about immigration consequences prior to entering guilty pleas.

I. THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS AFTER THE 1996 REFORMS

The 1996 amendments to the immigration laws radically transformed the immigration landscape, particularly with regard to the criminal grounds of removal. The total number of deportations based on criminal grounds in 1996 was 37,724. By 2005, the number had increased to 90,426.\footnote{“Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy” Human Rights Watch Report, Vol. 19 No. 3(G), page 38 (2007) citing to Immigration and Nationality Service and Department of Homeland Security’s Yearbook of Immigration Statistics for 1996 and 2005. No enforcement data was included in Yearbook of Immigration Statistics for 2006 and 2007.} The cumulative effect of the reforms is that more people are subject to removal for less serious crimes than in the past. In addition, more stringent enforcement efforts mean that those individuals are more likely to end up in removal proceedings; and with fewer forms of relief available, they are more likely to be deported than in the past.

Expanded Types of Offenses Leading to Deportation

Among the 1996 reforms was the broad expansion of the types of convictions that can lead to removal. For example, the definition of what constitutes an “aggravated felony,” a type of conviction that leads to mandatory deportation,\footnote{See 8 U.S.C.A. § 1101(a)(43) for complete definition of the term “aggravated felony” effective July 27, 2006.} was expanded. Under the revised definition, offenses may be “aggravated felonies” even if no jail time is imposed – and even if the offenses...
are not actually felonies.\textsuperscript{17} For example, the Third Circuit Court of Appeals found that even a state misdemeanor, such as a New York petit larceny conviction, could be an “aggravated felony.”\textsuperscript{18} In addition, a “theft offense” with a sentence of one year or more\textsuperscript{19} could be considered an aggravated felony for which the outcome would be mandatory removal. In New Jersey, this could include a fourth degree offense such as “theft of services” for which an individual received a sentence of one year or more. It could also include a fourth degree drug sale conviction for which the individual received no jail time.\textsuperscript{20}

The statutory definition of “conviction” that was included in IIRIRA has also served to bring a larger number of noncitizens within the reach of the removal statute. Under IIRIRA, a conviction includes “a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where . . .(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty, and (ii) the judge has ordered some form of punishment, penalty or restraint on the alien’s liberty be imposed.”\textsuperscript{21} This provision was included to specifically eliminate one of the prongs of the common law definition of “conviction” and to bring deferred adjudications within the scope of the removal statute.\textsuperscript{22} Thus, under this definition, even an offense that is later expunged or is otherwise not considered a crime by the state, might be deemed a “conviction” of a crime for immigration purposes. In New Jersey, for example, a criminal defense attorney might not contemplate that a disorderly persons offense would lead to immigration consequences since it is not considered a “crime” under state law. However, as evidenced by a memo from INS General Counsel Owen “Bo” Cooper, immigration officials consider certain New Jersey disorderly persons offenses to be convictions of “crimes involving moral turpitude”, preventing a noncitizen from establishing “good moral character” and therefore from naturalizing.\textsuperscript{23}

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\item \textsuperscript{17} According to Black’s Law Dictionary, a felony is “[a] serious crime usu. punishable by imprisonment for more than one year or by death”. Black’s Law Dictionary (8\textsuperscript{th} ed. 2004).
\item \textsuperscript{18} U.S. v. Graham, 169 F.3d 787, 793 (3d Cir. 1999).
\item \textsuperscript{19} 8 U.S.C.A. § 1101(a)(43)(G) (“a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year.”)
\item \textsuperscript{20} A fourth degree conviction under N.J.S.A. 2C:35-7 would likely be considered a “drug trafficking” aggravated felony under 8 U.S.C. Sec. 1101(a)(43) even if it is not a felony if it proscribes conduct that is punishable as a felony under federal law. Lopez v. Gonzales, 127 S. Ct. 625 (2006).
\item \textsuperscript{21} INA §101(a)(48)(A).
\item \textsuperscript{23} See Bo Cooper memo in INS and DOJ Legal Opinions published by Matthew Bender, 2002, Sec 99-4 entitled “New Jersey ‘disorderly persons offences’ as crimes. The issue addressed in the memo was whether a person convicted of theft of property worth less than $200 had been convicted of a “crime involving moral turpitude.”
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not by the State’s schema for the classification of the offense.”\textsuperscript{24} So, in addition to bringing a larger range of offenses within the reach of the deportation statute, the expanded definition of a conviction means that criminal defense practitioners must be aware of the federal law and not just the state designated consequences of a particular offense.

The expanded definition of a conviction has been held to encompass even state offenses vacated on the basis of a rehabilitative or first offender statute.\textsuperscript{25} In contrast, however, convictions vacated because of constitutional defects and ineffective assistance of counsel are not deemed convictions under immigration law.\textsuperscript{26} This is a reason that the ineffective assistance of counsel cases discussed later in this article are of increased importance.

