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

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[1] Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002) (describing collateral consequences as operating like secret sentences).

I. INTRODUCTION

After years of complaining to the police about her husband's violence, Ana Flores found herself in deportation[2] proceedings after she bit her husband during a fight.[3] Her husband called the police, leading to her arrest.[4] Following a brief hearing, Ana pled guilty to simple assault and received a thirty day suspended sentence and probation.[5] She soon learned, however, that even as a lawful permanent resident of the United States with two children who were United States citizens, she was subject to deportation as a result of this relatively minor conviction.[6]

Ana's situation has become increasingly common in the past decade since the Antiterrorism and Effective Death penalty Act (AEDPA) Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) were passed.[7] IIRIRA expanded the

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[2] Throughout this Article I will use "deportation," which is the term that was used in the pre-1997 immigration statutes, as well as the term that continues to be used colloquially.

[3] *See* Anthony Lewis, *Abroad At Home; The Mills of Cruelty*, N.Y. TIMES, Dec. 14, 1999, at A27. "Ana Flores" is a pseudonym. *Id.*

[4] *See id.*

[5] *See id.*

[6] *See id.*

[7] AEDPA went into effect on April 24, 1996, and most provisions of 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.

types of offenses that result in deportation and mandatory detention.[8] This statute also severely limited both the relief available to immigrants in deportation proceedings[9] and the opportunities for judicial review of deportation orders.[10] In many cases, immigration judges are no longer able to consider the equities in determining whether an immigrant should be allowed to remain in the United States in spite of a criminal conviction due to the limits on discretionary relief.[11] Because these statutes have restricted the role of judges and lawyers in deportation proceedings, the spotlight needs to turn to judges and lawyers in the earlier criminal proceedings.[12]

It is necessary to look closely to what happens during criminal adjudications 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 and relatively minor convictions like Ana's. The bulk of criminal adjudications are resolved through guilty pleas.[13] For these reasons, it is critical that immigrants and their counsel understand the potential consequences to their immigration status at the time of plea, and whether there are alternative pleas that would enable them to avoid these consequences.

The question of how to ensure that proper immigration advice is provided at the time of plea is ripe for discussion in New Jersey and is highlighted by the facts of *McKnight v. Office of the*

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[8] *See* Immigration and Nationality Act (INA) § 237(a)(2), 8 U.S.C. § 1227(a)(2) (1952) (criminal grounds of deportability); 8 U.S.C. §1182(a)(2) (1952), (criminal grounds of inadmissibility); *see also* 8 U.S.C. §1101(a)(48)(A) (1952) (definition of "conviction").

[9] *See* 8 U.S.C. § 1229b (1952) (aggravated felony conviction bar to cancellation of removal).

[10] *See* 8 U.S.C. § 1226(e) (1952) (stating that the Attorney General's discretion shall not be subject to review).

[11] *See* 8 U.S.C. § 1227(a)(2)(A)(i).

[12] For example, the expanded definition of an aggravated felony in INA § 101(a)(43) has meant that judges have fewer opportunities to use their discretion to grant relief to lawful permanent residents convicted of crimes since a conviction of an aggravated felony is a bar to Cancellation of Removal under INA § 240A(a).

[13] Chin & Holmes, *supra* note 1, at 698 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (1999); DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 & n.1 (1966)).

Public Defender,[14] a case that was decided by the New Jersey Supreme Court in November 2008. While the holdings of both the appellate division and supreme court focused on when a criminal malpractice cause of action accrues for statute of limitations purposes,[15] the underlying facts involved a non-citizen criminal defendant who was not advised of immigration consequences prior to entering a plea to aggravated assault.[16] After being placed in deportation proceedings, the defendant successfully vacated the plea via a petition for post-conviction relief.[17] Subsequently, however, he brought a malpractice action against his criminal defense attorney.[18] The testimony of his attorney regarding his completion of Mr. McKnight's plea form on a busy court day, as well as the failure to counsel Mr. McKnight about the impact of his plea on his status, reveals the nature of the problems raised in this Article.[19] Similarly, *State v. Nunez-Valdez*, a case argued before the New Jersey Supreme Court in March 2009, also involved a lawful permanent resident who asserted that he pled guilty to a criminal offense without being given accurate information about the immigration consequences.[20]

The fact that several cases raising related issues at the intersection of criminal and immigration law have appeared on the New Jersey Supreme Court's docket in recent months is no accident. Changes in immigration law have meant that deportation is mandatory in many circumstances,[21] 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.[22] Therefore, a finding that a lawyer has been ineffective may be the only way to keep a

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14 397 N.J. Super. 265 (App. Div. 2007), *rev'd* 962 A. 2d 482 (2008).

15 *See id.* at 267.

16 *See id.* at 267-68.

17 *Id.* at 269.

18 *Id.* at 270.

19 *See id.* at 268-69.

20 2008 WL 2743963 (App. Div. 2008), *cert. granted* 196 N.J. 599 (Oct. 22, 2008).

21 Removal would be almost certain because in addition to falling within the ground of deportability in 8 U.S.C. §1227(a)(2)(A)(iii), a conviction of an aggravated felony is a bar to most forms of relief, including cancellation of removal under 8 U.S.C. § 1229b. 8 U.S.C § 1229b(a)(3) (1952).

22 *See* DAN KESSELBRENNER & LORY ROSENBERG, *Amelioration of Criminal Activity: Post-Conviction Remedies, in* IMMIGRATION LAW AND CRIMES § 4:2 (2005).

non-citizen in the United States, even if that non-citizen has significant family ties and other equities exist. In spite of the critical importance of deportation consequences to criminal defendants, courts in many 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.[23] The ineffective assistance of counsel case law has not yet caught up with the changes that have taken place on the immigration front. By recently granting certiorari in a case raising these issues, the Supreme Court of the United States has implicitly recognized the need for clarification regarding an attorney's duty to advise a non-citizen defendant on the immigration consequences of a conviction.[24]

Part II of this Article discusses the developments in immigration law leading to the increased importance of properly counseling criminal defendants about the immigration consequences of criminal convictions. Part III provides two real-world examples of how proper advice on immigration issues may lead to vastly improved outcomes for non-citizen clients. Part IV 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 V recommends judicial, legislative, and professional changes to guarantee that the rights of immigrant defendants are better protected and that they are properly advised about immigration consequences prior to entering guilty pleas.

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

The 1996 amendments to the federal immigration statute radically transformed the immigration landscape, particularly with regard to the criminal grounds of removal. The cumulative effect of these reforms is that more people are subject to removal for less serious crimes than in the past. The total number of

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[23] *See* Lea McDermid, Comment, *Deportation is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CAL. L. REV. 741, 745 (2001).

