Guilty Pleas by Non-Citizens in Illinois: Immigration Consequences Reconsidered

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INTRODUCTION

Today, there are approximately 28.4 million foreign-born persons living in the United States. The foreign-born population in Illinois is approximately 1.2 million, including more than 500,000 legal non-citizens. Like United States citizens, non-citizens can be convicted of violating state and federal criminal laws. In addition, like citizens, non-citizens rely on criminal defense counsel to inform them of the consequences of pursuing a particular course in criminal court, including pleading guilty, pleading no contest, or proceeding to trial on the charges. The consequences of a non-citizen's criminal conviction are, however, very different from those of a United States citizen. For a United States citizen, the matter ordinarily ends with the disposition of the case in criminal court or the Department of Corrections. In contrast, for a non-citizen convicted of a criminal offense, the problems only begin at the disposition of the criminal case. Criminal defense attorneys across the country are starting to recognize that the immigration consequences of an alien defendant’s conviction are, in most cases, far more devastating than the punishment stemming from the criminal conviction itself. As a result, for a non-citizen client

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1. See Coming to America: A Profile of the Nation’s Foreign Born, Census Brief, U.S. Census Bureau, CENBR / 01-1 (Feb. 2002) [hereinafter Coming to America]. For the sake of simplicity, non-citizens are defined as all immigrants, legal and illegal, who are not U.S. citizens. Non-citizens (for the purposes of this article) include: Lawful Permanent Residents (LPR), asylees and refugees, various non-immigrant and immigrant visa holders, as well as people who entered the country illegally, continue to be in the country in violation of immigration laws, or both.

2. Id. at 2. The largest concentration of the foreign-born population in Illinois is concentrated in Chicago (1.1 million people).


4. See Magana-Pizano v. INS, 200 F.3d 603, 612 (9th Cir. 1999) (“That an alien charged with a crime ... would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented.”).
"preserving the client's right to remain in the United States may be more important . . . than any potential jail sentence."\textsuperscript{5}

In the vast majority of criminal cases in Illinois, convictions are reached through guilty or no contest pleas to the charges.\textsuperscript{6} In most cases, the immigration consequences of the plea are not recognized until it is too late. Once the Immigration and Naturalization Service (INS)\textsuperscript{7} starts removal proceedings against a non-citizen based on the existence of a criminal conviction (usually right after the person serves his or her time in jail, or in many cases, even during the time of incarceration or parole), there is very little relief available for aliens, especially if they plead guilty to an offense amounting to an "aggravated felony" under federal law.\textsuperscript{8} In such cases, removal, which is the current term for deportation, is the norm. Although jurisprudence tells us that deportation does not deserve the label of "criminal punishment,"\textsuperscript{9} the anguish and devastation such action causes a non-citizen and his or her family reflects a contrary reality. As Justice Hugo L. Black recognized, "[t]o banish [an immigrant] from home, family, and adopted country is punishment of the most dramatic kind."\textsuperscript{10} Other United States Supreme Court opinions have also recognized that deportation is a "drastic measure"\textsuperscript{11} that may result in the loss of "all that makes life worth living."\textsuperscript{12} Thus, although the Supreme Court has not technically categorized deportation as punishment in terms of a sentence imposed by the court, it is well recognized that this distinction is technical in nature and that deportation \textit{does} have the substan-

\textsuperscript{5} INS v. St. Cyr, 533 U.S. 289, 322 (2001) (citing \textit{Criminal Defense Techniques} §§ 60A.01, 60A.02[2] (1999)). \textit{Id.} at 323 ("[P]reserving the possibility of [INA § 212(c)] relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.").

\textsuperscript{6} \textit{Id.} at 323 n.51. Ninety percent of criminal convictions are obtained by guilty plea.


\textsuperscript{10} Lehman v. United States \textit{ex rel.} Carson, 353 U.S. 685, 691 (1957) (Black, J., concurring).

\textsuperscript{11} Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); Barder v. Gonzales, 347 U.S. 637, 642 (1954) (stating that "[a]lthough not penal in character, deportation statutes as a practical matter may inflict the equivalent of banishment and exile. . .").

\textsuperscript{12} Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
tive aspects of punishment. One such aspect is that, as of October 9, 1998, many categories of non-citizens are subject to mandatory detention by the INS without bond, irrespective of whether they represent a risk of flight or danger to the community. Non-citizens, therefore, are deprived of liberty during the pendency of removal hearings, and in many cases for long periods thereafter, even though they have fulfilled their sentence of parole or incarceration. As discussed below, even if deportation was not considered punishment in the past, such a characterization is no longer appropriate because of the changes made to immigration laws in the 1990s.

As such, and with the aim of providing the most effective assistance to a non-citizen client, it is imperative for defense attorneys working in Illinois to recognize and consider the immigration status of their clients because the advice they provide during criminal proceedings has far-reaching consequences outside the criminal court building. In addition, twenty states have recognized that immigration consequences of criminal convictions have serious effects that require trial judges to advise defendants that immigration consequences may result from pleading guilty to a criminal charge. As the state with the fifth largest foreign-born population in the nation, Illinois recently recognized the concerns associated with a non-citizen pleading guilty to criminal charges in state court. As this Article was being prepared for

13. See, e.g., Galvan v. Press, 347 U.S. 522, 531 (1954) (declining to overturn previous Supreme Court precedent, but commenting that the “intrinsic consequences of deportation are so close to punishment for crime”); Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) (“Everyone knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel.”).

14. See INA § 236(c), 8 U.S.C. § 1226(c) (2000). The categories of non-citizens subject to mandatory detention include those convicted of: (1) a crime involving moral turpitude for which they have been sentenced for one year or more; (2) an aggravated felony; (3) firearms offense; (4) possession of a controlled substance (other than a simple possession of thirty grams or less of marijuana); (5) sale of a controlled substance; and (6) two or more crimes involving moral turpitude, regardless of the length of sentence. Id.

15. See Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999) (holding that the Attorney General may release a non-citizen who falls under INA § 236(c) only if he or she determines that the non-citizen is eligible for the witness protection program). As the Parra court noted: “[A] criminal alien who insists on postponing the inevitable has no constitutional right to remain at large during the ensuing delay, and the United States has a powerful interest in maintaining the detention in order to ensure that removal actually occurs.” Id. at 958. See also Guardarrama v. Perryman, 48 F. Supp. 2d 778, 781 (N.D. Ill. 1999) (holding that the district court did not have jurisdiction to set bail for a non-citizen convicted of an aggravated felony and a controlled substance violation).


17. See infra Part VI(D) and accompanying text.

18. Coming to America, supra note 1, at 2.
publication, the Illinois legislature adopted Public Act 93-0373, which requires Illinois state court judges to advise all defendants that if they are not U.S. citizens, their conviction upon a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or felony offense may result in severe immigration consequences for the non-citizen defendant. This long-awaited amendment to the rules of criminal procedure imparts an important protection for non-citizen defendants by providing them and their counsel an opportunity to consider the immigration aspects of non-citizen defendants’ cases prior to entering a plea of guilty. This legislative change also alters Illinois Supreme Court precedent on the issue and takes into account the changes made in immigration laws during the 1990s.

II. The Mary Anne Gehris Story

Everyday practice of immigration law in the United States is replete with examples of immigrants convicted of, in some cases, minor offenses and being removed from the country. Take, for example, the story of Ms. Mary Anne Gehris, a citizen of Germany who arrived in the United States in 1965, when she was one year-old. Ms. Gehris became a lawful permanent resident (often referred to as a "green-card" holder), married a United States citizen, and had a son who is also a United States citizen. In 1988, when she was twenty-three, Ms. Gehris was involved in a minor altercation with another woman in Georgia, the state where she had lived since her arrival in the United States. As a result of the altercation, Ms. Gehris was charged with misdemeanor battery. On the advice of a public defender, she pleaded guilty and received a one-year suspended sentence. She did not violate her probation and had no subsequent criminal arrests or convictions. Years later, when Ms. Gehris was applying to become a United States citizen, the INS commenced removal proceedings against her, charging that she was an “aggravated felon.”


20. For further details on Ms. Gehris’s case, see Anthony Lewis, Abroad at Home: “This Has Got Me in Some Kind of Whirlwind,” N.Y. TIMES, Jan. 8, 2000, at A13. See also McDermid, supra note 16, at 741-43.


22. Evidently, Ms. Gehris pulled the other woman’s hair during the altercation. See McDermid, supra note 16, at 741-43.

23. Id.

24. Id.

25. Id.

26. Id.
voluntarily admitted her previous misdemeanor conviction on the INS naturalization application, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)\textsuperscript{27} and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA);\textsuperscript{28} however, the misdemeanor battery conviction\textsuperscript{29} resulting in a suspended one-year sentence\textsuperscript{30} was retroactively defined as an "aggravated felony,"\textsuperscript{31} which is one of the most severe grounds for removal from the United States. Ms. Gehris found herself in removal proceedings with little or no available relief. As a result, Ms. Gehris was in the process of being expelled and banished from the United States, the country where she lived since the age of one, the country where she raised a family, and the country where her son, a United States citizen, is hospitalized with cerebral palsy.\textsuperscript{32} Prior to the enactment of AEDPA and IIRIRA, Ms. Gehris’s misdemeanor conviction would not have caused her removal from the United States. Prior to the 1996 amendments to the Immigration & Naturalization Act (INA), her suspended sentence would not have amounted to a “conviction” because she served no time in jail.\textsuperscript{33} In addition, her misdemeanor battery conviction would not have been classified as an “aggravated felony” because the sentence imposed was less than five years imprisonment.\textsuperscript{34} Finally, under the old system, Ms. Gehris could have applied for equitable relief pursuant to the INA, an option that is no longer available for persons convicted of “aggravated felonies.”\textsuperscript{35}

\textsuperscript{28.} See supra note 8.
\textsuperscript{29.} McDermid, supra note 15, at 742.
\textsuperscript{30.} Id.
\textsuperscript{31.} Id.
\textsuperscript{32.} Id. at 743.
III. Brief History of Criminal Grounds for Removal.\footnote{For a good outline of the history of immigration laws in the United States, see IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 1-20 (8th ed. 2002).}

The changes to immigration laws in the late 1980s and 1990s have drastically changed the immigration consequences of criminal convictions. Although immigration to the United States began with an unrestricted immigration policy in the eighteenth century, the present structure of immigration law\footnote{The policy is contained in Titles 8 and 18, U.S.C.} dates back to the adoption of the McCarran-Walter Act in 1952.\footnote{Immigration and Nationality Act, Pub. L. No. 414, § 202, 66 Stat. 163 (1952) (current version 8 U.S.C. §§ 1101-1557 (2000)).} The Act established, among other things, detailed grounds for exclusion and deportation, relief available to immigrants in deportation proceedings, and the procedures to be followed in such proceedings.\footnote{Id.}

Finally, the 1988 Act expanded the law to require deportation for virtually all firearm offenses.\textsuperscript{46}

The laws were once again redefined and expanded in 1990 by the Immigration Act of 1990 (1990 Act).\textsuperscript{47} The definition of aggravated felony was substantially expanded, while "judicial recommendations against deportation" (JRAD), a form of relief available for criminal non-citizens, was completely eliminated from the law.\textsuperscript{48} Furthermore, while enhancing criminally-related grounds for deportation, the 1990 Act eliminated the availability of relief under INA section 212(c) for aggravated felons incarcerated for five years or more,\textsuperscript{49} and expanded the ability of immigration courts to enter \textit{in absentia} orders of deportation, and restricted the non-citizen's rights to re-open proceedings or obtain counsel.\textsuperscript{50} The 1990 Act was further supplemented in 1994 with the adoption of summary deportation procedures for aggravated felons who were not Lawful Permanent Residents (LPRs) and had no relief available to them.\textsuperscript{51} The same year, the Immigration and Nationality Technical Correction Act of 1994 adopted provisions allowing for judicial deportations, as well as additional restrictive changes to the summary deportation procedure most often used in cases of criminal non-citizens.\textsuperscript{52} The Act once again substantially broadened the definition of aggravated felonies.