**Limited Relief from Deportation**

The 1996 amendments also severely restricted the relief from deportation available to immigrants with criminal convictions. Before 1996, the primary form of relief from deportation was under section 212 (c) of the Immigration and Nationality Act.\textsuperscript{27} Under the old law, immigrants with a wide range of criminal convictions could appear before an immigration judge who could use her or his discretion to waive deportation based on a variety of factors, including the immigrant’s family ties, length of time in the United States, work history and demonstration of rehabilitation.\textsuperscript{28} Between 1989 and 1995, over half of all applications for waiver of

\textsuperscript{24} Id. at p. 2.


\textsuperscript{26} See e.g. In Re Adamiak, 23 I. & N. Dec. 878, 880 (BIA 2006); See also Pinho v. Gonzales, 432 F.3d 193, 195 (3d Cir. 2005)(“We conclude that the government may reasonably draw a distinction between convictions vacated for rehabilitative purposes and those vacated because of underlying defects in the criminal proceedings.”).

\textsuperscript{27} This section provided that: “Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9) (C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).” INA § 212(c), 8 U.S.C. § 1182(c) (1994), amended by Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, § 440(d), 110 STAT. 1214, 1277.

\textsuperscript{28} Gandarillas-Zambrana v. Board of Immigration Appeals, 44 F.3d 1215 (1995) Positive factors to be considered include length of residence, evidence of hardship to alien and his family if deported, service in the United States Armed Forces, employment history, property or business ties, rehabilitation, and other evidence attesting to the non-citizen’s good behavior.
deportation under INA section 212(c) that reached a final decision were granted. In addition, while section 212(c) included a provision mandating that permanent residents have resided in the United States for seven years in order to be eligible for relief, they were able to continue to accrue years of residence pending the duration of their immigration proceeding – normally a minimum of several years. So, many permanent resident immigrants were able to accrue the necessary years of permanent residence during the pendency of their deportation proceedings. In contrast, the amended immigration laws included a “clock-stopping” provision that cut off the date when the immigrant could accrue years of residence, limiting the numbers of immigrants eligible for a waiver of deportation. In addition, while the old law limited eligibility for the waiver to immigrants who had not been convicted of aggravated felonies for which they served sentences of five years or more, the new law foreclosed the new form of relief, cancellation of removal, from any permanent resident who had been convicted of an aggravated felony, notwithstanding the length of sentence. Because the category of crimes that constituted aggravated felonies had also been expanded by the law, the impact of this amendment was even broader than it would have been on its own.

In the pre-1996 landscape, where fewer crimes were deportable offenses and where more individuals were eligible for waivers, there was perhaps less concern with whether or not non-citizens were properly advised about immigration consequences. Although a non-citizen might have made an unwise decision by pleading guilty to a deportable offense, he or she might have had a second bite at the apple by applying for a waiver of deportation in an immigration proceeding. Since this is no longer the case, the decision to plead guilty is of even greater importance to a non-citizen who wishes to avoid negative immigration consequences.

Restricted Judicial Review of Deportation Orders

The combined impact of the reforms outlined above is even more severe because of the attempts to limit judicial review of removal orders also brought about by the 1996 amendments and subsequent immigration legislation. INA Section 242(a)(2)(C) states: “Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order against an alien

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30 INA § 212(c), 8 U.S.C. § 1182 (c) (1952).
31 See 8 U.S.C. § 1229(d)(1) stating that “Any period of continuous residence or continuous physical presence in the United States shall be deemed to end...(B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2)”
32 INA § 212(c), 8 U.S.C. § 1182 (c) (1952).
who is removable for reason of having committed [an enumerated] criminal offense.” INA Section 242(a)(2)(B) also precludes review of most forms of discretionary relief. Review is limited to whether the individual is a non-citizen and is removable for having committed one of the listed offenses. Review is also available for constitutional claims. In addition, the standard of review is now much more deferential to the finder of fact. It is no longer the case that “findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole [are] conclusive.” Instead, a petitioner must show that “any reasonable adjudicator would be compelled to conclude to the contrary.” INA §242(b)(4)(B).

**Increased Enforcement**

Another change that has meant that criminal convictions will have a greater impact on a non-citizen’s immigration status is simply that border enforcement has increased since the passage of the 1996 reforms and as a result of September 11th and its aftermath. Since 1996, the numbers of immigrants removed from the United States has increased dramatically. In the past, a person might have been able to serve his or her criminal sentence without ever being contacted by immigration officials. Now, ICE officers may be based at or regularly visit state prisons to issue immigration detainers for incarcerated individuals. As a result, fewer immigrants with criminal convictions are slipping through the cracks.