[24] *See* Padilla v. Kentucky, 129 S. Ct. 1317 (2009).

deportations based on criminal grounds was 37,724 in 1996.[25] By 2005, the number had increased to 90,426.[26] In addition, more stringent enforcement efforts mean that individuals are more likely to end up in removal proceedings. As the amendments also provide fewer forms of relief, individuals facing immigration proceedings are more likely to be deported than in the past.

A. Expanded Types of Offenses Leading to Deportation

The 1996 reforms broadly expanded the types of convictions that lead to removal. For example, the definition of what constitutes an aggravated felony, a type of conviction that leads to mandatory deportation,[27] 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.[28] For example, the Third Circuit Court of Appeals found that a state misdemeanor, such as a New York petit larceny conviction, may be an aggravated felony.[29] In addition, a "theft offense" with a sentence of one year or more may be considered an aggravated felony, which would result in almost certain removal.[30] Therefore, in New Jersey, an aggravated felony may arise from a fourth degree offense such as "theft of services," for which an individual

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[25] HUMAN RIGHTS WATCH REPORT, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 38 (2007) (citing to DEP'T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS (1996); DEP'T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS (2005)). No enforcement data was included in the YEARBOOK OF IMMIGRATION STATISTICS for 2006 and 2007. DEP'T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS (2006); DEP'T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS (2007).

[26] *Id.*

[27] See 8 U.S.C. § 1101(a)(43) (1996) for complete definition of the term aggravated felony.

[28] According to BLACK'S LAW DICTIONARY, a felony is "[a] serious crime usually punishable by imprisonment for more than one year or by death." BLACK'S LAW DICTIONARY 651 (8th ed. 2004).

[29] *See* United States v. Graham, 169 F.3d 787, 793 (3d Cir. 1999).

[30] 8 U.S.C. § 1101(a)(43)(G)(1996) defines an aggravated felony as: "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year." Removal would be almost certain because, in addition to falling within the ground of deportability in INA § 237 (a)(2)(A)(iii)(1952), a conviction of an aggravated felony is a bar to most forms of relief including cancellation of removal under 8 U.S.C. § 1229b; *see also supra* note 21.

received a sentence of one year or more.[31] A third degree drug sale conviction for which the individual received no jail time may also be considered an aggravated felony.[32]

The Illegal Immigration Reform and Immigration Responsibility Act's (IIRIRA) statutory definition of "conviction" has also brought a larger number of non-citizens within the reach of the deportation 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.[33]

Congress included this provision to eliminate one of the prongs of the common law definition of "conviction" and to bring

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[31] A person convicted of theft of services under N.J. STAT. ANN. § 2C:20-8 (1978) who is sentenced to one year or more in prison might be deemed to have been convicted of a theft aggravated felony under 8 U.S.C.A. § 1101(a)(43)(G) (1996). Under N.J. STAT. ANN. § 2C:20-8a (1978) for example, "[a] person is guilty of theft if he purposely obtains services which he knows are available only for compensation, deception or threat, or by false token, slug, or other means, including but not limited to mechanical or electronic devices or through fraudulent statements, to avoid payment for the service."

[32] A third degree conviction under N.J. STAT. ANN. § 2C:35-5 (1978) could be considered a "drug trafficking" aggravated felony under 8 U.S.C. § 1101(a)(43)(B) (1996). According to this part of the aggravated felony definition, it is irrelevant whether or not the individual served any time in jail. Instead, what is significant is that the offense involved "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in title 18, section 924(c) of the United States Code)." In *Gerbier v. Holmes*, the Court of Appeals for the Third Circuit held that under the "illicit trafficking" branch of this definition, a state crime will be an aggravated felony if it is categorized as a felony under state law and involves "trafficking." 280 F.3d 297, 313 (3d Cir. 2002). Here, the offense at issue was a third degree offense, which is punishable by three to five years in prison under N.J.S.A. 2C:43-6 (1978). So, as a state felony, if it involved a "controlled substance" as defined in 21 U.S.C. § 802 (1970), this New Jersey offense would likely be deemed an aggravated felony; *see also* Lopez v. Gonzales, 549 U.S. 47, 55 (2006); Wilson v. Ashcroft, 350 F.3d 377, 381 (3d. Cir. 2003) ("We hold that the state conviction in this case [N.J.S.A. § 35-5b(11) (1987)] cannot be analogized to a hypothetical federal felony under *Gerbier's* route B approach. But Wilson may be guilty of an aggravated felony under the route A analysis.").

[33] 8 U.S.C. § 1101(a)(48)(A) (1996).

deferred adjudications within the scope of the removal statute.[34] Therefore, 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.[35]

In New Jersey, for example, a criminal defense attorney might not contemplate that a disorderly persons offense would lead to immigration consequences since such an offense is not considered a "crime" under state law.[36] However, as evidenced by a memo from former INS General Counsel Owen "Bo" Cooper, immigration officials consider certain New Jersey disorderly persons offenses to be convictions of "crimes involving moral

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[34] H.R. CONF. REP. NO. 828, 104th Cong., 2d Sess. (1996), *reprinted in* 142 Cong. Rec. H10899 (daily ed. Sept. 24, 1996).

> Section 322-Senate recedes to House section 351. This section amends section 101(a) of the INA to add a new paragraph (48), defining conviction to mean a formal judgment of guilt entered by a court. If adjudication of guilt has been withheld, a judgment is nevertheless considered a conviction if: (1) the judge or jury has found the alien guilty or the alien has pleaded guilty or nolo contendere, and (2) the judge has imposed some form of punishment or restraint on liberty. This section also provides that any reference in the INA to a term of imprisonment or sentence shall include any period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence. This section deliberately broadens the scope of the definition of 'conviction' beyond that adopted by the Board of Immigration Appeals in *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). As the Board noted in *Ozkok*, there exist in the various States a myriad of provisions for ameliorating the effects of a conviction. As a result, aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered 'convicted' have escaped the immigration consequences normally attendant upon a conviction.

Id.

[35] *See generally* KESSELBRENNER & ROSENBERG, *supra* note 22 (citing In Re Pickering, 23 I & N Dec. 621, 625 (BIA 2003) (holding that negative immigration consequences will still attach to convictions that are vacated "solely" for immigration purposes); *see also* In Re Chavez-Martinez, I & N Dec. 272, 273-74, 2007 WL 20601436 (BIA 2007) (holding that in order to avoid negative immigration consequences stemming from a "conviction," the non-citizen bears the burden of establishing that a vacated conviction was not vacated "solely" for immigration purposes).