The most substantial changes, however, occurred in 1996 with the adoption of two comprehensive sets of immigration laws. The first law, AEDPA,\textsuperscript{53} drastically expanded the criteria for crimes involving moral turpitude by including persons who were convicted of crimes with a \textit{possible} sentence of a year.\textsuperscript{54} In addition, AEDPA established special deportation procedures for persons deemed terrorists, while simultaneously allowing for deportation of non-violent offenders prior

\begin{itemize}
\item \textsuperscript{46} See INA § 241(a)(14), 8 U.S.C. § 1251(a)(14) (2000).
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id. INA § 212(c) relief is a discretionary waiver of the grounds of inadmissibility that may be granted by an immigration judge to certain LPRs convicted of certain crimes. In addition to other statutory criteria, relief under § 212(c) was available if the non-citizen was able to establish that positive equities in favor of a favorable exercise of discretion (including rehabilitation) outweigh his or her criminal behavior and any other adverse factors. As described in other sections of this Article, relief under this section was repealed by the enactment of IIRIRA in 1996.
\item \textsuperscript{50} See supra note 47. See also Kurzban, supra note 36, at 6.
\item \textsuperscript{52} Pub. L. No. 103-416, 108 Stat. 4305 (1994).
\item \textsuperscript{53} See supra note 27.
\item \textsuperscript{54} See infra Part IV(B) and accompanying text. See also Kurzban, supra note 36, at 8-9.
\end{itemize}
to the completion of their sentences.\(^5\) The law also re-established provisions resulting in detention of any persons, including LPRs, convicted of most crimes that are deportable offenses without any possibility of release on bond.\(^6\) Once again, the definition of aggravated felonies was broadened under AEDPA, and relief under INA section 212(c) was further eliminated for people facing deportation for the conviction of a crime.\(^7\) Finally, the law broadened the expedited and summary deportation procedures.\(^8\)

The second law, IIRIRA,\(^9\) enacted several months after AEDPA, established new criminal grounds for deportation, including convictions for high-speed flight from an immigration checkpoint, domestic violence, stalking, child abuse and neglect, or for violating a court order entered to prevent domestic violence.\(^60\) IIRIRA further altered proceedings by removing the distinction between exclusion and deportation proceedings, but retained the differences associated with the burdens of proof in each.\(^61\) Furthermore, relief from deportation under INA sections 212(c) and 244 was eliminated and replaced by much more restrictive relief provisions, such as the seven-year cancellation of removal for LPRs and the ten-year cancellation of removal for non-LPRs.\(^62\) Neither type of relief was, however, available for people convicted of aggravated felonies. In addition, persons who committed any crimes were barred from the ten-year cancellation provision, which now requires, in addition to other factors, a showing of "exceptional and extremely unusual hardship" that would result in the non-citizen's family's removal from the United States.\(^63\) In addition to being an exceptionally difficult standard to satisfy, it is important to note that the hardship to the non-citizen is not considered at all in making a determination under this section.\(^64\)

Other provisions adopted in IIRIRA included: (1) mandatory detention for persons inadmissible due to certain criminal convictions or activity or those who may be removed due to certain criminal convic-

\(^5\) See Kurzban, supra note 36, at 8.
\(^6\) Id.
\(^7\) Id.
\(^8\) See supra at 9.
\(^61\) Id.
\(^62\) See Kurzban, supra note 36, at 9-12.
\(^63\) Id. at 11.
\(^64\) Another form of relief previously available under INA § 212(h) was modified to preclude lawful permanent residents, who are aggravated felons or who have not lawfully resided in the United States for seven years, from receiving relief under this section. In addition, INA § 212(i) was modified to require a showing of extreme hardship.
tions; (2) elimination of judicial review for persons who have been convicted of certain crimes; (3) elimination of judicial review of discretionary relief determinations; (4) elimination of judicial review for discretionary bond or detention determinations; (5) elimination of judicial review for summary exclusion determinations except through the writ of habeas corpus; (6) elimination of automatic stays of removal orders pending appeals; (7) appeals allowed only in Circuit Courts of Appeal and only in circumstances in which a proceeding was held before an immigration judge; and (8) expedited procedures for appeal and briefing. Significantly, the definition of what constituted a "conviction" and "term of imprisonment" was also redefined to include time ordered, even if the imposition or execution of the actual sentence is withheld. Not surprisingly, the definition of aggravated felonies was once again redefined to include virtually all felonies. In addition, IIRIRA eliminated the requirement that jail time actually be served by providing that any crime of theft or violence for which a sentence of one year or more could be imposed is an aggravated felony. Last, but not least, IIRIRA extended the procedure of judicial deportations to all cases, not just aggravated felonies.

Among the most recent additions to the United States immigration laws is the USA PATRIOT Act (Patriot Act). Among other provisions, the Act redefines and extends the definition of a terrorist organization to include a group of two or more individuals, whether organized or not, that engages in terrorist activities as defined by the Act. In addition, the Act allows the Attorney General to detain persons for seven days prior to deciding whether to charge them as terrorists if the Attorney General has reasonable grounds to believe that a person has engaged in terrorist activities or sought to overthrow the United States government. If the person is then charged, the Attorney General may keep the person in detention even after the person has a final order of removal from the United States.

IV. CRIMINAL GROUNDS FOR REMOVAL

Today, the three major and most frequently encountered criminal grounds triggering removal from the United States include: aggra-

65. See Kurzban, supra note 36, at 9-12.
66. Id. at 12.
68. Id.
69. Id.
70. See Kurzban, supra note 36, at 18-19.
vated felonies, crimes of moral turpitude,\textsuperscript{71} and drug-related offenses.\textsuperscript{72}

A. Aggravated Felonies

An alien, including an LPR, is deportable at any time after a conviction for an aggravated felony.\textsuperscript{73} Since 1988, the definition of aggravated felony has consistently expanded.

Today, aggravated felonies include the following crimes, irrespective of whether they are committed in "violation of Federal or State law:"\textsuperscript{74} (1) murder, rape, or sexual abuse of a minor;\textsuperscript{75} (2) illicit trafficking in controlled substances as defined in 21 U.S.C. § 802, including a drug trafficking crime as defined under 18 U.S.C. § 924(c);\textsuperscript{76} (3) illicit trafficking in firearms or destructive devices as defined in 18 U.S.C. § 921;\textsuperscript{77} (4) any offense related to laundering of monetary instruments as described in 18 U.S.C. § 1956 or § 1957, including engaging in monetary transactions in property derived from specific

\textsuperscript{71} See infra note 84.

\textsuperscript{72} Other categories of criminal offenses which may result in removal from the United States include: high-speed flight (INA § 237(a)(2)(A)(iv)), firearms violations (INA § 237(a)(2)(C)), miscellaneous crimes (INA § 237(a)(2)(D)), and domestic violence, stalking, and protective order violations (INA § 237(a)(2)(E)).


\textsuperscript{77} See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). In Illinois, these offenses include, but are not limited to, the crimes in 720 ILL. COMP. STAT. 5/24-3 (2003) (unlawful sale of firearms); 225 ILL. COMP. STAT. 210/2001 (2003) (purchase or transfer of explosive materials without a license).
unlawful activity if the amount of the funds exceeds $10,000;78 offenses relating to explosives, firearms, and arson;79 any crime of violence as defined in 18 U.S.C. § 1680 for which the term of imprisonment imposed, regardless of any suspension of imprisonment is at least one year;81 theft offenses, including receipt of stolen property, or burglary offense, for which the term of imprisonment imposed regardless of any suspension of imprisonment, is at least one year;82 ransom offenses;83 child pornography offenses;84 RICO offenses under 18 U.S.C. § 1962, an offense described in § 108485 (if it is a second or subsequent offense) or § 1955 (relating to gambling offenses) for which a sentence of one-year imprisonment may be imposed;86 prostitution and slavery offenses;87 national defense

78. See supra note 75. In Illinois, these offenses include, but are not limited to, the crimes in 720 ILL. COMP. STAT. 5/29B-1 (2003) (money laundering if over $10,000).

79. See 18 U.S.C. §§ 842(h), 844(d)-(i), 922(g)(1)-(5), (j), (n), (o), (p), or (r) (2000) (barring aliens illegally or unlawfully in the U.S. from possessing and receiving any firearms or ammunition), 924(b), (h); 26 U.S.C. § 5861 (2000) (relating to receipt, manufacture or possession of firearms without proper license or taxes). In Illinois, these offenses include, but are not limited to, the crimes in 225 ILL. COMP. STAT. 210/5010 (2003) (unlawful possession of explosive material without a license); 720 ILL. COMP. STAT. 5/24-3A (2003) (unlawful sale of firearms).

80. This does not include a purely political offense.

81. 18 U.S.C. § 16 defines crimes of violence as any offense that has as an element the use or attempted use of force against person or property, or any other felony that by its nature involves a risk that force may be used. For an extensive list of offenses that have been found to constitute (or not constitute) a crime of violence see KURZBAN, supra note 36, at 129-30. In Illinois, these offenses include, but are not limited to, the crimes in 720 ILL. COMP. STAT. 5/12-4 (2003) (aggravated battery); 5/12-4.1 (heinous battery) 5/12-4.2 (aggravated battery with a firearm); 5/12-14.3 (aggravated battery of a child). These Illinois crimes are aggravated felonies only if a sentence of at least one year of incarceration has been ordered.