**II. Proper Immigration Advice Can Make a Difference: Two Real World Stories**

To see how the amendments to the immigration statute have impacted non-citizens with criminal convictions, it is helpful to look at some individual stories. In a well publicized case, Mary Anne Gehris, a 34 year old permanent resident who came to the United States from Germany as an infant, faced deportation based on a misdemeanor conviction for pulling hair and grabbing a woman when she was 23. Ms. Gehris had pleaded guilty to the offense and received a one year sentence, which was suspended. She had no other arrests or convictions. She married a United States citizen and had a son who was also a citizen. After applying for citizenship, she was placed in deportation proceedings when the conviction came to light. Under the 1996 amendments, her offense is considered an aggravated felony, subjecting her to mandatory deportation.

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33 See INA Sec. 242(a)(2)(D).
35 See Lea McDermid, Deportation is Different: Noncitizens and Ineffective Assistance of Counsel, 89 Cal. L. Rev. 741, 741 & newspaper articles like NYT article by Anthony Lewis, January 8, 2000 at A13.)
Ultimately, Ms. Gehris was not deported because her conviction was vacated by a sympathetic judge and she was re-sentenced in drug court to a term that did not involve jail time and did not make her an aggravated felon. While the offense to which she pleaded still subjected her to deportation, because she was not convicted of an aggravated felony she was able to ask for and obtain discretionary relief from an immigration judge. Therefore, having her conviction vacated was essential to enabling her to remain in the United States and ultimately to becoming a U.S. citizen. While her case involved an old conviction that became problematic only after retroactive application of the amended deportation laws, it also demonstrates how proper counseling and creative sentencing can mean the difference between mandatory deportation and naturalization for a non-citizen criminal defendant.

Similarly, a federal court decision in the Third Circuit demonstrates the critical importance of proper immigration advice and the need for failsafe measures in the event an immigrant unknowingly pleads to an offense leading to removal. In August, 2004, in an opinion cited in the New Jersey Law Journal, a United States District Court judge in the Eastern District of Pennsylvania vacated the conviction of a thirty-five year old lawful permanent resident from Antigua, who had lived in the United States for twenty-five years, was married to a U.S. citizen, had eight U.S. citizen children and had been employed as a lab technician at the Hospital of the University of Pennsylvania. The judge found that counsel’s performance had been ineffective. He noted that counsel had affirmatively misstated the immigration consequences to both his client and the court, and essentially confirmed the judge’s statement that there were no collateral consequences other than the possible deprivation of the right to vote, to hold public office, to service on a jury and to possess a firearm. In agreeing to vacate the conviction, the judge noted that defense counsel could have attempted to structure the defendant’s sentence to avoid an aggravated felony conviction and mandatory deportation if the defendant had received consecutive sentences on separate counts instead of concurrent eighteen month sentences.

Although an unpublished district court opinion, this opinion highlights the impact of effective advice about collateral consequences. The structure of a sentence may mean the difference between mandatory deportation and the opportunity for a longtime permanent resident with substantial ties to the United States to ask an immigration judge for a waiver of deportation. However, this opinion still emphasized the distinction between affirmative misadvice and failure to advise, without taking the next important step of placing an affirmative duty on defense counsel. The historical distinction between the “failure to advise” and “misadvice” line of cases

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38 Id. at *3
39 Id. at *9.
and the problems with this approach will be discussed in greater detail below.

III. Problems with the Status Quo in New Jersey

Although New Jersey is among the five states with the highest number of new immigrant residents, an examination of the current legal landscape in terms of (1) case law on ineffective assistance of counsel, (2) statutes and court rules governing the plea process; and (3) professional standards and norms, reveals that it has lagged behind other states with high immigrant populations in terms of implementing mechanisms to ensure that defendants are giving adequate information about potential immigration consequences.

Immigration consequences and ineffective assistance of counsel case law in New Jersey

The case law in New Jersey dealing with the ineffective assistance of counsel in advising non-citizen defendants about immigration consequences, while reflecting subtle shifts in the responsibility of judges and attorneys towards non-citizen defendants, has not kept pace with the changes in the immigration landscape brought about by the 1996 amendments.

Defining “Ineffective Assistance of Counsel”: Incorporation of the Strickland Standard in New Jersey

New Jersey has incorporated the test for ineffective assistance of counsel set forth in Strickland v. Washington. In Strickland v. Washington the Supreme Court introduced a two pronged test to determine whether an attorney’s actions violated a defendant’s Sixth Amendment right to assistance of counsel. First, the petitioner must demonstrate that the counsel’s performance failed to meet an objective standard of reasonableness. Next, the petitioner must show that the counsel’s failure to comply with an objective standard of reasonableness led to a prejudice against the defendant so strong that a different outcome could have been expected had counsel acted reasonably. The Supreme Court has, on numerous occasions, refused to state exactly what it considers to be effective performance by counsel. It has, however, recognized that there are certain “prevailing norms of practice” which can be found in ABA guidelines and similar professional treatises. The defendant generally must show that had counsel acted differently, he would not have entered a plea of guilty or no contest. The New Jersey Supreme

41 466 U.S. 668 (1984)
42 Id. at 694.
43 Id. at 688-689
Court adopted the Strickland test in \textit{State v. Fritz}.\footnote{10} 

\textbf{Primacy of the Collateral Consequences Doctrine}

New Jersey courts have generally adhered to the collateral consequences doctrine by holding that it is not ineffective assistance of counsel for an attorney to fail to advise a criminal defendant about the immigration consequences of a plea. The doctrine, followed by courts in almost all jurisdictions, posits that a lawyer can only be considered ineffective for failing to advise about direct consequences of a plea.