[36] N.J. STAT. ANN. § 2C:1-4(b) (1978) states that "[d]isorderly persons offenses and petty disorderly persons offenses are petty offenses and are not crimes within the meaning of the Constitution of this State. There shall be no right to indictment by a grand jury nor any right to trial by jury on such offenses. Conviction of such offenses shall not give rise to any disability or legal disadvantage based on conviction of a crime."

turpitude" that prevent a non-citizen from establishing "good moral character" and, therefore, from naturalizing.[37] The former General Counsel determined that "[w]hether an offense is a crime is controlled by federal law, not by the state's schema for the classification of [the] offense."[38] Therefore, 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.[39] In contrast, however, convictions vacated because of constitutional defects or ineffective assistance of counsel are not deemed convictions under immigration law.[40] For this reason, the ineffective assistance of counsel cases discussed later in this Article are of increased importance.

B. 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.[41]

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[37] *See* New Jersey "Disorderly Persons Offenses" as Crimes, INS and DOJ Legal Opinions § 99-4 (2006). The issue addressed in the opinion was whether a person convicted of theft of property worth less than $200 had been convicted of a "crime involving moral turpitude." *Id.*

[38] *Id.*

[39] *See* KESSELBRENNER & ROSENBERG, *supra* note 22.

[40] *See generally* In Re Adamiak, 23 I. & N. Dec. 878 (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.").

[41] 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

Under the old law, immigrants with a wide range of criminal convictions could appear before an immigration judge who could use his or her 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.[42] Between 1989 and 1995, over half of all 212(c) deportation waiver applications that reached a final decision were granted.[43] In addition, while section 212(c) included a provision mandating that permanent residents must have resided in the United States for seven years in order to be eligible for relief, [44] they were able to continue to accrue years of residence pending the duration of their immigration proceeding—normally a minimum of several years.[45] Thus, many permanent residents were able to accrue the necessary years of continuous 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.[46] While the old law limited eligibility for the waiver to immigrants who had not been convicted of aggravated felonies for which they served

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> 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 1227(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 1227(a)(2)(A)(ii) for which both predicate offenses are covered by section 1227(a)(2)(A)(i).

8 U.S.C. § 1182(c) (1952), *repealed by* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-208, Div. C, Title III, § 304(b), 110 Stat. 3009-597 (1996).

42 *See* Gandarillas-Zambrana v. Board of Immigration Appeals, 44 F.3d 1251, 1257 (4th Cir. 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.

43 *See* INS v. St. Cyr, 533 U.S. 289, 296 n.5 (2001) (citing Julie Rannik, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver*, 28 U. MIAMI INTER-AM. L.REV. 123, 150, n.80 (1996)).

44 8 U.S.C. § 1182(c) (repealed Sept. 30, 1996).

45 *See* 8 U.S.C. § 1229b(d)(1) (1952).

46 *See id.* ("Any period of continuous residence or continuous physical presence in the United States shall be deemed to end...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).").

sentences of five years or more,[47] 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.[48] Because the law had also expanded the category of crimes that constituted aggravated felonies, 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 more individuals were eligible for waivers, whether or not non-citizens were properly advised about immigration consequences was arguably less important. Although a non-citizen might have made an unwise decision by pleading guilty to a deportable offense, he or she would often have another opportunity to avoid negative immigration consequences by applying for a waiver of deportation in an immigration proceeding. Since eligibility for waivers is much more limited, the decision to plead guilty is of even greater importance to a non-citizen who wishes to avoid negative immigration consequences.

C. 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 § 242(a)(2)(B)(i) precludes review of most forms of discretionary relief.[49] Under this section, review is limited to whether the individual is a non-citizen and is removable for having committed one of the listed offenses.[50] In addition, the standard of review is now much more deferential to the finder of fact. With regard to administrative findings, 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 shall be conclusive."[51] Instead, a petitioner

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47 8 U.S.C. § 1182(c).

48 8 U.S.C. § 1229b(a)(3) (1952).

49 INA § 242 (a)(2)(B)(i) (1952).

50 *Id.*

51 8 U.S.C. § 1105(a)(4) (1952), *repealed by* Pub. L. No. 104-208, Div. C, Title III, § 306(b), 110 Stat. 3009-612 (1996) (discussing review of findings of fact in petitions for review to courts of appeal).

must show that "any reasonable adjudicator would be compelled to conclude to the contrary."[52] This narrowing of judicial review creates additional hurdles on appeal and marks another challenge for a non-citizen who faces deportation because of a criminal plea.

D. 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 enforcement has increased since the passage of the 1996 reforms and the aftermath of September 11th. Since 1996, the numbers of immigrants removed from the United States has increased dramatically.[53] 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 in or regularly visit state prisons to issue immigration detainers for incarcerated individuals. As a result, fewer immigrants with criminal convictions are avoiding deportation proceedings.

III. 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 thirty-four 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

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[52] 8 U.S.C. § 1252(b)(4)(B) (1952). For a discussion of the changes to judicial review instituted during the 1996 reforms, *see generally* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997).

[53] *See* HUMAN RIGHTS WATCH REPORT, NATIONAL STATISTICS ON DEPORTATION FOR CRIMES (2007), *available at* http://www.hrw.org/en/node/10856/section/7 (Figure 1 of the Report shows that in 1996, 37,724 deportations were based on criminal grounds and in 2005, 90,426 deportations were based on criminal grounds); *see also* DEP'T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS 182 (2003), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003 Yearbook.pdf. (In 1984, 863 deportations were based on criminal grounds).

a woman in a fight over a boyfriend when she was twenty-three.[54] Ms. Gehris pled guilty to the offense and received a one-year sentence, which was suspended.[55] She married a United States citizen and had a son who was also a citizen.[56] After applying for citizenship, she was placed in deportation proceedings when the conviction came to light.[57] Under the 1996 amendments, her offense is considered an aggravated felony, subjecting her to mandatory deportation.[58]

Ultimately, Ms. Gehris was pardoned by the Georgia Board of Pardons and Paroles.[59] While the offense to which she pled guilty still subjected her to deportation even though 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.[60]

Similarly, a federal court's decision in the Third Circuit demonstrates the critical importance of proper immigration

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54 Anthony Lewis, *Abroad At Home; Rays of Hope*, N.Y.TIMES, Feb. 10, 2001, at A15.

55 *Id.*

56 Anthony Lewis, *Abroad at Home; This Has Got Me in Some Kind of Whirlwind*, N.Y.TIMES, Jan. 8, 2000, at A13.

57 *Id.*

58 *See* McDermid, *supra* note 23, at 741; *see also* Anthony Lewis, *Abroad at Home; 'Measure of Justice'*, N.Y.TIMES, July 15, 2000, at A13.

59 *See* Anthony Lewis, *Abroad at Home: Rays Of Hope*, N.Y.TIMES, Feb. 10, 2001, at A15; *see also* Mark Bixler, *No Need to Pull up Roots: Georgian won't be deported*, THE ATLANTA CONSTITUTION, Mar. 3, 2000, at A1.