82. See Hernandez-Mancilla v. INS, 246 F.3d 1002, 1009 (7th Cir. 2001) (holding that possession of stolen vehicle under 625 ILL. COMP. STAT. 5/4-103(a)(1) (2003) is a theft offense). For a complete list of theft offenses, see KURZBAN, supra note 36, at 131-32. In Illinois, these offenses include, but are not limited to, the crimes in 720 ILL. COMP. STAT. 5/19-1 (2003) (burglary), 19-3 (residential burglary); 720 ILL. COMP. STAT. 5/16-1 (felony theft), 5/16A-3 (retail theft, second offense), 5/16G-15 (financial identity theft, felony) (2003); and 625 ILL. COMP. STAT. 5/4-103 (2003) (possession, receipt, transfer of stolen motor vehicle). These Illinois crimes are "aggravated felonies" only if a sentence of at least one year of incarceration has been ordered.

83. This includes those offenses defined under 18 U.S.C. §§ 875, 876, 877, and 1202 (2000). In Illinois, these offenses include, but are not limited to, the crimes in 720 ILL. COMP. STAT. 5/10-2(a)(1) (2003) (aggravated kidnapping for the purpose of obtaining a ransom).

84. This includes those offenses defined under 18 U.S.C. §§ 2251, 2251A, and 2252 (2000). In Illinois, these offenses include, but are not limited to, the crimes in 720 ILL. COMP. STAT. 5/11-20.1 (2003) (child pornography).

85. The "described in language" in aggravated felony statutes means that the state offense must contain all the elements of the federal offense to be an aggravated felony, not including the federal jurisdictional element. See In re Vasquez-Muniz, 23 I. & N. Dec. 207 (B.I.A. 2002).

86. Note that it is not required that a one-year imprisonment is in fact imposed; it is sufficient that this term is a possibility under the relevant statute. In Illinois, these offenses include, but are not limited to, the crimes in 725 ILL. COMP. STAT. 175/4 (2003) (narcotics racketeering).
offenses;\textsuperscript{88} (13) fraud and deceit offenses in which the loss to the victim or victims exceeds $10,000;\textsuperscript{89} (14) alien smuggling under 18 U.S.C. § 274(a)(1)(A);\textsuperscript{90} (15) an offense described in INA § 275(a) or § 276 committed by a person who was previously deported for another aggravated felony conviction;\textsuperscript{91} (16) falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of 18 U.S.C. § 1583 or as described in the document fraud section under 18 U.S.C. § 1546(a) and for which the term of imprisonment is at least twelve months;\textsuperscript{92} (17) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of five years or more;\textsuperscript{93} (18) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered identification numbers, for which the term of imprisonment is at least one year;\textsuperscript{94} (19) an offense relating to obstruction of justice, perjury or subornation of perjury or bribery of a witness for which a term of imprisonment is at least one year;\textsuperscript{95} and (20) an offense relating to a failure to appear before a court pursuant to a court order to answer or disprove a felony charge for which a sentence of two years imprisonment or more may be imposed.\textsuperscript{96}

It is important to note that attempts or conspiracies to commit any of the above noted offenses within the United States also constitute

\textsuperscript{87} See 18 U.S.C. §§ 1581-1589, 2421-2423 (2000). In Illinois, these offenses include, but are not limited to, the crimes in 720 ILL. COMP. STAT. 5/11-14 to 19 (2003).

\textsuperscript{88} See 18 U.S.C. §§ 793, 798, 2153, 2381, 2382 (2000); 50 U.S.C. § 421 (2000). In Illinois, these offenses include, but are not limited to, the crimes in 720 ILL. COMP. STAT. 5/11-14 to 19 (2003) (treason).

\textsuperscript{89} See INA § 101(a)(43)(m), 8 U.S.C. § 1101(a)(43) (2000). Actual loss of $10,000 is not necessary because it may be viewed as an “attempt” crime under 8 U.S.C. § 1101(a)(43)(u) (2000). This category includes the offense of income tax evasion where the loss to the government exceeds $10,000.


\textsuperscript{92} See 8 U.S.C. § 1101(a)(43)(p). There is a limited exception for first offense violators. In Illinois, these offenses include, but are not limited to, the crimes in 720 ILL. COMP. STAT. 5/17-3 (2003) (forgery); 15 ILL. COMP. STAT. 335/14 (2003) (knowing manufacture or altering of identification cards, second offense).

\textsuperscript{93} See 8 U.S.C. § 1101(a)(43), (q). In Illinois, these offenses include, but are not limited to, the crimes in 720 ILL. COMP. STAT. 5/31-6 (2003) (violation of bail bond).

\textsuperscript{94} See 8 U.S.C. § 1101(a)(43), (r). In Illinois, these offenses include, but are not limited to, the crimes in 720 ILL. COMP. STAT. 5/17-3 (2003) (forgery) and 625 ILL. COMP. STAT. 5/4-103.2 (2003) (some aggravated offenses related to motor vehicles).

\textsuperscript{95} See 8 U.S.C. § 1101(a)(43)(s). In Illinois, these offenses include, but are not limited to, the crimes in 720 ILL. COMP. STAT. 5/31-4 (2003) (obstruction of justice), 5/32-2 (perjury), 5/32-3 (subornation of perjury), 5/32-4(a) (harassment of jurors), and 5/33-1 (bribery).

\textsuperscript{96} See 8 U.S.C. § 1101(a)(43)(t). In Illinois, these offenses include, but are not limited to, the crimes in 720 ILL. COMP. STAT. 5/32-10 (2003) (violation of bail bond).
aggravated felonies. In addition, any term of imprisonment referenced in the statute includes suspension of the imposition or execution of the sentence. A sentence of probation, however, has not been considered a sentence of imprisonment.

B. Crimes Involving Moral Turpitude

In addition to drastically expanding the definition of aggravated felony, the changes that occurred during the 1990s significantly expanded the scope of so-called "crimes of moral turpitude," a category of crimes undefined in INA which make an alien deportable under two separate statutory provisions.

First, a "single scheme" offender is deportable if he or she is convicted of a crime involving moral turpitude within five years of his or her last entry into the United States, and a sentence of one year or more may be imposed for the commission of the crime. Notably, the previous statute required a sentence or actual confinement of one year or more. Following the amendments made by AEDPA in 1996, this provision applies to aliens irrespective of the actual length of confinement as long as the offense in question carries a potential sentence of one year or longer.

Second, a "multiple scheme offender" is deportable at any time after entry, without regard to the duration of sentence or length of imprisonment. Thus, a person may be deported even if he or she was never confined or was convicted at a single trial, as long as he or she was charged with separate counts and the prosecution needed to prove separate facts for the convictions, even if the second offense was a misdemeanor.

98. See KURZBAN, supra note 36, at 137.
99. Id.
105. See KURZBAN, supra note 36, at 122 (citing Chanan Din Khan v. Barber, 235 F.2d 547 (9th Cir. 1958)).
Although INA does not define what constitutes a "crime involving moral turpitude," a commonly referenced definition of such crime is "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed [to one another and society in general]."\textsuperscript{107} It is the "inherent nature of the crime as defined by statute and interpreted by the courts as limited and described by the record of conviction" and not the facts and circumstances of the individual's case that determines whether a crime involves moral turpitude.\textsuperscript{108}

Administrative and judicial decisions have held that the following crimes are crimes of moral turpitude: murder and voluntary manslaughter,\textsuperscript{109} rape,\textsuperscript{110} assault with a deadly weapon,\textsuperscript{111} child abuse,\textsuperscript{112} disorderly conduct,\textsuperscript{113} driving under the influence (aggravated),\textsuperscript{114} statutory rape,\textsuperscript{115} embezzlement,\textsuperscript{116} fraud,\textsuperscript{117} petty theft,\textsuperscript{118} counterfeiting,\textsuperscript{119} and stealing bus transfers.\textsuperscript{120} Although this list is far from exhaustive, it illustrates the types of crimes deemed to involve moral turpitude.\textsuperscript{121} In addition, any crime involving fraud is almost always labeled a crime of moral turpitude, whether committed against the government or individuals.\textsuperscript{122}

C. Drug-Related Offenses

While drug trafficking is considered an aggravated felony, other drug-related offenses, including conspiracy to commit a drug-related offense, are separate offenses that can cause a person's removal from the United States, regardless of the criminal sanction imposed by the court or the time elapsed since the alien's last entry into the United

\begin{enumerate}
\item[108.] See United States ex rel Giglio v. Neely, 208 F.2d 337 (7th Cir. 1954).
\item[109.] DeLucia v. Flagg, 297 F.2d 58 (7th Cir. 1962), cert. denied, 369 U.S. 837 (1962).
\item[110.] Ng Sui Wing v. United States, 46 F.2d 755 (7th Cir. 1931).
\item[112.] Guerrero de Nodahl v. INS, 407 F.2d 1405 (9th Cir. 1969).
\item[113.] Hudson v. Esperdy, 290 F.2d 879 (2d Cir. 1961), cert. denied, 368 U.S. 918 (1961).
\item[115.] Castle v. INS, 541 F.2d 1064 (4th Cir. 1976).
\item[118.] United States v. Esparza-Ponce, 193 F.3d 1133 (9th Cir. 1999).
\item[119.] Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974).
\item[120.] Michel v. INS, 206 F.3d 253, 261-66 (2d Cir. 2000).
\item[121.] For a complete list of crimes involving moral turpitude, see KURZBAN, supra note 36, at 52-58.
\item[122.] See id. at 57.
\end{enumerate}
States. Thus, if a non-citizen is convicted of a violation or conspiracy to violate any law or regulation of a state, the United States, or a foreign country relating to a controlled substance as defined in 21 U.S.C. § 802, he or she is removable from the United States. It is, however, not a removable offense for someone to be convicted of a “single offense involving possession for one’s own use of thirty grams or less of marijuana.” However, being under the influence of a drug other than marijuana, even if a misdemeanor under state law, may be an offense that can subject a non-citizen to removal from the United States. The 1986 Anti-Drug Abuse Act made the provision regarding drug-related offenses retroactive to all earlier convictions.

V. Deportation as a Direct Consequence of Criminal Convictions

The continued legislative focus on redefining and expanding the definition of crimes that would result in an alien’s removal from the United States, coupled with a simultaneous restriction on forms of relief available to aliens convicted of criminal violations and the progressive elimination of judicial review for these types of cases, have also been accompanied by a drastically expanding enforcement network led by the INS.

In fiscal year 2000, the INS apprehended 1,814,729 aliens. According to the agency, criminal cases represent the largest proportion of the total investigations workload. In 2000, criminal cases accounted for ninety-one percent of cases completed by the enforcement branch of the service. The number of crime-related removal cases increased by 116 percent between 1994 and 2000. In addition,
the number of aliens removed for criminal violations increased from 1,978 in 1986 to a staggering 71,028 in 2000, which was the largest total in the history of the INS, and a two percent increase over fiscal year 1999.\textsuperscript{133} The INS also continues to increase cooperation with other law enforcement agencies by using the Institutional Removal Program to insure that incarcerated criminal aliens are placed in removal proceedings.\textsuperscript{134} In 2000, 29,171 aliens were removed through this program.\textsuperscript{135} In light of the post-September 11th changes in immigration and national security laws,\textsuperscript{136} the number of aliens removed from the United States on crime-related charges is expected to increase even further in the coming years.