The New Jersey Supreme Court incorporated the collateral consequences doctrine in its opinion in \textit{State v. Heitzman},\footnote{State v. Fritz, 105 N.J. 42. 57-58 (1987).} which held that defendants must be informed only of penal consequences of a plea and not the “collateral consequences, such as loss of public or private employment, effect on immigration status, voting rights, possible auto license suspension, possible dishonorable discharge from the military, or anything else.”\footnote{State v. Heitzman, 107 N.J. 603, 604, 527 A.2d 439 (1987).} Therefore, in New Jersey, counsel may be deemed effective even if they do not advise their non-citizen clients about immigration consequences.

However, as demonstrated by the testimony in the \textit{McKnight} case and the cases discussed below, even though the \textit{Heitzman} opinion led to the addition to the plea form of a question regarding immigration consequences, this did not guarantee that non-citizen defendants were advised of immigration consequences at the time of plea. The case law makes it clear that attorneys and their clients are often confused about these issues and that pleas are often entered by clients with no knowledge of the impact on their immigration status.

\textbf{Appellate Precedent in New Jersey: Moving in the Right Direction, But Not Far Enough}

The two leading appellate cases in New Jersey on the obligation of defense counsel to advise about immigration consequences come to different results. In the first case from 1986, the motion to vacate the conviction was denied.\footnote{State v. Chung, 210 N.J. Super. 427 (App. Div.1986).} In the second, from 1999, the case was remanded for an evidentiary hearing on whether or not counsel was effective.\footnote{State v. Garcia, 320 N.J. Super. 332 (App. Div.1999)} The different outcomes have been reconciled by saying that one is a “failure to advise” case and the other an “affirmative misadvice” case.\footnote{See William E. McAlvanah, “Strategies for Avoiding Adverse Immigration Consequences when Representing Foreign-Born Defendants” \textit{New Jersey Lawyer}, April 2004, page.} But, in addition to this distinction, there are other relevant factual distinctions that may have been at play in the cases. First, the cases were decided a
decade apart, so they may reflect an increasing recognition over time of the importance of proper immigration advice. In addition, the first case involved an undocumented criminal defendant and the second a lawful permanent resident. It is possible that there was also implicit recognition of the increased importance of correct advice in the case of a defendant with greater ties to the United States. But, whatever the reason for the different outcome, neither opinion goes far enough in defining the obligation of defense counsel in a climate where deportation as a result of a criminal disposition is often mandatory. An examination of these opinions is helpful to highlight the degree to which the case law is out of step with the current immigration climate.

The first leading appellate case in New Jersey dealing with the responsibilities of counsel vis a vis advising non-citizen defendants about immigration consequences is State of New Jersey v. Chung. In this case, an Appellate Division judge denied a motion to vacate a conviction brought by an immigrant who pled guilty to possession of marijuana with intent to distribute. The appellant asserted that defense counsel was ineffective because he did not properly advise Chung of the consequences of his plea. The court noted that no legislation had been enacted requiring judges in New Jersey to warn defendants about the immigration consequences of pleas, and found that “it is not the present responsibility of a New Jersey judge to advise a defendant of the federal deportation consequences at the time of the taking of the guilty plea. Moreover, the trial judge’s omission of this advice does not render a defendant’s plea involuntary.” The court went on to find that it also was not the obligation of defense counsel to advise about immigration consequences.

The judge held that the defendant was unable to show that the attorney’s performance was deficient under the test for ineffective assistance of counsel established in Strickland v. Washington. The judge determined that the first prong of Strickland, deficient performance, was not met. This opinion was based on the fact that the client was aware that he might face immigration consequences, since he was approached by immigration officers prior to entering his plea, and his attorney stated in an affidavit that “[w]hile the defendant-appellant was advised by me that his immigration situation would become ‘sticky’ due to this case. I never advised him that a plea of guilty would result in deportation. The reason for the lack of that advice was that I was not sure of how the plea would affect his immigration status and never advised concerning it.” The judge accepted the notion that the attorney’s duties towards his client were satisfied and placed the burden on the client to inquire further as to any impact on his status.

In the Chung opinion, the judge further found that the defendant-appellant did not meet the second “prejudice” prong of the Strickland test because he failed to ask further about immigration consequences after being advised about the “sticky” situation. In the judge’s view, there was no prejudice because the defendant did not seek a new trial when he requested that his

51 Id. at 436.
52 Id. at 435.
plea be vacated, but only that the plea be applied to another count of the indictment. Moreover, he admitted his guilt and did not insist on his innocence in his appeal.