60 As pointed out by Professor Nancy Morawetz, it also illustrates the ways in which the various provisions of the 1996 statute combined to make a woman with a conviction for hair pulling subject to mandatory deportation. The combination of IIRIRA's new definition of "sentence" so as to include suspended sentences like Ms. Gehris' and its new definition of aggravated felony to include "crimes of violence" with sentences of a year or more of imprisonment resulted in a case in which a woman was facing mandatory deportation as a result of a misdemeanor conviction for which she had received no jail time. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1943 (2002).

advice and the need for failsafe measures in the event a non-citizen 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.[61] 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 trial judge's statement that there were no collateral consequences other than the possible deprivation of the right to vote, to hold public office, to serve on a jury and to possess a firearm.[62] 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.[63]

Although an unpublished district court opinion, this opinion highlights the impact of effective advice regarding 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 and the problems with this approach will be discussed in greater detail below.

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[61] *See* United States v. Shaw, No. CRIM.A. 99-525-01, 2004 WL 1858336 (E.D. Pa. Aug. 11, 2004).

[62] *Id.* at 3.

[63] *Id.* at 9.

IV. PROBLEMS WITH THE STATUS QUO IN NEW JERSEY

Although New Jersey is among the five states with the highest number of new immigrant residents,[64] 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 given adequate information about potential immigration consequences.

A. *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.

1. 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*.[65] In *Strickland*, the United States 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.[66] First, the petitioner must demonstrate that counsel's performance failed to meet an objective standard of reasonableness. Second, the petitioner must show that counsel's failure to comply with an objective standard of reasonableness led to such strong prejudice against the defendant that a different outcome could have been

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[64] *See* DEP'T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS 42 (2004), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2004/Yearbook2004.pdf.

[65] 466 U.S. 668 (1984).

[66] *Id.* at 690.

expected had counsel acted reasonably.[67] The Supreme Court has, on numerous occasions, refused to state exactly what it considers effective performance by counsel. It has, however, recognized that there are certain "prevailing norms of practice" that can be found in American Bar Association (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.[68] The New Jersey Supreme Court adopted the *Strickland* test in *State v. Fritz*.[69]

2. 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.[70] The doctrine, followed by courts in almost all jurisdictions, posits that a lawyer can only be considered ineffective for failing to advise about the direct consequences of a plea.[71]

The New Jersey Supreme Court incorporated the collateral consequences doctrine into its opinion in *State v. Heitzman*,[72] which held that defendants must be informed only of the 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

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67 *Id.* at 694.

68 *See id.* at 688-689. In *Hill v. Lockhart*, the U.S. Supreme Court held that the same *Strickland* test also applies to challenges to the effectiveness of counsel in the plea process. 474 U.S. 52, 57 (1988).

69 105 N.J. 42, 57-58 (1987).

70 *See e.g.*, State v. Heitzman, 107 N.J. 603, 604 (1987) (discussing immigration consequences as collateral consequences in dicta); *see also* State v. Chung, 210 N.J. Super. 427 (App. Div. 1986). This Article is primarily focuses on state court opinions; however, some federal courts in the Third Circuit have addressed similar issues. For example, in a recent opinion in a habeas case, a judge in the District of New Jersey found that a petitioner had been deprived of his Sixth Amendment right to counsel and vacated his plea in a bribery charge. Sasonov v. United States, 575 F. Supp. 2d 626, 637-39 (D.N.J. 2008). The petitioner was a lawful permanent resident who was advised that he would not be deportable if convicted of this offense, when in fact the offense was an aggravated felony. *Id.*

71 *See generally* Chin & Holmes, *supra* note 1, at 706-08 (listing the federal circuit courts and state courts that have adopted the collateral consequences doctrine).

72 107 N.J. 603.

dishonorable discharge from the military, or anything else." [73] 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 *McKnight* case and the cases discussed below, even though the *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.[74] Case law subsequent to *Heitzman* and the amendment of the plea form makes it clear that attorneys and their clients are often confused about these issues, and pleas are often entered by clients without sufficient knowledge of the impact on their immigration status.

3. Appellate Precedent in New Jersey: Moving in the Right Direction, but Not Far Enough

The two leading appellate cases in New Jersey regarding the obligation of defense counsel to advise about immigration consequences have reached different results. In the first case, from 1986, the motion to vacate the conviction was denied.[75] In the second, from 1999, the case was remanded for an evidentiary hearing on whether or not counsel was effective.[76] The different outcomes have been reconciled by saying that one involves the absence of advice and the other inaccurate advice.[77] But, in

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[73] *Id.* at 604 (quoting State v. Heitzman, 209 N.J. Super. 617, 622 (App. Div. 1986), *aff'd*, 107 N.J 603 (1987)).

[74] For example, the criminal case of *State v. Garcia* took place after Question 17 was added to the plea form and yet there was still confusion as to whether or not the defendant had been properly advised of the consequences of immigration. 320 N.J. Super. 332, 336 (App. Div.1999).

[75] *See Chung*, 210 N.J. Super. at 441.

[76] *See Garcia*, 320 N.J. Super. at 341.

[77] *Compare* State v. Oropesa, 2007 WL 4460606, at *6 (N.J. App. Div. Dec. 21, 2007), *with Chung*, 210 N.J. Super. at 435, *and* State v. Garcia, 320 N.J. Super. 332, 336 (App. Div. 1999) (where defense counsel specifically advised his client that "he would not be subject to deportation.").

> Although a guilty plea may be vacated where a defendant is *actually* misinformed of a material element *and* was prejudiced by that misinformation, *State v. Howard*, 110 N.J. 113, 123 (1988), we previously denied a claim similar to defendant's where a defense counsel did not actually misinform the defendant as to the immigration consequences of

addition to this distinction, there are other relevant factual distinctions that may have been at play in these 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 stronger ties to the United States. Whatever the reason for the different outcomes, 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 v. Chung*.[78] 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.[79] The appellant asserted that defense counsel was ineffective because he did not properly advise Chung of the consequences of his plea.[80] 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

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> his plea. . . . The present matter is distinguishable from *Garcia* because although Question 17 was also marked N/A, as in *Garcia*, the defense counsel here did not offer advice to defendant about immigration consequences, let alone boldly and inaccurately assert that the guilty plea would have no effect at all on defendant's immigration status. In contrast to *Garcia*, here there was no misinformation or false information conveyed to defendant, nor any showing of prejudice therefrom, to warrant an evidentiary hearing, much less the full relief requested.

Oropesa, 2007 WL 4460606, at *6.

78 210 N.J. Super. 427.

79 *Id.* at 441.