As the above sections demonstrate, violation of state or federal penal laws inevitably results in the commencement of removal proceedings against non-citizens. In most cases, avenues for relief are either unavailable or exceedingly difficult to obtain.\textsuperscript{137} In addition, persons convicted of criminal law violations inevitably face the loss of liberty during (and in many cases after) the pendency of removal proceedings.\textsuperscript{138} Judicial review of the administrative decisions are severely restricted, leaving few meaningful avenues for review. Thus, even if removal from the United States did not amount to “criminal punishment” prior to 1996, the dramatic and far-reaching changes brought by the 1996 laws have transformed removal into a form of punishment.\textsuperscript{139} In most cases involving criminal convictions, mere removal from the United States has become a direct and almost inevitable consequence.\textsuperscript{140}

\textsuperscript{133} Id. at 6.
\textsuperscript{134} YEARBOOK, supra note 129, at 6.
\textsuperscript{135} Id.
\textsuperscript{136} Changes include the formation of a Homeland Security Department, which now includes the INS, as well as the institution of special registration programs for natives of twenty-five countries legally in the United States. The proposed Domestic Security Enhancement Act, also commonly known as “Patriot II,” would also provide for the expatriation of terrorists even if the terrorist is a United States citizen. See draft Patriot II § 501, available at http://www.pbs.org/now/politics/patriot2-hi.pdf (last visited Aug. 19, 2003). The adoption of the later provision would extend the immigration consequences of criminal convictions to United States citizens, who are generally outside the reach of United States immigration laws.
\textsuperscript{137} See United States v. El-Nobani, 145 F. Supp. 2d 906, 913-14 (2001) (“The enactments of AEDPA and IIRIRA have eliminated virtually all discretion on the part of the INS and, under the current state of the law, deportation is often a direct and inevitable result of an alien defendant’s conviction.”).
\textsuperscript{138} See supra notes 14-15 and accompanying text.
\textsuperscript{139} McDermid, supra note 16, at 763.
\textsuperscript{140} See United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000) (stating that a guilty plea to an aggravated felony charge has a “definite, immediate, and largely automatic effect” on the alien defendant’s ability to remain in the United States). See also El-Nobani, 145 F. Supp. 2d at 906.
VI. EFFECTIVE ASSISTANCE OF COUNSEL AND IMMIGRATION

Once the INS initiates removal proceedings against a non-citizen, the non-citizen starts to recognize the consequences of the prior criminal conviction and the issue of effective assistance by the defense counsel arises. Three general scenarios may emerge. In the first scenario, defense counsel and the non-citizen never consider the immigration consequences of a plea because the defense counsel never inquired and the non-citizen never volunteered the relevant immigration status information. In the second scenario, defense counsel in fact becomes aware of the immigration status of the defendant, but neither volunteers nor advises the client concerning the immigration consequences of the criminal conviction. In the third scenario, counsel is aware of the client's immigration status and affirmatively advises the client on the immigration consequences of pleading guilty. The following sections will examine the status of the law on this issue in Illinois, as well as several other states.

A. Effective Assistance of Counsel in General

The right to assistance of counsel in criminal proceedings is a right guaranteed by the United States Constitution. The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."141 The United States Supreme Court has held that the right to counsel guaranteed by the Sixth Amendment recognizes a right to "effective" assistance of counsel.142 In addition, in Strickland v. Washington,143 the Supreme Court reaffirmed that the Sixth Amendment requires the effective assistance of counsel and established a two-part test for determining whether criminal defendants have been deprived of this right.144 Under the Strickland test, the defendant must first prove that his or her attorney's representation fell below an objective standard of reasonableness.145 Performance is reasonable if the advice given is "within a range of competence demanded of attorneys in a criminal case."146 Second, the defendant must establish prejudice by showing a reasonable probability that, had

141. U.S. Const. amend. VI. The right to counsel was held to apply to states through the operation of the Fourteenth Amendment to the U.S. Constitution. See Gideon v. Wainwright, 372 U.S. 335, 340 (1963).
144. Id. at 687.
145. Id. at 687-88.
146. Id. at 687 (citing McMann v. Richardson, 397 U.S. 759, 771 (1970)). Attorney competence is presumed. Id. at 688.
the attorney performed reasonably, there would have been a different outcome.\textsuperscript{147} The same test applies in the context of guilty pleas and plea-bargaining.\textsuperscript{148} In this context, however, the second part of the test is satisfied by a showing that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."\textsuperscript{149}

\textbf{B. Effective Assistance of Counsel in Illinois—The Early Cases}

In \textit{People v. Correa},\textsuperscript{150} the defendant pleaded guilty to three charges of delivery of controlled substance (less than fifty grams of cocaine) in 1981 and was sentenced to three years in the penitentiary, sentences to run concurrently.\textsuperscript{151} Shortly after his release from prison, the INS took the defendant into custody, and initiated deportation proceedings against Correa based on his criminal conviction.\textsuperscript{152} The defendant filed a post-conviction relief petition to have his conviction set aside, alleging that his guilty pleas were not voluntary and that he was denied effective assistance of counsel because his attorney specifically misrepresented to him the effect of his guilty pleas upon his immigration status.\textsuperscript{153} In this case, the defendant specifically asked his attorney about the effect of the guilty plea on his status as an immigrant and the defendant told him that his wife was a United States citizen.\textsuperscript{154} The attorney testified at the evidentiary hearing that he told the defendant "if your wife is an American citizen, then a plea of guilty would not affect your status. You probably will be picking up her status as an American citizen . . . I don't think you have anything to worry about. I don't think you will be deported."\textsuperscript{155} After the evidentiary hearing, the trial court set aside the guilty pleas, reinstated the three charges against the defendant, and set them for trial.\textsuperscript{156} The State appealed, and the appellate court affirmed the trial court's decision.\textsuperscript{157} The State then appealed to the Illinois Supreme Court.\textsuperscript{158}

\begin{thebibliography}{99}
\bibitem{147} \textit{Strickland}, 466 U.S. at 694.
\bibitem{149} \textit{Id.} at 59.
\bibitem{150} 485 N.E.2d 307 (Ill. 1985).
\bibitem{151} \textit{Id.} at 307-08.
\bibitem{152} \textit{Id.} at 308.
\bibitem{153} \textit{Id.}
\bibitem{154} \textit{Id.} at 309.
\bibitem{155} \textit{Correa}, 485 N.E.2d at 309.
\bibitem{156} \textit{Id.} at 308.
\bibitem{158} People v. Correa, 485 N.E.2d 307 (Ill. 1985).
\end{thebibliography}
In *Correa*, the Illinois Supreme Court relied on the United States Supreme Court's decision in *Brady v. United States*,\(^{159}\) which stated that the waiver of constitutional rights involved in a plea of guilty must not only be voluntary, but must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.\(^{160}\) The *Correa* court also relied on the *McMann v. Richardson*\(^{161}\) test for ineffective assistance of counsel, which is stated as: "whether a plea of guilty is unintelligent and therefore vulnerable. . . . depends as an initial matter, not on whether a court would retroactively consider counsel's advice to be right or wrong, but whether that advice was within a range of competence demanded of attorneys in criminal cases."\(^{162}\)

The Illinois Supreme Court noted that the resolution of the question of whether the defendant’s pleas, made in reliance on counsel’s advice, were voluntarily, intelligently, and knowingly made “depends on whether the defendant had effective assistance of counsel.”\(^{163}\) If the defendant’s pleas were made “in reasonable reliance upon the advice or representation of his attorney, which advice or representation demonstrated incompetence, then it can be said that that the defendant’s pleas were not voluntary; that is, there was not a knowing and intelligent waiver of fundamental rights that a plea of guilty entails.”\(^{164}\) The court noted that the United States Supreme Court guidelines laid out in *Strickland* may not “fit neatly into the contours of this case” because the *Strickland* decision addressed the conduct of counsel in the “adversary setting of trial,” whereas this case involved “advice rendered to a defendant in counsel’s office, which advice was one of the factors underpinning the defendant’s decision to plead guilty.”\(^{165}\)

The court noted that “it is counsel’s responsibility, and not the court’s, to advise an accused of a collateral consequence of a plea of guilty; the consequence of deportation has been held to be collateral.”\(^{166}\) The court noted that deportation, although a collateral consequence of a criminal conviction, is nevertheless “a drastic

\(^{159}\) 397 U.S. 742 (1970).

\(^{160}\) *Correa*, 485 N.E.2d at 310.


\(^{162}\) *Id.* *Correa* was decided several months prior to the United States Supreme Court decision in *Hill v. Lockhart*, 474 U.S. 52 (1985), which further clarified the ineffective assistance of counsel test in the context of guilty plea.

\(^{163}\) *Correa*, 485 N.E.2d at 310.

\(^{164}\) *Id.*

\(^{165}\) *Id.*

\(^{166}\) *Id.* at 310-11 (citing Fruchtman v. Kenton, 531 F.2d 946 (9th Cir. 1976); Michel v. United States, 507 F.2d 461 (2d Cir. 1974)).
consequence,"167 which in most cases is "more severe than the penalty imposed by the court in response to the plea."168 The court, however, distinguished the circumstances of the case from a situation where counsel simply fails to advise the defendant of the collateral consequence of deportation.169 The defendant specifically asked counsel's advice on the question, and counsel provided "unequivocal, erroneous, misleading representations . . . the accuracy of which counsel could have ascertained before the pleas were entered."170

As a result of counsel's erroneous and misleading advice which was held to "fall outside the range of competence" required of counsel in situations where the immigration consequences of pleading guilty are of prime concern to the defendant, the Illinois Supreme Court affirmed the appellate court decision finding that defendant's pleas of guilty were not intelligently and knowingly made and were, therefore, not voluntary.171

In People v. Padilla, the alien defendant was charged with three counts of delivery of controlled substance to a government agent.172 The defendant pleaded guilty and the trial court entered judgment, convicting the defendant and sentencing him to concurrent terms of eight years on two of the counts and seven years on the remaining count.173 After the INS started deportation proceedings against him, Padilla filed a petition for post-conviction relief contending that he was denied effective assistance of counsel when counsel either erroneously advised him that his guilty pleas would not subject him to deportation or failed to advise him of the deportation consequences of his guilty plea.174

In Padilla, the defendant testified that he raised the immigration question twice with his attorney.175 First, prior to pleading guilty, the defendant asked his attorney whether he would be deported.176 The defendant testified that his attorney assured him that, because Padilla's wife was an American citizen, the defendant had a green card, and he had been in the United States for over six years, he would not

168. Id.
169. Id. This will be referred to as the "passive conduct" limitation in the remainder of the article.
170. Id.
171. Id. at 312.
173. Id. at 1182-83.
174. Id. at 1184.
175. Id. at 1183.
176. Id.
be deported. Padilla also testified that he asked his attorney a second time regarding the immigration consequences of pleading guilty while the trial judge was still in charge of the case, and that his attorney once again told him not to worry about immigration and that he would not be deported. The defendant admitted that he said nothing about the immigration issue to the trial judge, but insisted that had he known his guilty plea would result in his deportation, he would have risked going to trial. Unlike the attorney in Correa, however, Padilla's attorney testified that the immigration issue was never raised in his discussions with the defendant. Furthermore, Padilla's attorney denied telling the defendant that guilty pleas would not subject him to deportation. The attorney, however, testified that he knew that Padilla was an alien from the start and that aliens could be deported for drug offenses.