The judge noted that Mr. Chung was undocumented and subject to deportation notwithstanding his criminal conviction, that he was aware of the potential for deportation consequences prior to plea, given that he was told by his attorney that his situation was “sticky,” and that he was not prejudiced because “virtually nothing” could have been done by his attorney to prevent deportation. The last observation was probably not accurate since, as part of his motion to vacate his conviction, Chung was seeking to enter a plea to a different count. It seems likely that he had subsequently been advised that an alternate plea might have had less severe immigration consequences. And, as demonstrated by the stories above, sometimes even when it is not possible for a non-citizen to avoid a conviction that would render him deportable, preserving eligibility for relief from deportation may still be possible.

The Chung case is often cited for the proposition that in New Jersey failure to advise about immigration consequences is not ineffective assistance of counsel, whereas the Garcia decision, discussed below, stands for the proposition that misadvice about immigration consequences can be a basis for a successful claim.54 In Garcia, the Appellate Division remanded the case for an evidentiary hearing on whether or not counsel was effective since there was a dispute as to whether counsel was aware that the defendant was a noncitizen. Garcia was a lawful permanent resident who pled guilty to possession of cocaine on or near school property and other offenses. He was sentenced to eleven years in prison with three years of parole ineligibility.55 In response to question 17, added as a result of the dissenting opinion in the Heitzman case, which asks “Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty?” Mr. Garcia said “N/A.”56 There was a factual dispute as to the reason for the response. Mr. Garcia said this was because his attorney told him he would not be deported. His attorney said it was his practice to ask clients about their immigration status and that he usually fills out N/A on the plea form when he is told client is a citizen. As a result of his conviction, Garcia was not deported because he was a Cuban national and could not be deported to Cuba. Therefore, he was being detained indefinitely following his criminal sentence.

The appellate court found that the N/A answer to Question 17 was a prima facie showing of misinformation sufficient to remand for a hearing on whether counsel was effective. Although the court did not make a finding as to whether or not counsel was effective in this instance, by remanding the case for an evidentiary hearing, the opinion opened the door to those seeking to vacate convictions based on misadvice about immigration consequences. For this reason, it is significant in the progression of New Jersey case law. The implication is that if Mr.

54 Supra n. 48.
55 Garcia at 335.
56 In his dissent, Chief Justice Wilentz asserted that judges should inform defendants about consequences that are “generally known and substantially adverse.” Heitzman, at 607, 527 A.2d 439.
Garcia had told him he was a non-citizen and his lawyer had said “no immigration consequences” it may have violated the defendant’s Sixth Amendment rights.

In State v. Garcia, the Appellate Division expresses a concern with counsel providing non-citizen criminal defendants with incorrect advice on immigration consequences, notwithstanding the fact that such consequences are still considered “collateral.” However, while this case moves in the direction of finding ineffective assistance of counsel for affirmative misadvice, it is still does not go far enough in light of the severity of the consequences under the current immigration law scheme.

While not an appellate case, State v. Viera takes the Garcia decision a step further by actually vacating the defendant’s conviction. The court still did not find that counsel has any obligation to inquire into a defendant’s citizenship status. However, the judge held in favor of defendant based on the particular facts, which included that information about defendant’s immigration status was in the case file and should have been known to defense counsel, and that defendant disclosed that he had problems with English. The judge found that “while deportation may not be a penal consequence and counsel is not obligated to make specific inquiry as to the residency status of a defendant, when a defendant previously discloses that he is a resident alien, the knowledge is imputed to the defense counsel and the defendant discloses in open court that he has problems reading and writing English, counsel’s performance is constitutionally deficient if the attorney does not address the issue of deportation with the defendant and the defendant is not aware of the risk of deportation.” Once again, the judge took pains to limit the holding to the specific facts. Nevertheless, it is still an expansive holding compared with the appellate decisions discussed above, because it indicates that in certain circumstances failure to advise – not just misadvice – can be a basis for ineffective assistance of counsel. It does not go far enough, however.

Where New Jersey Courts Should Head

New Jersey courts should recognize a higher duty of defense counsel in light of the changed immigration climate, and should stop distinguishing between so called “failure to advise” and misadvice scenarios. New Jersey courts should follow the lead of the New Mexico Supreme Court, which recognized in a 2004 opinion that failure to advise about immigration consequences can constitute ineffective assistance of counsel. In a case involving an attorney who advised his permanent resident client that a plea to sexual contact with a minor, an aggravated felony for immigration purposes, “could affect his immigration status” the court found that the attorney was deficient in his performance. In doing so, the court did not stop with a holding regarding affirmative misadvice and instead continued:

59 Id. at 843.
60 Id.
We refuse to draw a distinction between misadvice and non-advice; therefore, we depart from the Tenth Circuit's holding for three reasons.