80 *Id.* at 429.

does not render a defendant's plea involuntary."[81] The court went on to find that it also was not the obligation of defense counsel to advise about immigration consequences.[82]

The court 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*.[83] The court determined that the first prong of *Strickland*, deficient performance, was not met.[84] 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.[85]

The court accepted the notion that the attorney's duties towards his client were satisfied and placed the burden on the client to inquire further with competent immigration counsel as to any impact on his status.[86]

In the *Chung* opinion, the court further found that the defendant-appellant did not meet the second "prejudice" prong of the *Strickland* test.[87] In the court's view, there was no prejudice because the defendant did not seek a new trial when he requested that his 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.[88]

The court noted that Mr. Chung was an undocumented immigrant and subject to deportation notwithstanding his

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81 *Id.* at 433 (following the rule set forth in *State v. Reid*, 148 N.J. Super. 263 (App. Div. 1977)).

82 *Id.* at 433-35.

83 *Id.* at 435.

84 *See Chung*, 210 N.J. Super. at 434.

85 *Id.* at 435.

86 *Id.*

87 *See id.* at 435-36.

88 *Id.* at 436.

criminal conviction and that he was aware of the potential for deportation consequences prior to his plea. His attorney had told him that his situation was "sticky," and he was not prejudiced because "virtually nothing" could have been done by his attorney to prevent deportation.[89] 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.[90] It seems likely that he had subsequently been advised that an alternate plea might have had less severe immigration consequences. Moreover, 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 a client about immigration consequences is not considered ineffective assistance of counsel, whereas the *Garcia* decision is cited for the proposition that misadvice about immigration consequences can be a basis for a successful claim.[91] 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 non-citizen.[92]

Mr. Garcia was a lawful permanent resident who pled guilty to possession of cocaine on or near school property, as well as other offenses, and was subsequently sentenced to eleven years in prison with three years of parole ineligibility.[93] In response to Question 17 on the plea form, added as a result of the dissenting opinion in the *Heitzman* case and 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."[94] There was a factual dispute as to the reason for the "N/A" response. Mr.

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89 *Id.* at 441.

90 *See id.* at 430.

91 *See* State v. Garcia, 320 N.J. Super. 332, 341 (App. Div.1999).

92 *See id.* at 340-41.

93 *Id.* at 335.

94 *Id.* at 336. In his dissent in *Heitzman,* Chief Justice Wilentz asserted that judges should inform defendants about consequences that are "generally known and substantially adverse." State v. Heitzman, 209 N.J. Super. 617, 607 (App. Div. 1986) (Wilentz, J., dissenting).

Garcia said this was because his attorney told him he would not be deported.[95] 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 that the client is a citizen.[96] As a result of his conviction, Garcia was not deported because he was a Cuban national and could not be deported to Cuba and therefore was detained indefinitely following his criminal sentence.[97]

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.[98] 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 alone it is significant in the progression of New Jersey case law. The implication is that if Mr. Garcia told his lawyer he was a non-citizen and the lawyer had said "no immigration consequences," his lawyer's advice may have violated the defendant's Sixth Amendment rights.

In *Garcia*, the appellate division expressed 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."[99] However, while this case moves in the direction of finding ineffective assistance of counsel for affirmative misadvice, it 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.[100] The court still did not find that counsel has any obligation to inquire into a defendant's citizenship status.[101] However, the court held in favor of the defendant based on the

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95 *Garcia*, 320 N.J. Super. at 336.

96 *Id.*

97 *Id.* at 335.

98 *Id.* 340-41.

99 *Id.*

100 State v. Viera, 334 N.J. Super. 681, 688 (App. Div. 2000).

101 *See id.*

particular facts of the case, including the fact 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 reading and writing English.[102] The court 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.[103]

Once again, the court took pains to limit the holding to the specific facts. Nevertheless, it is still an expansive holding compared to 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.

4. Where New Jersey Courts Should Head

New Jersey courts should impose a higher duty for defense counsel in light of the changed immigration climate, and should stop distinguishing between so-called "failure to advise" and "misadvice" scenarios. A better approach would be to follow the lead of courts like the New Mexico Supreme Court, which recognized in a 2004 opinion that failure to advise about immigration consequences can constitute ineffective assistance of counsel.[104] In a case involving an attorney who advised his permanent resident client that a plea to sexual contact with a minor, which is an aggravated felony for immigration purposes, "'could' affect his immigration status," the court found the

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102 *Id.*

103 *Id.*

104 State v. Paredez, 136 N.M. 533, 538 (2004).

attorney deficient in his performance.[105] In doing so, the court did not limit itself to a holding regarding affirmative misadvice:

> 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." 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.[106]

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. [107] The "tenuous" distinction between failure to provide advice and misadvice is illustrated by the *Garcia* case.[108] Further, 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?[109] 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 should be whether the defendant received sufficient information to make an informed decision about whether or not to enter the plea. In addition, both the court and John J. Francis, the law professor whose article it cites

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105 *Id.* at 538-39.

106 *Id.*

107 *Id.*

108 *See* State v. Garcia, 320 N.J. Super. 332, 339-40 (App. Div. 1999).

109 *See id.* at 336.

in its opinion, raise valid concerns about the "chilling effect" on a lawyer's counseling role of a rule that would only deem an attorney to be ineffective for providing incorrect information, but not for choosing not to inquire about immigration status at all.[110]

Along with the reconsideration of the traditional distinction between failure to advise and misadvise, New Jersey courts should also reconsider the overall application of the collateral consequences doctrine in immigration related claims. As have several other courts that have considered the issue, the New Mexico Supreme Court has emphasized that the collateral consequences doctrine does not bar a finding of ineffective assistance of counsel in such claims.[111] 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 Constitution does not require the judge to inform the defendant about immigration consequences pursuant to the collateral consequences doctrine, defense counsel is held to a higher standard in these circumstances.[112]

While there is some progression in New Jersey case law towards recognition that attorneys may have special responsibilities towards non-citizen criminal defendants, no New Jersey court has recognized a constitutional duty to inquire about immigration status and to counsel clients accordingly.[113] In addition, the case law sends a message to attorneys that they could

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110 State v. Paredez, 136 N.M. 533, 539 (2004).

111 *See* In Re Resendiz, 25 Cal. 4th 230, 248 (2001). Many federal courts of appeal have also distanced themselves from the collateral consequences doctrine. For example, the Second Circuit Court of Appeals has held that affirmative misadvice regarding immigration consequences does constitute ineffective assistance of counsel. *See* U.S. v. Couto, 311 F.3d 179, 188 (2d Cir. 2002). However, because it was not required under the circumstances, the court declined to reconsider its prior decision that failure to advise was not ineffective assistance. *Id.*

112 *Paredez*, 136 N.M. at 537.