The Padilla court noted that a guilty plea is valid "when made as a voluntary and intelligent choice by defendant." When the defendant enters a guilty plea after representation by counsel, the voluntariness of the plea reflects whether counsel's advice was within the expected range of competence of attorneys practicing criminal law. The court further stated that the Supreme Court applies the two-prong test for ineffective assistance of counsel provided by Strickland. In Padilla, the prejudice prong is satisfied by "showing a reasonable probability that, but for counsel's errors, defendant would not have pleaded guilty." Following Correa, the appellate court further stated that a defendant's plea is "rendered involuntarily due to ineffective assistance of counsel when misrepresentations by counsel concerning deportation influenced defendant to plead guilty."

Unlike the Illinois Supreme Court in Correa, the Padilla court chose to address the situation in which defense counsel failed to discuss deportation and question whether such failure constitutes ineffective assistance of counsel. After first noting that deportation has been

177. Id.
179. Id. at 1184.
180. Id. at 1183.
181. Id.
182. Id.
183. Id. at 1184 (citing Hill v. Lockhart, 474 U.S. 52, 54 (1985); Brady v. United States, 397 U.S. 742, 755-57 (1970)).
184. Padilla, 502 N.E.2d at 1184 (citing Hill, 474 U.S. at 56; McMann v. Richardson. 397 U.S. 759, 770-71 (1970)).
185. Id.
186. Id. (citing Correa, 485 N.E.2d at 307).
187. Id. at 1185-86.
"recognized as a severe action that can be extremely injurious," the equivalent of banishment, and "a life sentence of exile," the Padilla court considered other state legislation and case law on the issue of effective assistance of counsel in the context of alien defendants and guilty pleas.

The court noted that five states have enacted statutes requiring courts to inform defendants of the possible deportation consequences of guilty pleas, and that some jurisdictions have concluded that the failure of an attorney practicing criminal law to advise a defendant of immigration consequences of guilty pleas constitutes ineffective assistance of counsel. These cases hold that, because the penalty of deportation is so extreme, "counsel has a duty to inform his client of this potential consequence so that any plea of guilty can be truly knowing and voluntary." The Padilla court, however, also noted that other jurisdictions have not followed the above standard.

"The overall trend in State courts," the court concluded, "favors finding ineffective assistance of counsel rendering a guilty plea involuntary where counsel knows his client is an alien and does nothing to inform him of possible deportation consequences." The court adhered to this overall trend and held that Padilla was unable to make a knowing and intelligent decision to plead guilty and that the failure of an attorney to inform a client that a guilty plea will result in deportation, when that consideration may be material to the client's interests, constitutes ineffective assistance of counsel, making the guilty plea involuntary. As a result, the court ordered that the guilty plea be vacated and defendant granted a new trial.

In People v. Miranda, the alien defendant pleaded guilty to one count of aggravated battery and the court sentenced him to a thirty-

188. Id. at 1185 (citing Ng Fung Ho v. White, 259 U.S. 276, 284 (1977)).
189. Id. (citing Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1922)).
191. See infra Part VI(D).
192. These states include California, Connecticut, Massachusetts, Oregon, and Washington.
195. Id.
196. Id. at 1186 (citing United States v. Campbell, 778 F.2d 764 (11th Cir. 1985); United States v. Santelises, 509 F.2d 703-04 (2d Cir. 1975); Tafoya v. State, 500 P.2d 247, 251-52 (Alaska 1972), cert. denied, 410 U.S. 945 (1973)).
198. Id.
199. Padilla, 502 N.E.2d at 1186.
month term of probation. After serving his sentence, and after recognizing that his guilty plea would adversely affect his immigration status in the United States, Miranda filed a post-conviction petition alleging that he was denied effective assistance of counsel when his attorney, who knew that he was an illegal alien, did not advise him as to the effect of the guilty plea and conviction on his immigration status. The circuit court granted the defendant’s post-conviction petition and granted him leave to withdraw his guilty plea.

On appeal, the State argued that defense counsel had no duty to sua sponte advise defendant regarding the effect of a guilty plea upon his immigration status. The defendant, on the other hand, argued that the judgment of the circuit court should be affirmed because a criminal defense attorney has a duty to advise his client of all collateral consequences of a guilty plea, including the effect of a guilty plea and a conviction upon defendant’s immigration status and the failure . . . to so advise his client amounts to ineffective assistance of counsel and renders the client’s guilty plea involuntary.

After referring to the United States Supreme Court precedent in Strickland and Hill, the Miranda court followed the Illinois Supreme Court decision in Correa by affirming that “[d]eportation, although collateral, is nevertheless, a drastic consequence” and that “[i]n most cases this collateral consequence is more severe then the penalty imposed by the court in response to a plea.” Although the Miranda court acknowledged the “passive conduct” limitation in Correa, the court nevertheless noted that the Correa decision established several significant points including the following: (1) defense counsel has the responsibility to advise a defendant of collateral consequences of a guilty plea in at least some circumstances; (2) immigration consequences—particularly deportation—may be drastic, often harsher than the sentence itself; and (3) to give erroneous and misleading advice on deportation falls outside of the range of competence demanded of attorneys in criminal cases.

The Miranda court also noted that the appellate court decision in Padilla stands for the proposition that, when an attorney knows that a client is an alien, the attorney’s representation falls outside of the range of competence demanded of attorneys in criminal cases if the

201. Id. at 1009.
202. Id. at 1010.
203. Id.
204. Id. at 1011.
205. Id.
207. Id.
attorney fails to inform the client of the possibility of deportation when that may be material to the client's interests.\textsuperscript{208} As a result, the court noted that it is not "necessary that a bad collateral consequence be a certitude for it to be one defense counsel should discuss with the defendant before a guilty plea."\textsuperscript{209} Rather, it is only necessary "that the consequence be material to the client's interests."\textsuperscript{210} A consequence is material if, under all of the circumstances, "including both the severity and the likelihood of the particular consequence, it is one that may affect a client's decision to plead guilty."\textsuperscript{211} The court held that the immigration consequences of the guilty plea to Padilla were of such magnitude.\textsuperscript{212}

In conclusion, the court held that the immigration consequences present in the case "were sufficiently likely to affect defendant's decision to plead guilty" and that counsel, knowing defendant was an illegal alien, should have advised defendant of these consequences.\textsuperscript{213} The attorney's failure to do so resulted in his advice "falling outside the range of competence demanded of attorneys in criminal cases."\textsuperscript{214} This approach to the issue of ineffective assistance of counsel was followed by two additional appellate decisions in Illinois.

First, in \textit{People v. Maranovic}\textsuperscript{215} the Appellate Court of Illinois, First District, considered defendant Maranovic's petition under the Post Conviction Hearing Act\textsuperscript{216} alleging that his guilty plea to a charge of delivering thirty grams or less of a substance containing cocaine was involuntary because he was not advised as to the possibility of deportation as a result of the plea.\textsuperscript{217} In this case, the defendant's attorney testified that he did not advise the defendant about the possible consequences of deportation, which could have occurred as a result of entering a guilty plea.\textsuperscript{218} In addition, the defense attorney testified that, although the defendant did not inform him that he was an alien, he

\begin{itemize}
\item \textsuperscript{208} Id. at 1012.
\item \textsuperscript{209} Id. at 1013.
\item \textsuperscript{210} Id. (citing Padilla, 502 N.E.2d at 1186).
\item \textsuperscript{211} Id. at 1014.
\item \textsuperscript{212} The court noted that if the defendant were deported after the conviction in this case he could not apply for admission into the United States since he would be excludable. \textit{Miranda}, 540 N.E.2d at 1013. In addition, the court noted that, by pleading guilty to a crime of moral turpitude, defendant became ineligible for discretionary relief from deportation. \textit{Id}. The court noted that the defendant would be eligible for some relief if he was not convicted of the crime in this case. \textit{Id}.
\item \textsuperscript{213} Id. at 1014.
\item \textsuperscript{214} Id.
\item \textsuperscript{215} 559 N.E.2d 126 (Ill. App. Ct. 1990).
\item \textsuperscript{216} 725 ILL. COMP. STAT. 5/122-1 (2001).
\item \textsuperscript{217} Maranovic, 559 N.E.2d at 126-27.
\item \textsuperscript{218} Id. at 127.
\end{itemize}
believed that the defendant was from Yugoslavia but did not inquire into defendant’s legal status in the United States. The arrest report, which was reviewed by the attorney, indicated that Maranovic’s place of birth was Yugoslavia.

The appellate court in Maranovic relied on its earlier decision in Padilla and the plurality opinion in People v. Huante in reaching its decision. In Huante, the appellate court majority opinion extended the Padilla standard and found that trial counsel either knew or should have known that defendant was an alien and, therefore, was required to advise defendant of the deportation consequences of a guilty plea. The determination of whether the failure to investigate potential deportation consequences constitutes ineffective assistance of counsel turns on “whether the trial attorney had sufficient information to form a reasonable belief that defendant was in fact an alien.”

Applying this standard to the facts of the Maranovic case, the appellate court noted that the trial attorney “had sufficient information, before defendant pleaded guilty, to question defendant’s alien status; yet he chose, albeit erroneously, to assume that defendant was not of alien status.” As a result, trial counsel’s representations fell below an objective standard of reasonableness when he failed to ascertain the immigration status of the defendant in a case where a conviction could result in deportation.

In the second case, People v. Luna, the defendant pleaded guilty to a charge of forgery. After being denied legalization under the Immigration Reform Control Act because of his forgery conviction, he brought an action for post conviction relief and argued that his guilty plea should be vacated as it was not voluntary because of ineffective assistance of counsel at the time the plea was entered. The defendant asserted that he was never told of any potential immigration consequences for entering a plea of guilty and that he would not have pleaded guilty if he had been advised that he could be deported.