First, in many cases, there will only be a tenuous distinction between the two. Whether an attorney provides no advice regarding immigration consequences or general advice that a guilty plea “could,” “may,” or “might” have an effect on immigration status, the consequence is the same: the defendant did not receive information sufficient to make an informed decision to plead guilty. Second, distinguishing between misadvice and non-advice would “naturally create a chilling effect on the attorney's decision to offer advice,” because if the attorney's advice regarding immigration consequences is incorrect, the attorney's representation may be deemed “ineffective.” John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?*, 36 U. Mich. J.L. Reform 691, 726 (2003). Third, not requiring the attorney to specifically advise the defendant of the immigration consequences of pleading guilty would “place[ ] an affirmative duty to discern complex legal issues on a class of clients least able to handle that duty.” Id.; see also *In re Alvernaz*, 2 Cal.4th 924, 8 Cal.Rptr.2d 713, 830 P.2d 747, 753 (1992) (“Although [the decision to plead guilty] ultimately is one made by the defendant, it is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain.”).

The New Mexico Supreme Court properly recognized that a range of factors warrant a finding that failure to advise about immigration may constitute ineffective assistance of counsel. The “tenuous” distinction between failure to provide advice and misadvice is illustrated by the Garcia case. Is responding “n/a” to a question on a plea form asking if a defendant is aware of immigration consequences, as the attorney did in Garcia, a failure to provide immigration advice when that defendant is a non-citizen, or is it improper advice? It is a questionable distinction to make, especially when the impact of the distinction is so significant. Rather, as the New Mexico Supreme Court suggests, the proper inquiry is whether the defendant received sufficient information to make an informed decision about whether or not to enter the plea.

In addition, the concern the court and Professor Francis raise about the “chilling effect on the attorney’s decision to offer advice” is real. The issue came up at a 2005 training for New Jersey public defenders. When presented with the case law on ineffective assistance of counsel, at least one attorney in attendance concluded that there was an incentive to not inquire about immigration status.

In addition to reconsidering the traditional distinction between failure to advise and misadvice, New Jersey Courts should also reconsider the application of the collateral

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consequences doctrine in immigration related claims. The New Mexico Supreme Court, along with several other courts that have considered the issue, including California’s Supreme Court, emphasized that the collateral consequences doctrine does not bar a finding of ineffective assistance of counsel in such claims. The court distinguished between the duty of the court and the duty of defense counsel. It found that while the Due Process Clause of the federal constitution would not require the judge to inform the defendant about immigration consequences pursuant to the collateral consequences doctrine, defense counsel would be held to a higher standard in these circumstances.

While there is some progression in New Jersey case law towards a recognition that attorneys may have special responsibilities towards non-citizen criminal defendants, no New Jersey court has recognized, or placed on counsel, an affirmative duty to inquire about immigration status and to counsel clients accordingly. In addition, the case law itself sends a message to attorneys that they are likely to be found ineffective if they provide inaccurate advice. Given this, many attorneys may find that the safest route is simply not to inquire too deeply into a client’s immigration status, although this puts them out of step with professional standards recommended by many national professional organizations. For these and all of the reasons discussed above, it is time for courts to consider a new direction when considering claims of ineffective assistance of counsel based on insufficient or improper immigration advice.

The need to develop and implement professional standards for criminal defense lawyers representing non-citizen clients in New Jersey

By adhering to the “collateral consequences doctrine” and continuing the “failure to advise” and “misadvice” distinction, the case law on ineffective assistance of counsel in New Jersey establishes a low standard with regard to the constitutional obligation of New Jersey lawyers to advise non-citizens on immigration consequences. However, professional organizations, such as the American Bar Association and the National Legal Aid and Defender Association (NLADA) have set a higher standard for the criminal defense bar.

The American Bar Association considers “penalties and disadvantages triggered exclusively by criminal conviction to be part of the criminal justice process, and not solely civil, administrative or regulatory.” Similarly, the NLADA standards provide that during the

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65 Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons: Black Letter with Commentary, American Bar Association (2003). (Note however: “Failure of the court or counsel to inform the defendant of applicable collateral sanctions shall not be a basis for withdrawing the plea of guilty, except where otherwise provided by law or rules of procedure, or where the failure renders the plea constitutionally
process of a negotiating a plea, defense counsel should “be fully aware of, and make sure that the client is fully aware of . . . consequences of conviction such as deportation.” Even the U.S. Supreme Court has recognized that practice guides and professional standards emphasize the importance of providing advice on immigration consequences. In INS v. St. Cyr, it cited a legal practice memo when stating that “preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” In addition, the Court stated in a footnote to the case that “competent defense counsel, following the advice of numerous practice guides” would advise clients of potential effects that their plea agreement could have on their immigration status.