113 While each court relied heavily on the particular facts of the case, it still may not be a coincidence that in the more recent opinions the courts seemed more open to considering the possibility that there may have been ineffective assistance of counsel. *See* State v. Chung, 210 N.J. Super. 427 (App. Div. 1986) (finding no ineffective assistance of counsel); *Garcia*, 320 N.J. Super. 332 (remanding for a hearing to determine whether counsel was effective for providing incorrect advice on immigration consequences); State v. Viera, 334 N.J. Super. 681 (App. Div. 2000) (vacating conviction based on ineffective assistance of counsel).

be found ineffective if they provide inaccurate advice.[114] Given this, many attorneys may find that the safest route is simply not to inquire too deeply into a client's immigration status, even though this puts them out of step with the professional standards of many national professional organizations.[115]

The New Jersey Supreme Court will have the opportunity to address these issues in *State v. Nunez-Valdez*, a case argued in March 2009.[116] In 1998, Mr. Nunez-Valdez pled guilty to a fourth degree charge of criminal sexual contact against a minor.[117] A lawful permanent resident, Mr. Nunez-Valdez was subsequently ordered deported as a result of the conviction.[118] At his post-conviction relief (PCR) hearing, the question arose as to what his attorney had advised him about the immigration consequences of the plea.[119] There was a factual dispute as to the exact nature of what was said. However, at best, one of these attorneys told him: "It's a possibility that you would be deported....Well, basically, it's on the form, one, and it's a sexual assault case, so there's a chance that you will get deported. It doesn't mean that you are guaranteed to be deported."[120] Given that the conviction was an aggravated felony and, as discussed above, such a conviction would lead to mandatory deportation, the question was whether the attorney had been ineffective since he did not warn Mr. Nunez-Valdez more definitively about the result of the plea.[121]

It is possible that the court might decline to address the broader issues raised by *Nunez-Valdez* by focusing on the more limited question of whether it was proper for the appellate division to have reversed the PCR judge's credibility findings.[122] However, *Nunez-Valdez* is also a prime opportunity for the court to clarify the scope and extent of counsel's constitutional duty in

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114 *See generally Garcia*, 320 N.J. Super 332 (App. Div. 1999).

115 *See infra* Part IV.C. for a discussion of professional standards adopted by some national associations.

116 State v. Nunez-Valdez, 2008 WL 2743963 (App. Div. 2008), *cert. granted*, 196 N.J. 599 (Oct. 22, 2008).

117 *Id.* at *1.

118 *Id.*

119 *Id.* at *2.

120 *Id.* at *4.

121 *See* KESSELBRENNER & LORY ROSENBERG, *supra* note 22 (regarding limits to relief for individuals convicted of aggravated felonies).

122 *Nunez-Valdez*, 2008 WL 2743963 at *7-8.

these circumstances, particularly in light of the changes in immigration law over the past decade.

B. *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 ABA[123] and the National Legal Aid and Defender Association (NLADA)[124] have set higher standards for the criminal defense bar. Even the U.S. Supreme Court has recognized that practice guides and professional standards emphasize the importance of providing advice on immigration consequences.[125] In *INS v. St. Cyr*, the Court cited a legal practice memorandum 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."[126] 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.[127] The push to incorporate counseling about

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[123] ABA CRIMINAL JUSTICE SECTION STANDARDS, Statement on Collateral Sanctions and Discretionary Disqualification of Convicted Persons § 19-2.3(b) (2003), *available at* http://www.abanet.org/crimjust/standards/collateral_blk.html#2.3 (noting 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 invalid.")

[124] NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION 6.2(a) (1995), *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines. ("During the process of 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.").

[125] INS v. St. Cyr, 553 U.S. 289, 322 (2000).

[126] *Id.*

[127] *Id.* at 323, n.50.

immigration consequences in the defense role is also part of a larger "holistic lawyering" movement.[128]

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 Lawyers 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."[129]

The Commentary to the rule further expands on this duty of competence by stating that: "Perhaps 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."[130] In discussing the preparation involved, the Commentary also stresses: "[T]he attention and preparation are determined in part by what is at stake."[131] Thus, the Model Rules recognize that "competent" representation requires the legal knowledge necessary for the representation.[132] 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."[133] 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

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[128] *See generally* Michael Pinard, *Broadening the Holistic Mindset Incorporating Collateral Consequences and Reentry Into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067 (2004).

[129] MODEL RULES OF PROF'L CONDUCT R.1.1 (2008).

[130] *Id.* at R.1.1 cmt. 2.

[131] *Id.* at R.1.1 cmt. 5.

[132] *Id.*

[133] N.J. RULES OF PROF'L CONDUCT R.1.1 (2008).

competence, the absence of an explicit professional standard for criminal defense attorneys, combined with the Rules of Professional Conduct's focus on avoiding negligence rather than defining competence seem insufficient given the severity of the potential consequences in the context of a non-citizen's plea to a criminal charge.

C. *The Lack of an Advisement Statute in New Jersey*

During the period from 1995-2004, New Jersey was among the five states with the highest number of new immigrant residents.[134] 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.[135] As of 2008, twenty-four 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.[136] These states include the four other states with the largest number of new immigrant residents: California, New York, Florida and Texas.[137]

The nature and types of warnings vary from state to state,[138] but many are similar to the suggested advisement set forth by the ABA in *A Judge's Guide to Immigration Law in Criminal Proceedings*, which reads:

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134 *See* DEP'T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS 42 (2004).

135 *See* ABA Comm'n on Immigration, *A Judge's Guide to Immigration Law in Criminal Proceedings*, JUDICIAL IMMIGRATION EDUC. PROJECT, at 4-11 (2004). Note that the judge in *Chung* discussed the trend of states enacting similar statutes and that New Jersey had not yet followed suit. *See* State v. Chung, 210 N.J. Super. 427, 432 (App. Div. 1986).

136 KESSELBRENNER & ROSENBERG, *supra* note 22, at app. k.

137 One of the more recent additions includes Vermont. In 2006, Vermont was added to the roster of states mandating that judges advise defendants about immigration consequences. The Vermont statute, VT. STAT. ANN. 13 § 6565(c)(2) (2005), 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." *Id.* 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.

138 *See* ABA Comm'n on Immigration, *supra* note 135, at 4-11 (The Guide lists states that require judges to advise about immigration consequences of criminal dispositions in); KESSELBRENNER & ROSENBERG, *supra* note 22, at § 4:19.

> 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.[139]

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 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 pressured to go forward with the plea despite questions or concerns about its impact on his or her immigration status.[140] 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.[141] 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.[142] In fact, the New York statute explicitly says, "The

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139 *See* ABA Comm'n on Immigration, *supra* note 135, at 4-12.