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219. Id.
220. Id. On cross-examination, the attorney for Maranovic revealed that he acted as the trial attorney in Padilla. Id.
223. Id.
224. Id. at 128.
225. Id. The appellate court also found the second element of the Strickland test satisfied, noting that the trial attorney’s “unprofessional errors affected the outcome of the case.” Id.
228. Luna, 570 N.E.2d at 405.
229. Id.
As a threshold matter, the appellate court in *Luna* noted that a "defendant who seeks to have his guilty plea vacated because he was never advised that it could result in deportation is not precluded from seeking relief under the Post-Conviction Hearing Act."230 The court noted that even though the defendant had completed his term of probation, the consequence of deportation is a "drastic one," and the Act provides the appropriate method to "belatedly assert" the defendant's rights.231

Citing to the *Correa, Maranovic, Huante, and Miranda* decisions, the court in *Luna* noted that it is the responsibility of the defense attorney to research and advise the alien defendant of the immigration consequences of a plea of guilty to a felony charge.232 As in *Maranovic*, the determination of whether the failure to investigate potential deportation consequences constitutes ineffective assistance of counsel turns on whether the trial attorney "had sufficient information to form a reasonable belief that defendant was in fact an alien."233 Thus, if the defendant's attorney had sufficient information to reasonably believe the defendant was an alien but failed to advise him of the potential immigration consequences resulting from entering a plea of guilty, the representation would fall below the objective range of competence expected of attorneys in such criminal matters.234 Because insufficient evidence was available to the court at the appellate stage, the case was remanded to the trial court, which was ordered to conduct an evidentiary hearing on the issue.235

The line of reasoning developed in the aforementioned cases was substantially modified by the Illinois Supreme Court decision, *People v. Huante*.236

**C. People v. Huante**

In *Huante*, defendant Jose Huante pleaded guilty to felony drug charges. As a result of his convictions, the defendant became subject to deportation from the United States.237 In his post-conviction petition, the defendant argued that his plea was involuntary because his attorney failed to advise him that he would be deported as a result of

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230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* at 406.
235. *Id.*
237. *Id.* at 739.
his convictions. The trial court denied defendant's petition, but the appellate court reversed and the State appealed.

The Illinois Supreme Court found that, during discussions between the defendant and his attorney regarding plea negotiations and the consequences of pleading guilty, the attorney did not ask the defendant about his citizenship, the defendant did not disclose to the attorney his alien status, and the attorney was not otherwise aware of his status. Furthermore, the attorney did not at any time advise the defendant that he would be subject to deportation as a result of his convictions although he was aware that a drug conviction could result in deportation under federal law. The defendant also testified that he would not have entered the guilty plea had he known that he would face deportation as a consequence of conviction.

The Illinois Supreme Court's analysis of the case began with the familiar \textit{Strickland} rationale. The court noted that, although \textit{Strickland} dealt with a claim of ineffective assistance of counsel in a capital sentencing proceeding, the test announced in \textit{Strickland} "is applicable as well to challenges to guilty pleas alleging ineffective assistance of counsel." To show that he was deprived of effective assistance of counsel, the defendant must establish both that the attorney's performance was deficient, and that the defendant suffered prejudice as a result.

Next, the Illinois Supreme Court noted its holding in \textit{Correa}, stating that the court "expressly declined to consider the question raised here, whether 'the passive conduct of counsel in failing to discuss with a defendant the collateral consequences of a guilty plea' constituted ineffective assistance of counsel." In \textit{Huante}, the court noted that it was "undisputed that the defendant and his attorney did not discuss the defendant's status as a legal alien, and that the attorney did not provide any misleading or incorrect advice with respect to immigration consequences of criminal convictions." The Illinois Supreme Court then proceeded with the application of the \textit{Strickland} test. First, the court considered whether counsel's per-
formance was deficient—that is, whether it fell below an objective standard of reasonableness.248 In cases involving guilty pleas, the standard for reasonableness depends on whether the advice given was "within a range of competence demanded of attorneys in criminal cases."249 Because the validity of the plea turns on whether the defendant entered the plea voluntarily and intelligently, counsel's conduct is deficient under Strickland if the attorney failed to ensure that the defendant entered the plea voluntarily and intelligently.250 The court further noted that, in measuring the reasonableness of an attorney's performance, courts have emphasized the distinction between advising a defendant of the "direct" consequences of a guilty plea and consequences "such as deportation that arise collaterally from the plea."251 Because the knowledge of collateral consequences is "not necessary for the entry of a knowing and voluntary plea, courts have generally "declined under Strickland to find an attorney who failed to advise a defendant of the deportation consequences . . . provided ineffective assistance of counsel."252

The Illinois Supreme Court further noted that it had adopted Illinois Supreme Court Rule 402 in order to ensure that a defendant enters his plea knowingly and voluntarily.253 Rule 402, however, did not require that a defendant be advised of the collateral consequences of his plea.254 In addition, the court noted that decisions interpreting the federal counterpart to Rule 402, Rule 11 of the Federal Rules of Criminal Procedure, have also held that the validity of the guilty plea is not affected by the failure of the court or counsel to inform the defendant of the "myriad consequences that are collateral to a felony conviction."255

In sum, the court found no reason to depart from the reasoning that defendant's awareness of collateral consequences, including deportation, is not a prerequisite to the entry of a knowing and voluntary plea of guilty,256 "which reflects the proper concerns for the Sixth Amendment guarantee of effective assistance of counsel, for the practical administration of criminal justice, and for the integrity of the plea

248. Id. at 741-42 (citing Strickland, 466 U.S. at 688).
249. Id. at 743 (citing McMann v. Richardson, 397 U.S. 759, 770-71 (1970)).
250. Id. (citing Santos v. Kolb, 880 F.2d 941, 944 (7th Cir. 1989)).
251. Id.
253. Id. at 743-44.
254. Id.
255. Id. at 744.
256. Id.
process." Thus, applying this standard to the circumstances of the case, the court held that the defendant's attorney's failure to "volunteer" to his client advice concerning the deportation consequences of a criminal conviction "did not fall below an objective standard of reasonableness." Although this finding would have been sufficient to dispose of Huante's claim, the Illinois Supreme Court also addressed the second prong of the Strickland test, namely, whether there is a reasonable probability that, but for the attorney's errors, "the result of the proceeding would have been different." On this issue, the court noted that the same threat of deportation existed "whether defendant was convicted upon a guilty plea or following trial." In addition, because defendant raised no possible defense to the charges at the post-conviction proceeding and said nothing to repudiate his admission of guilt, the court noted that "defendant would have no reason to continue with the plea even if he had been aware of the deportation consequences of a conviction." As a result, the court found no "reasonable probability" that advising the defendant of the deportation consequences of a conviction would have led him to reject the terms of the plea agreement.

In conclusion, the court found that neither prong of the Strickland test was satisfied, meaning that the defendant had shown "neither that his attorney's performance caused him to plead guilty unknowingly or involuntarily, nor that he would have insisted on proceeding to trial had he been aware of the collateral consequences of his convictions." After noting that "no less is required," the Illinois Supreme Court expressly disapproved of the Maranovic, Padilla, and Miranda decisions, to the extent inconsistent with the court's decision in Huante.

Following the 1991 Illinois Supreme Court decision in Huante, the failure to advise a non-citizen defendant about the immigration conse-

257. Id.
258. Huante, 571 N.E.2d at 744-45.
259. Id. at 745 (citing Strickland, 466 U.S. at 694). The Illinois Supreme Court noted that in this case, the appellate court concluded that the defendant satisfied the prejudice prong because "there could be no doubt that the attorney's conduct affected the outcome of the plea process." Id. at 741.
260. Id. at 745.
261. Id. The court also noted that the defendant was originally charged with a Class X felony and that the defendant failed to show that the decision to go to trial would have carried with it anything more than a remote chance of gaining an acquittal. Id. at 744.
262. Huante, 571 N.E.2d at 744.
263. Id. at 744-45.
264. Id.
quences of his or her conviction no longer constituted a claim for ineffective assistance of counsel in Illinois. Unlike the earlier supreme court decision in Correa and the appellate court decisions that followed, the supreme court decision in Huante seemed to have embraced the "ignorance is bliss" standard with regard to a criminal defense attorney's representation of non-citizen clients. In the aftermath of Huante, a defense attorney was considered effective in representing his non-citizen client even though he or she remained personally unaware about his or her client's immigration status and the immigration consequences of a criminal conviction. Therefore, since Huante, Illinois courts considered a post-conviction motion under the ineffective assistance of counsel claim only if the defense attorney affirmatively misadvised his or her non-citizen client concerning the immigration consequences of a conviction. This practice will be considerably altered following the adoption of Public Act 93-0373.

The adoption of Public Act 93-0373 recognizes that the Illinois Supreme Court decision in the 1991 Huante case was made prior to the series of dramatic changes in immigration laws that have radically altered the immigration consequences of criminal convictions for non-citizens. The adoption of AEDPA and IIRIRA in 1996 made the immigration consequences of a criminal conviction more severe and more certain by dramatically expanding the definition of aggravated felony, increasing the class of persons "convicted" (by eliminating the requirement of actual incarceration), reducing or eliminating the forms of relief available, and reducing the minimum sentence that must be imposed to trigger removability from the United States. As demonstrated in the Mrs. Gehris story above, there is no other area of the law today pursuant to which a misdemeanor conviction can cause permanent separation from a person's longtime home and family.

265. Id.
266. See infra Part III. See also U.S. v. El-Nobani, 145 F. Supp. 2d 906, 916-17 (N.D. Ohio 2001) ("The precedent that those cases relied upon was derived at a time when an alien defendant's conviction did not automatically lead to deportation. Before AEDPA and IIRIRA, immigration judges could weigh an alien defendant's extenuating factors (length of residency, personal ties, etc.) with the severity of the defendant's crime, unless the defendant had committed an aggravated felony (when the term "aggravated" still had some and had served at least five years in jail. This Court cannot hold that deportation is merely a collateral consequence of conviction now that most alien defendants will be automatically, and summarily, deported, even those who commit relatively minor crimes and receive no prison time.").
267. See infra Part VI(E); supra Part III. See also McDermid, supra note 16, at 743.
268. See infra Part II.
In addition, the Huante standard is not consistent with the American Bar Association Standards for Criminal Justice which provide that, if a defendant will face deportation as a result of a conviction, defense counsel “should fully advise the defendant of those consequences.” 269 The United States Supreme Court in INS v. St. Cyr 270 has acknowledged that criminal defense counsel routinely advise their clients on the immigration consequences of criminal convictions. 271 A defense attorney following the standard adopted by the Supreme Court in Huante was essentially allowed to ignore a major aspect of his client’s case, thereby significantly limiting the range of issues he may present in support of a particular plea bargain. 272 Such practices, in turn, are inconsistent with the defender’s mandate of protecting a client’s best interest.

D. Other States

Although not all states require that non-citizens be advised of the immigration consequences of pleading guilty to criminal charges, the draconian changes in immigration laws in the 1990s and the consequences they impose on non-citizens convicted of criminal offenses have led a large number of states to adopt measures requiring such advisories at the guilty plea stage of the proceedings.