While several states have established standards similar to the national ones, New Jersey is not among them. Given its position as one of the states with the largest immigrant population, the increasing importance of this issue for non-citizen clients, and the mixed message transmitted by the ineffective assistance of counsel case law, it is important for New Jersey bar associations, such as the Association of Criminal Defense Layers of New Jersey, to develop standards along the lines of those implemented by the ABA and the NLADA. Such standards would also be consistent with the ABA Model Rules of Professional Conduct, which state that: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The Commentary to the rule further expands on this duty by saying that “[p]erhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.” In discussing the preparation involved, the Commentary also stresses “the attention and preparation are determined in part by what is at stake.” Thus, the Model Rules recognizes that “competent” representation requires the legal knowledge necessary for the representation. Arguably, knowledge of “collateral” consequences is necessary for the representation in a criminal matter that could lead to deportation.

In contrast to the Model Rules, the New Jersey version of Rule 1.1 focuses on avoiding “gross negligence.” While it is beyond the scope of this article to discuss the varying approaches of the Model Rules and the New Jersey rules with regard to attorney competence, the absence of an explicit professional standard for criminal defense attorneys, combined with the rules’ focus on avoiding negligence rather than defining competence leaves New Jersey behind the curve in coming to terms with the severity of the consequences at stake in these matters.

invalid.” Sec. 19-2.3(b))


Id. at 323 no. 50

MRPC 1.1

MRPC 1.1, Comment 2.

MRPC 1.1, Comment 5.

NJPRC1.1
The Lack of an Advisement Statute in New Jersey

During the period from 1988-2004, New Jersey was among the five states with the highest number of new immigrant residents, however it is the only one of these states that has not passed a law requiring judges to advise defendants of the possibility of adverse immigration consequences at the time of sentencing. As of 2004, a total of twenty-one states and the District of Columbia required judges to advise criminal defendants in some manner of the risk of immigration consequences before they enter a plea. These states include the four other states with the largest number of new immigrant residents: California, New York, Florida and Texas.

The nature and types of warnings vary from state to state, but many are similar to the suggested advisement set forth by the American Bar Association in A Judge’s Guide to Immigration Law in Criminal Proceedings, which reads: “If you are not a citizen of the United States, you are advised that a plea of guilty, a plea of nolo contendere or a plea of no contest for the offense for which you are charged may result in deportation, the exclusion from admission to the United States, or the denial of naturalization under federal law. You should consult with defense counsel if you need additional information concerning the potential consequences of the plea.” Most state statutes mirror this language although some do not refer to consequences other than the possibility of deportation.

It is not enough, however, to require that judges warn non-citizen defendants of the possible immigration consequences of plea agreements. While mandating that judges advise immigrants about immigration consequences before entering a plea is an important step, there are

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74 A Judge’s Guide to Immigration Law in Criminal Proceedings, American Bar Association, Commission on Immigration, Judicial Immigration Education Project (2004), at 4-11. (Note that judge in Chung discussed trend of states towards enacting similar statutes - and that New Jersey had not yet followed suit) Chung, at 432

75 In addition, in 2006, Vermont was added to the roster of states mandating that judges advise defendants about immigration consequences. The new law went into effect on September 1, 2006. The Vermont statute, in 13 V.S. A. § 6565 (c)(2), also permits the court to vacate the judgment against a defendant who was not properly warned and who “later at any time shows that the plea and conviction may have or has had a negative consequence regarding his or her immigration status.” Therefore, Vermont has joined the ranks of states that will vacate a conviction based on a judge’s failure to advise about immigration consequences, even if the lawyer’s performance does not meet the Strickland test for ineffective assistance of counsel.

76 See the list of states requiring judges to advise about immigration consequences of criminal dispositions in A Judge’s Guide to Immigration Law in Criminal Proceedings, ABA Commission on Immigration, Judicial Immigration Education Project (2004), at 4-11.
limits to its impact on the problem of immigrants unknowingly entering into pleas with negative immigration consequences. For maximum effectiveness, timing is significant. If the warning is given only at the moment at which a plea is about to be entered, the defendant may feel pressure to go forward with the plea in spite of questions or concerns about its impact on his or her immigration status. There must be adequate time for the defendant to raise questions and for his attorney to conduct research and counsel him on the options. In addition, a warning, like the one recommended by the ABA, is so generalized that it may be given little weight by a defendant because it is not tailored to the particular individual’s immigration status and the nature of the conviction. Simply knowing that a conviction may lead to deportation may not be enough, if the defendant does not know whether any relief would be available to him in deportation proceedings.

Most significantly, to be effective, there must be a remedy for failing to give the advisement. Some state statutes, like New York’s, do not provide for any recourse if a judge does not give the warning. In fact, the New York statute explicitly says: “The failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction, nor shall it affect a defendant any rights in a subsequent proceeding relating to such defendant’s deportation, exclusion, or denial of naturalization.” Without a remedy, there is less incentive for judges to comply and, in most cases; immigrants may still be left with no recourse if they unknowingly agree to a plea with negative immigration consequences. In contrast to New York, other states such as California include provisions mandating that a conviction be vacated if a proper advisement was not given. According to the approach used in California, an immigrant does not need to demonstrate innocence when requesting that the plea be vacated. It is enough to show that the warning was not given (or that there is no record that the required advisement was given), and that the conviction or plea may lead to deportation or exclusion from admission.