140 *See* Jennifer Welch, *Defending Against Deportation: Equipping Public Defenders to Represent Non-citizens Effectively*, 92 CAL. L. REV. 541, 555 (2004) (discussing California's warning and the limited effectiveness of such a warning).

141 *Id.*

142 *See generally* N.Y. CRIM. PROC. LAW § 220.50(7) (1995) (to be repealed Sept. 1,

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 afford a defendant any rights in a subsequent proceeding relating to such defendant's deportation, exclusion, or denial of naturalization."[143] 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 have provisions mandating that a conviction be vacated if a proper advisement was not given.[144] Under the approach used in California, an immigrant does not need to demonstrate innocence when requesting that the plea be vacated.[145] 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.[146]

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 as, for example, a citizen, permanent resident, undocumented immigrant or 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 his or 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 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

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2009, pursuant to CRIMINAL PROCEDURE LAW § 220.5 (McKinney Supp. 2009)).

143 *Id.*; Welch, *supra* note 140, at 555.

144 *See, e.g.*, CAL. PENAL CODE § 1016.5(b) (West 1995); WIS. STAT. § 971.08(2) (1983).

145 CAL. PENAL CODE § 1016.5(b).

146 *Id.*

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.[147] In addition, mandating an advisement reflects a concern for fairness in the criminal justice system and an understanding that immigration consequences matter.[148]

D. Effective Language for a Court Advisement or Plea Form

In addition to the importance of proper timing and the availability of a remedy for a failure to provide the warning, the language of any advisement is also critical. If the language is inaccurate or difficult to understand, it will not serve its purpose. The ABA's proposed advisement language would be an improvement over the warning on the current New Jersey plea form, but it is not comprehensive enough. Similarly, language proposed by the American Civil Liberties Union of New Jersey (ACLU-NJ) and the Association of Criminal Defense Attorneys of New Jersey (ACDL-NJ) in their amicus brief in the *Nunez-Valdez* case could also be expanded.

The question of how the plea form might be amended to address the problem of defendants pleading guilty without an understanding of the immigration consequences was a central topic at the oral arguments in the *Nunez-Valdez* case.[149] In particular, the justices appeared concerned about the increasing number of post-conviction appeals raising the question of

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147 *See* ARIZONA RULE 17.2 STUDY COMMITTEE, REPORT OF THE RULE 17.2 7 (2003), *available at* http://www.nationalimmigrationproject.org/crimmats/Final%20report%20from%20Rule%2017.2%20committee.doc (Anne Benson of the Washington Legal Defender Association, told the committee that in sixty-five to seventy percent of the cases on which she consults, the defendants are able to either avoid deportability or preserve eligibility for relief by negotiating their plea).

148 *See generally* McDermind, *supra* note 20, at 751-52 (discussing the "collateral consequences doctrine").

149 *See* Audio Webcast: Oral Arguments in *State v. Nunez-Valdez* (Mar. 9, 2009), http://njlegallib.rutgers.edu/supct/bydate.php (last visited Apr. 14, 2009).

improper immigration advice and whether changes to the plea form could help the problem.[150]

The *Garcia* opinion discussed earlier highlights the confusion surrounding Question 17 on the plea form that was also in use at the time Mr. Nunez-Valdez entered his plea. The question previously stated, "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?" and provided three possible answers: yes, no and N/A.[151] While the addition of this question was progress towards ensuring that non-citizen defendants understood potential immigration consequences before entering pleas, it did not fully resolve the issue.

In October 2008, this question on the plea form was amended. It is now in two parts and asks: "Are you a citizen of the United States? [Yes] [No] (If no, answer question #17b.) Do you understand if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty? [Yes] [No]"[152] By separating the two questions in this way, the new plea form eliminates the problem of determining what an "N/A" response to the old question meant. However, from an immigration advocacy perspective, this question could lead to an increase in deportations by making it easier for immigration officials to identify non-citizens in criminal proceedings and by the possibility that the admission to non-citizen status could be used in subsequent deportation proceedings.

In their brief in *Nunez-Valdez*, amicus curiae ACLU/ACDL-NJ urged the court to modify the plea form again to provide: "Question 17a: Do you understand that if you are not a United States Citizen or National you may be deported/removed from the country by virtue of your plea of guilty? Question 17b: Do you understand that if your plea of guilty is to a crime considered an aggravated felony under federal law you will be subject to deportation/removal? Question 17c: Do you understand that you

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150 *Id.*

151 State v. Garcia, 320 N.J. Super. 332, 336 (App. Div.1999).

152 New Jersey Administrative Office of the Courts, Directive #14-8 (October 8, 2008).

have the right to seek legal advice from an immigration attorney prior to entering a plea of guilty?"[153]

This suggested change is an improvement over the current version of the plea form because it indicates that certain convictions will lead to mandatory deportation and that revelation would hopefully stimulate further inquiry by the defendant and the attorney. However, this question is not completely inclusive or accurate. For example, an individual convicted of an aggravated felony might be able to avoid deportation to a specific country if he could establish eligibility for relief under the Convention Against Torture.[154] Additionally, if a lawful permanent resident was convicted of a deportable offense before he had accrued sufficient years of residence—even if the offense was not an aggravated felony—he also would not be eligible for the discretionary relief of cancellation of removal.[155] Depending on the individual's particular characteristics and circumstances, any conviction might leave that individual without any relief available.[156]

Thus, instead of focusing on the risk of aggravated felonies *per se*, perhaps warning language could focus on the fact that there are circumstances in which even a lawful permanent resident with extensive ties to the United States could be denied the opportunity to explain to a judge why he or she should not be

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153 Brief of Amicus Curiae Association of Criminal Defense Lawyers of New Jersey and the American Civil Liberties Union of New Jersey at 15, State v. Nunez-Valdez, 2008 WL 2743963 (N.J. App. Div. July 16, 2008), *cert. granted*, 196 N.J. 599 (Oct. 22, 2008).

154 The United National Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc A/Res/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985), was enacted into U.S. law in 1998. The Department of Justice's implementing regulations are at 8 C.F.R. § 208.16-18 (2000). Under 8 C.F.R. § 208.17, a conviction of an aggravated felony is not a bar to a grant of deferral of removal under the Convention Against Torture. Such a grant does not confer any lawful status in the United States and does not prevent the individual from being deported to a country where he or she would not be subject to torture. 8 C.F.R. § 208.17(b)(1)(i) and (2) (2000).

155 See the requirements for Cancellation of Removal for lawful permanent residents in 8 U.S.C. § 1229b(a), which limits relief to individuals who have resided in the United States continuously for 7 years after admission.

156 While there is relief from deportation other than Cancellation of Removal, such as asylum, it is possible that the individual might not be able to establish the eligibility requirements for any form of relief.

deported. This was the situation faced by Mary Ann Gehris, whose case was described earlier.[157] This might be the type of information that would resonate most with someone who is facing an important decision about whether or not to enter a plea.