As of this writing, twenty-one states in the United States (including Illinois) require that the trial judges advise defendants that immigration consequences may result from accepting a plea agreement. Other than Illinois, these states include the following: California 273, Connecticut 274, District of Columbia 275, Florida 276, Georgia 277, Hawaii 278, Maryland 279, Massachusetts 280, Minnesota 281, Montana 282, Maine 283, New

271. See infra Part VI(E).
272. Id.
274. CONN. GEN. STAT. §54-1j (2001).
276. FLA. R. CRIM. P. 3.172(e)(8).
277. GA. CODE ANN. §17-7-93 (1997).
281. MINN. R. CRIM. P. 15.01.
283. ME. R. CRIM. P. 11.
The first illustrative example of these provisions is Section 1016.5 of the California Penal Code:

(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

Another approach is exemplified by the Maine Supreme Court Rule 11. This Rule provides:

(b) Prerequisites to Accepting a Plea of Guilty or Nolo Contendere to a Class C or Higher Crime. In all proceedings in which the offense charged is murder or a Class A, Class B, or Class C crime, before accepting a plea of guilty or nolo contendere, the court shall insure:

(5) That a defendant who is not a United States citizen has been notified that there may be immigration consequences of the plea, as provided in subdivision (h). The court is not required or expected to

287. OHIO REV. CODE ANN. §2943.031 (Anderson 2003).
293. CAL. PENAL CODE §1016.5 (West 1985).
inform the defendant of the nature of any consequences, but may consider a brief continuance to permit the defendant to make inquiry.

... (h) Immigration consequences of the plea. Before accepting a plea of guilty or nolo contendere, the court shall inquire whether the defendant is a United States citizen. If the defendant is not a United States citizen, the court shall ascertain from defense counsel whether the defendant has been notified that there may be immigration consequences of the plea. If no such notification has been made, or if the defendant is unrepresented, the court shall notify the defendant that there may be immigration consequences of the plea and may continue the proceeding for investigation and consideration of the consequences.294

The Maine Rule "builds into the guilty plea proceeding a pause—a 'stop-look-and-listen'—to ponder whether there may be serious immigration consequences of the plea."295 Because the section appears to treat immigration consequences as "collateral" to a plea, the failure to comply with the provision on immigration consequences "is not intended as a ground for collateral attack."296 In addition, and unlike the Maryland approach described next, the Maine approach specifically requires the court to inquire whether the defendant is a U.S. citizen prior to proceeding to notify the defendant under the Rule. The requirement that a court inquire into the citizenship of the defendant has been specifically rejected in Maryland and Massachusetts, as well as a number of other states.

Although similar to Maine, Maryland differs in some important respects from both Maine and the newly adopted Illinois provision. Maryland Rule R. 4-242 provides:

(5) Collateral Consequences of a Plea of Guilty or No Contest: Before the court accepts a plea of guilty or no contest, the court, the State's Attorney, the attorney for the defendant, or any combination thereof shall advise the defendant (1) that by entering the plea, if the defendant is not a United States citizen, the defendant may face additional consequences of deportation, detention, or ineligibility for citizenship and (2) that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequences of the plea. The

294. ME. R. CRIM. P. 11.
296. Id. The Advisory Committee note also states that the purpose of the amendment is to prevent collateral attack and to promote both fairness and finality. ME. R. CRIM. P. 11, Advisory Committee Note (2002). See also Murphy, supra note 295.
omission of advice concerning the collateral consequences of a plea does not itself mandate that the plea be declared invalid.

Under the "Maryland approach," in determining whether to accept the plea, the court should not question defendants about their citizenship or immigration status. Rather, the court should only ensure that all defendants are advised in accordance with this section. In addition, the Maryland approach also allows for either the defendant's attorney, the State's Attorney, or the court (or a combination of the three) to advise the defendant about the possible immigration consequences of the plea. This approach is, therefore, consistent with the primary purpose of this procedure, which is to provide notice to a defendant and allow him to make a truly knowing and voluntary decision concerning the plea. Under this approach, it is of no consequence which party to the proceeding actually informs the defendant of the immigration consequences; as long as one of the parties does so, the primary purpose of the rule is satisfied.

Yet another similar approach is followed in Wisconsin. The Wisconsin statute, which is similar to the Washington and Hawaii statutes on the issue, provides as follows:

(1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:

(c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

(2) If a court fails to advise a defendant as required by sub. (1)(c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. This subsection does not limit the ability to withdraw a plea of guilty or no contest on any other grounds.

The "Wisconsin approach" is the broadest of the approaches described above. Under the provisions of section 971.08, the court is required to address the defendant personally and advise him regarding the possible immigration consequences of her plea. Unlike other statutes discussed above, the Wisconsin statute provides the specific lan-

297. Id.
language that a judge must use in advising a defendant. In addition, the Wisconsin statute also provides a remedy for a violation of this provision in subsection (2). A defendant is required to show prejudice—that, as a result of entering to a plea, (which was not preceded by the required advisory by the court) the defendant is likely to be deported or excluded from the United States or denied naturalization.

The adoption of similar provisions in other states reflects the legislative (or supreme judicial) recognition that, in many instances, an individual who is not a citizen of the United States enters a plea of guilty or no-contest without knowing that a conviction of such an offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to Federal laws. The principal reason legislatures and courts adopt such measures is to "promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea." As a result, in the event the defendant or the defendant's counsel was unaware of the immigration consequences resulting from a conviction, a court in such cases may grant the defendant a reasonable amount of time to familiarize himself with the issue and further negotiate with the prosecuting agency.

Similar to California, the Florida Rule of Criminal Procedure 3.172(c)(8) states that a judge accepting a plea to a criminal offense shall inform the defendant that, if he or she is not a U.S. citizen, the

298. See State v. Garcia, 610 N.W.2d 180 (Wis. Ct. App. 2000), review denied, 612 N.W.2d 734 (Wis. 2000) (holding that before accepting plea of guilty or no contest, trial court must personally address defendant regarding risk that plea will result in deportation from country, exclusion from admission, or denial of naturalization, in express words of statute requiring court to inform defendant of risks; however, a failure to comply with requirement is subject to harmless error analysis). See also State v. Douangmala, 646 N.W.2d 1 (Wis. 2002) (Statute establishing deportation warning in accepting pleas of guilty and no contest is a clear directive to the circuit courts and not only commands what the court must personally say to the defendant, but the language is bracketed by quotation marks, an unusual and significant legislative signal that the statute should be followed to the letter.)

299. Garcia, 610 N.W.2d 180 (Trial court's failure to inform defendant in express statutory language of risk that his no contest plea to drug charges could potentially result in deportation, exclusion from admission to country, or denial of naturalization, was not prejudicial and, thus, was harmless error and did not require that defendant be allowed to withdraw plea, when defendant was informed during plea hearing of risk of deportation and indicated that he understood warning, court repeatedly stated during hearing that no one could be sure whether defendant would be deported, and risk of deportation was a prime consideration in negotiation of plea agreement.).

300. See CA. PENAL CODE § 1016.5(d); WASH. REV. CODE § 10.40.200(1).

301. Id.

302. CA. PENAL CODE § 1016.5(d).
entry of the plea may lead to deportation. The failure of the court to inform a non-citizen defendant that the plea may subject him or her to deportation is not, by itself, sufficient to allow for a withdrawal of the plea. Under subsection (i), a showing of prejudice to the defendant is also required. Several Florida cases have considered the standard of prejudice required to set aside a plea due to the court’s failure to advise the defendant of the immigration consequences of the plea.

In Perriello v. State, the defendant was an Italian citizen who had been an LPR in the United States for thirty-two years. He was originally charged with the offense of capital sexual battery, but after plea negotiations, he entered a plea of guilty to a reduced charge of lewd and lascivious or indecent acts. Subsequent to his guilty plea, the INS commenced removal proceedings against him based on the existence of the criminal conviction. The evidence in the record established that, during the plea colloquy, the trial judge failed to warn the defendant of the immigration consequences of the plea, as required by Florida Rule of Criminal Procedure 3.172.

As a result of this finding, the Court of Appeals held that the threat of deportation resulting from a plea is sufficient to establish the prejudice required under the Florida rule. In addition, the court also ruled that signing a written plea form, which includes language that deportation consequences may ensue, does not meet the requirements under Rule 3.172; the court must inform the defendant of the possible immigration consequences in an oral plea colloquy in order to comply with the Rule.

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303. Florida Rule of Criminal Procedure 3.172(c)(8) states:
if [defendant] pleads guilty or nolo contendere the trial judge must inform him or her that, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases.

FLA. R. CRIM. P. 3.172(c)(8).

304. FLA. R. CRIM. PROC. 3.172(i).


306. Id. at 258.

307. Id.

308. Id. at 259.

309. Id.

310. Id. See also Hen Lin Lin v. State, 683 So. 2d 1110 (Fla. Dist. Ct. App. 1996) (holding that a written plea form that notes the possibility of deportation does not comply with Rule 3.172(c)(8) absent an oral plea colloquy informing the defendant of the possible immigration consequences of the plea).
In another decision, however, the court of appeals upheld a plea of nolo contendere to a possession of cocaine and drug paraphernalia charges even though the sentencing judge did not inform the defendant of the possible immigration consequences. The court reasoned that because the defendant voluntarily left the United States under the threat of deportation, it was his own decision rather than a direct consequence of the plea. Additionally, in Ross v. State, a Florida court of appeals similarly refused to vacate the non-citizen defendant's claim and held that, to show prejudice, the defendant not only had to assert that he would not have entered into the plea agreement but, in addition, that "had he gone to trial, he probably would have been acquitted." The Florida Supreme Court has recently reaffirmed the need to protect the right of non-citizen defendants to be informed about the immigration consequences of pleading guilty. In Peart v. Florida, the court also clarified the standard for prejudice that is required in such cases.

In Peart, the court of appeals held that, in order to demonstrate prejudice under Rule 3.172, the defendant must demonstrate a "probable likelihood that he or she would have been acquitted." The court of appeals noted that to require any less of a showing "would subject the trial court to entertaining petitions for relief to set aside pleas in cases where the defendant would nonetheless be found guilty at trial and therefore would be facing the same consequence of deportation."

With respect to showing prejudice, the Florida Supreme Court disagreed with the court of appeals in this case and stated that it was well established that "[i]n order to show prejudice pursuant to a rule 3.172(c)(8) violation, defendants had to establish that they did not know that the plea might result in deportation, that they were 'threatened' with deportation because of the plea, and that had they known of the possible consequence they would not have entered the plea." Accordingly, and relying on established precedent, the Flor-

312. Id. at 1037.
314. Peart v. State, 756 So. 2d 42 (Fla. 2000).
315. Peart, 705 So. 2d at 1063-64.
316. Id.
317. Peart, 756 So.2d at 43 (citing Perriello, 684 So. 2d at 259 (holding prejudice shown where defendant was "threatened" with deportation); Marriott v. State, 605 So. 2d 985, 987 (Fla. Dist. Ct. App. 1992) (holding that "threat" of deportation of alien was a sufficient showing of prejudice in such cases); De Abreu v. State, 593 So. 2d 253, 254 (Fla. Dist. Ct. App. 1991) (hold-
The Colorado Supreme Court in *People v. Pozo* also examined the right of a non-citizen defendant to be informed about the immigration consequences of pleading guilty. In examining the issue, the Colorado Supreme Court first noted that trial courts have no specific duty to inform a defendant of the collateral deportation consequences of a guilty plea. Although Colorado law imposed no duty on the trial court to inform the defendant of the immigration consequences, the court held that the counsel's duties could extend beyond the "direct" consequences of his client's plea to include the collateral consequence of deportation. Specifically, the *Pozo* court noted that "in cases involving alien criminal defendants, . . . thorough knowledge of fundamental principles of deportation law may have significant impact on a client's decisions concerning plea negotiations and defense strategies."