One additional problem with the advisements is that there are situations in which the defendant might not be aware of his or her immigration status - for example, as a citizen, permanent resident, undocumented immigrant, or a temporary visa holder. Many immigrants came to the United States as children and may be confused about how they arrived in the country or the documents that were submitted on their behalf. Without critical information about a defendant’s immigration status, it would be nearly impossible for a defense attorney to properly advise her client. In response to a judge’s warning a defendant might simply respond that he or she is aware that immigration consequences may flow from a given plea, but may mistakenly

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78 See Jennifer Welch, “Defending Against Deportation: Equipping Public Defenders to Represent Non-citizens Effectively,” 92 Cal. L. Rev. 541, 555 (discussing California’s warning and the limited effectiveness of such a warning).
79 Id.
80 N.Y. CRIM. PROC. LAW §220.50 (8) (discussed in Welch article, supra n. 79)
81 See e.g. CAL PENAL CODE § 1016.5 (b) (West 1995); WIS. STAT. §971.08(2); D.C., Ohio, Mass, Texas
82 CAL PENAL CODE § 1016.5 (b).
believe that such consequences would not apply to him or her.

In spite of the limitations on the effectiveness of warnings by judges in criminal proceedings, as legislators in many states have recognized, there is still a value to requiring judges to make this kind of advisement. There is a chance that a warning by a judge could prompt a defendant to engage in a further dialogue with his or her attorney and obtain the type of counseling that might actually make a difference in the outcome of his or her case. As outlined in the two stories in Part II above, proper counseling and strategizing can lead to significant differences in outcome. In addition, mandating an advisement reflects a concern for fairness in the criminal justice system and an understanding that immigration consequences matter.

IV. Summary of Recommendations

New Jersey should keep pace with the other states with heavy immigrant populations in terms of developing systems and strategies to ensure that non-citizen defendants are advised about immigration consequences well before entering guilty pleas, and that appropriate remedies are available when they are not properly advised. These strategies should include action by the legislature and the bar, as well as by New Jersey courts.

Enactment of an advisement statute or court rule that applies across the board to violations and disorderly persons offenses, as well as to felonies, and that includes a remedy for failing to advise about immigration consequences

In keeping with the discussion above, the statute should be specific and directed at the non-citizen. The advisement should apply to disorderly persons offenses and other violations, not just to felonies – since consequences could attach. The warning should occur early in the proceeding, and should include a certification by the attorney that he or she has inquired into the client’s immigration status and has counseled the client about any immigration consequences flowing from the conviction. Finally, the law or court rule should provide for a remedy for the non-citizen who has not been properly advised - including vacating the conviction upon a showing that the advisement was not made and that negative immigration consequences resulted from the conviction.

Development and implementation of professional standards for the New Jersey criminal defense bar including continued training for criminal defense attorneys on immigration consequences

83 Anne Benson, Washington Legal Defender Association, says that in 65-70% of the cases on which she consults, the defendants are able to either avoid deportability or preserve eligibility for relief by negotiating their plea. Arizona Rule 17.2 Study Committee, Report of the Rule 17.2 Study Committee (October 8, 2003) at 7.

New Jersey also needs to continue and enhance the training of judges and criminal defense attorneys who represent non-citizens. The trainings should include information on substantive criminal and immigration law, as well as recommendations for interviewing and counseling non-citizen clients. To further provide support for judges and criminal defense attorneys seeking information about collateral consequences, New Jersey should consider following the lead of the New York court system which supported the establishment of a website that breaks down collateral consequences into six areas and also has a message board to enable judges and practitioners to more readily access information.  

Reevaluation by the courts of the reasoning applied to ineffective assistance of counsel claims related to immigration advice

New Jersey courts should depart from the outdated opinions of the 1980s and 1990s and reexamine the approach used to analyze the ineffective assistance of counsel claims, which in many cases may be a last resort for long term resident aliens facing deportation as a result of pleas for which they did not fully understand the consequences. Such a change is overdue in view of the more direct and mandatory nature of the deportation consequences, and in light of the courts in other jurisdictions that have either reconsidered the collateral consequences doctrine, or distinguished it.

Especially given the large immigrant population, the problem of non-citizen criminal defendants in New Jersey entering pleas without understanding the immigration consequences is troubling. Because of the scope of the current immigration statutes, even long-term permanent residents with significant family ties and minor criminal convictions are affected. Partial solutions, like changes to the plea form, have been tried. But the nature and complexity of the problem require a comprehensive approach on the part of the legislature, the courts, and the bar.

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