While it may be too difficult to simplify the immigration law enough to provide a concise and accurate warning about the risk of a particular type of conviction, an advisement or plea form warning could still play an important role in encouraging the defendant and his attorney to research and explore the law further. In light of this, perhaps the most important element to include in a warning is simply the ABA and ACDL/ACLU-NJ's recommendation to seek immigration advice.[158] Or, as Manuel Vargas, the founder of the Immigrant Defense Project has suggested, the court could inform defendants that they have the right to ask for more time in order to seek that advice.[159] Without an understanding that defendants can have more time to obtain this critical information, the recommendation to seek advice will be an empty one. In addition, he suggests, the court could ask the criminal defense attorney, rather than the defendant, to certify that he or she has counseled the defendant about immigration consequences.[160] In this way, the burden would fall on the party with a better understanding of the law and legal system. While there would likely be resistance in the defense community to explicitly adding this responsibility, effective lawyering and counseling already require it, as the ABA and NLADA standards reflect.[161]

Another advantage of the ACLU/ACDL-NJ proposal is that it does not require a non-citizen to make an admission regarding his or her immigration status as the current New Jersey plea form does. In reviewing advisement statutes and plea forms of other states, no others were found to similarly require such an admission. In fact, more commonly, advisement statutes provide

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157 *See supra* notes 55-61 and accompanying text.

158 *See* ABA Comm'n on Immigration, *supra* note 135, at 4-12.

159 *See* E-mail from Manuel D. Vargas, Founder and Senior Counsel, Immigrant Defense Project, to author (Mar. 27, 2009) (on file with author).

160 *Id.*

161 *See supra* notes 123-24.

that the court should *not* inquire into the defendant's immigration status.[162]

However, the ACDL/ACLU-NJ proposal could also be improved in several important ways. The first two questions should include immigration consequences beyond deportation, such as exclusion from reentry and denial of naturalization. This is, in fact, the approach taken by California. The California plea form provides:

> I understand that if I am not a citizen of the United States, my plea of guilty or no contest may or, with certain offenses, will result in my deportation, exclusion from reentry to the United States, and denial of naturalization and amnesty and that the appropriate consulate may be informed of my conviction. The offenses that *will* result in such immigration action include, but are not limited to, an aggravated felony, conspiracy, a controlled substance offense, a firearm offense, and, under certain circumstances, a moral turpitude offense.[163]

The California form improves on the proposed language for New Jersey by expanding on the range of offenses that would lead to a variety of immigration consequences. However, its language may still be confusing to a non-lawyer unfamiliar with immigration law.

The Arizona advisement statute uses simpler language to convey similar ideas and includes important information about the risk of admissions as well as of convictions generally. It provides that the judge shall state to the defendant:

> If you are not a citizen of the United States, pleading guilty or no contest to a crime may affect your immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. Your plea or admission of guilt could result in your deportation or removal, could prevent you from ever being able to get legal status in the United States, or could prevent you from becoming a United States citizen.[164]

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[162] *See e.g.*, ARIZ. R. CRIM. P. 17.2(f); CONN. GEN. STAT ANN. § 54-1j(b); HAW. REV. STAT. § 802E-1; MASS. GEN. LAWS ANN. CH. 278, § 29D; OHIO REV. CODE ANN. § 2943.031(C); R.I. GEN. LAWS § 12-12-22(d); WASH. REV. CODE § 10.40.200(1).

[163] CAL. PENAL CODE § 1016.5 (emphasis added). The July 1, 2008 plea form can be found at http://www.courtinfo.ca.gov/forms/documents/cr101.pdf.

[164] ARIZ. R. CRIM. P. 17.2(f).

The statute also mandates that the advisement be given "prior to any admission of facts sufficient to warrant finding of guilt, or prior to any submission on the record" and that "the defendant shall not be required to disclose his or her legal status in the United States to the court."[165]

An improved warning in New Jersey should incorporate the range of immigration consequences and straightforward language of Arizona's form, as well as the recommendation to obtain immigration advice that the ACDL-NJ/ACLU-NJ and the ABA's proposed language includes. Also, similar to the ACDL/ACLU-NJ proposal, it should reference the fact that there are circumstances in which no discretionary relief would be available, although, as explained above, it should not limit that warning to only aggravated felony convictions. An example of such a warning would be:

> Question 17. If you are not a United States citizen or national, do you understand that:
>
> (a) your plea of guilty or no contest may result in your detention and deportation, or may prevent you from ever getting legal status in the United States, from becoming a United States Citizen, or from returning to the United States if you were to leave?
>
> (b) your plea of guilty or no contest to certain offenses will result in your deportation with no opportunity to explain to an immigration judge the reasons why you should not be deported, such as that you have had a green card for many years, or that your children are United States citizens?
>
> (c) admitting guilt may result in deportation even if the charge is later dismissed?
>
> (d) you have the right to request additional time to obtain legal advice from an immigration attorney before entering a

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165 *Id.*

guilty plea?[166]

It is challenging to draft language for a plea form that is comprehensive, accurate, and simple enough to be understood by non-lawyers. However, Question 17 on the New Jersey plea form plays too important a role to be left in its current iteration.

V. 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. The following is a summary of recommended strategies:

- **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 or plea form warning should be comprehensive yet simply worded. 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.

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[166] Kathy Brady, Senior Staff Attorney, Immigrant Legal Resource Center, Angie Junck, Staff Attorney, Immigrant Legal Resource Center, and Manuel D. Vargas, Founder and Senior Counsel, Immigrant Defense Project, provided feedback and suggestions regarding this language.

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

As discussed in more detail above, professional organizations in New Jersey should incorporate the types of standards established by the NLADA and the ABA and explicitly require defense attorneys to provide their clients with information on immigration consequences. Such standards will be meaningless without the availability of resources, information, and support. Thus, the courts, and bar associations in New Jersey also need 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.[167] Given that judges and defense attorneys already handle heavy dockets and caseloads, easy access to training materials and resources is essential.

- **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 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

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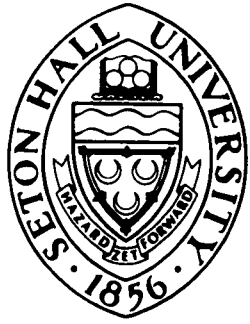
[167] *See* JUDGE JUDITH S. KAYE, REPORT ON THE STATE OF THE JUDICIARY 22 (2007), *available at* http://www.courts.state.ny.us/admin/stateofjudiciary/soj2007.pdf.; *see also* Collateral Consequences of Criminal Charges: New York State, http://www2.law.columbia.edu/fourcs/index.html (last visited Mar. 15, 2009).

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 piece-meal 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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