Because immigration consequences can be (and in most cases are) material to a defendant's decision to plead guilty, the court held that counsel may have an affirmative duty to investigate immigration law even though immigration consequences are considered "collateral" to the entry of a plea. "The determination of whether the failure to investigate those consequences constitutes ineffective assistance of counsel turns, to a significant degree, upon whether the attorney had sufficient information to form a reasonable belief that the client was in fact an alien. When defense counsel in a criminal case is aware that his client is an alien, he may reasonably be required to investigate relevant immigration law."
The Colorado Supreme Court in *Pozo* did not create an absolute duty requiring that defense counsel always investigate the immigration consequences of a client’s conviction. Rather, the court determined that counsel’s duty to investigate depended on the particular circumstances of his client. The court held that a defendant’s non-citizen status could render immigration consequences material to his decision to plead guilty. As such, counsel’s awareness of a client’s non-citizen status can create an affirmative duty to research immigration consequences, while a failure to do so can result in ineffective assistance of counsel because such consequences are material in nature and significantly affect the client’s decision to plead guilty.\(^{326}\) The Colorado Supreme Court decision, therefore, is significant because it recognizes that, although immigration consequences may still be considered “collateral,” they are material to a client’s decision to plead guilty or no contest to the state court charges.\(^{327}\)

Some courts may be inclined to find a due process violation when special circumstances warrant withdrawal of a plea made without knowing the immigration consequences that may result. In *People v. Ford*, the non-citizen defendant pleaded guilty to second-degree manslaughter in the death of his girlfriend.\(^{328}\) Neither the defendant’s attorney nor the sentencing court considered the immigration consequences of his guilty plea. After the INS started deportation proceedings against him, Ford moved to withdraw the underlying plea arguing that because immigration consequences were not mentioned during the plea negotiations, the deportation based on such a plea was a violation of his due process rights. Finding that the facts of the case clearly established that the underlying offense was a “terrible accident,” and was therefore distinguishable from an act involving moral turpitude, the New York Supreme Court held that in limited circumstances (such as when the facts of the case would not suggest that the defendant was admitting to “grossly immoral activity,”) the defendant should be informed that pleading guilty to such a charge may nevertheless make him or her deportable.\(^{329}\)

Thus, the courts and legislatures in twenty states have recognized that the severe immigration consequences of a criminal conviction warrant an advisory to the defendant that makes him or her aware

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326. Id.
329. *Ford*, 597 N.Y.S.2d at 884. Note: The decision in *Ford* was reached before New York enacted section 220.50(7) of the New York Code of Criminal Procedure, requiring the court to inform a non-citizen defendant about the potential immigration consequences of his or her guilty plea. See N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2001).
that such consequences may ensue as a result of the plea of guilty or no contest. In effect, these twenty states have recognized that the immigration consequences of criminal convictions are rarely "collateral" to the criminal proceeding, but rather flow directly as a result of a non-citizen's conviction in state court, especially if the conviction is considered an "aggravated felony" conviction under federal law. Even where immigration consequences are labeled "collateral," they are found to be "material" to a non-citizen's decision on how to proceed with his criminal case.330 Disregarding the distinctions between collateral versus direct consequences, these state rules, statutes, and court decisions simply stand for a "fundamental proposition that it is unfair to hold an alien defendant to a guilty plea that will result in deportation when the alien defendant is ignorant or misinformed on that point."331

E. The American Bar Association Standards

The American Bar Association (ABA) Standards of Criminal Justice provide guidance to state courts in accepting guilty pleas from non-citizen defendants. In particular, ABA standard 14.1(c) provides as follows:

Before accepting a plea of guilty or nolo contendere, the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to . . . if the defendant is not a United States citizen, a change in the defendant's immigration status. The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea.332

In addition, ABA Standard 14-3.2 provides that, if a defendant will face deportation as a result of a conviction, defense counsel "should fully advise the defendant of those consequences."333 The United States Supreme Court in INS v. St. Cyr334 acknowledged that criminal defense counsel routinely advise their clients on the immigration consequences of criminal convictions and pointed out that a large number

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330. See Pozo, 746 P.2d at 529.
of states\textsuperscript{335} and the ABA instruct them to inform the defendant of the potential immigration consequences of a plea.\textsuperscript{336}

In \textit{Strickland v. Washington}, the Supreme Court established a two-part test for determining whether criminal defendants have been denied a right to effective assistance of counsel.\textsuperscript{337} As noted above,\textsuperscript{338} the first prong of the test requires a showing that the attorney’s representation fell below an objective standard of reasonableness.\textsuperscript{339} The Supreme Court in \textit{Strickland} recognized that the “[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . .”\textsuperscript{340}

Thus, the ABA standards require defense counsel to reasonably investigate the immigration consequences the plea may produce for a non-citizen client and inform them of such consequences “sufficiently in advance of the entry of any plea.”\textsuperscript{341} As the comment to Standard 14-3.2 notes, “[c]ounsel should interview the client to determine what collateral consequences are likely to be important to a client given the client’s particular personal circumstances and the charges the client faces.”\textsuperscript{342} The comment further recognizes that, “depending on the jurisdiction, it may well be that many clients’ greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction.”\textsuperscript{343}

In addition, ABA Standard 14-1.4 recognizes that the grave immigration consequence that may flow from a guilty plea are “[a] serious and growing issue in a significant number of cases involving non-citizens.”\textsuperscript{344} This standard, therefore, stands for the proposition that the most effective way of protecting a defendant’s right to knowingly plead to criminal charges is by requiring the trial court to advise the defendant concerning the potential changes on his or her immigration status that may result from pleading guilty. Finally, the standard also

\textsuperscript{335} See supra Part VI(D).
\textsuperscript{336} St. Cyr, 533 U.S. at 295 n.48. The Court found a significant reliance interest among criminal defendants who had entered guilty pleas prior to 1996 when INA § 212(c) relief was still available to them.
\textsuperscript{338} See infra Part IV(A).
\textsuperscript{339} Strickland, 466 U.S. at 687-88.
\textsuperscript{340} Strickland, 466 U.S. at 688 (emphasis added).
\textsuperscript{341} ABA \textsc{Standards for Criminal Justice}, supra note 269, at 14-3.2(f) cmt. See also United States v. Campbell, 778 F.2d 764, 769 (11th Cir. 1985) (“It is highly desirable that both state and federal counsel develop the practice of advising defendants of the collateral consequences of pleading guilty.”).
\textsuperscript{342} ABA \textsc{Standards for Criminal Justice}, supra note 269, at 14-3.2 cmt.
\textsuperscript{343} \textit{Id.} (emphasis added).
\textsuperscript{344} \textit{Id.} at 14-1.4 cmt.
recognizes a growing trend in federal case law that acknowledges that the better practice is to include such a notice in the court's colloquy with the defendant.\textsuperscript{345}

Following the ABA Standards of Criminal Justice also results in a fair and more effective representation of a non-citizen client. It is, after all, defense counsel's duty to advocate and protect his or her client's best interest. Without an investigation into the client's background and the resulting recognition that immigration consequences may follow as a result of the client's conviction, a defense attorney is significantly limiting the range of issues he or she may present in support of a particular plea bargain. For example, it is well established that mitigating evidence is relevant to sentencing and should be heard.\textsuperscript{346} The harsh immigration consequences of a criminal conviction can certainly be considered a mitigating circumstance that should factor into plea negotiations.\textsuperscript{347} In addition, the full recognition of the immigration consequences will also allow the attorney to more effectively negotiate an agreement to plead guilty to a different charge (or sentence) that would minimize (or completely avoid) the non-citizen client's exposure to removal from the United States.\textsuperscript{348} Thus, fully understanding a client's background and concerns about his or her immigration status is not only mandated by the ABA Standards of Criminal Justice, but also increases the defense counsel's ability to fashion a better plea agreement with the government, which in turn assures the protection of a non-citizen client's best interest.

VII. PUBLIC ACT 93-0373

On July 24, 2003 the Illinois legislature adopted Public Act 93-0373, which amends the 1963 Illinois Code of Criminal Procedure by adding a new section 5/113-8. The section reads as follows:

Sec. 113-8. Advisement concerning status as an alien.
Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or felony offense, the court shall give the following advisement to the defendant in open court:

"If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion

\textsuperscript{347} McDermid, supra note 16, at 766.
\textsuperscript{348} Id. See also Sandoval v. INS, 240 F.3d 577, 582 (7th Cir. 2001) ("Alien convicted in state court of possession of more than thirty grams of cannabis was not subject to deportation due to conviction, where conviction was vacated on post-conviction motion and sentence modified consistently with first time conviction for possession of less than thirty grams.").
from admission to the United States, or denial of naturalization under the laws of the United States.”

In essence, this provision requires that, prior to the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere, to a misdemeanor or felony offense, the court must advise the defendant in open court that if the defendant is not a citizen of the United States (at the time of entry of the plea) the conviction of the offense for which the defendant was charged may result in “deportation, exclusion from admission to the United States, or denial of naturalization under the federal law.”

Looking at the legislative history of Public Act 93-0373, it is significant to note that the bill, as initially introduced by Illinois Senator Ira I. Silverstein, provided for additional requirements that were deleted (by Illinois Senate amendment) prior to the final adoption of the bill. Thus, when first introduced, Senate Bill 43 (S.B. 43) provided the following additional requirements in subsections (b) (c) and (d):

(b) Upon the defendant's request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement described in subsection (a). If the defendant is arraigned on or after the effective date of this amendatory Act of the 93rd General Assembly and the court fails to advise the defendant as required by subsection (a) of this Section and the defendant shows that conviction of the offense to which the defendant pleaded guilty, guilty but mentally ill, or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States, the court, on the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of not guilty. Absent a record that the court provided the advisement required by subsection (a) of this Section, the defendant shall be presumed not to have received the required advisement.

(c) If the defendant is arraigned before the effective date of this amendatory Act of the 93rd General Assembly, a court's failure to provide the advisement required by subsection (a) of this Section does not require the vacation of judgment and withdrawal of the plea or constitute grounds for finding a prior conviction invalid. Nothing in this subsection (c) prohibits a court, in the sound exercise of its discretion, from vacating a judgment and permitting a defendant to withdraw a plea.

349. PA 93-0373 (effective date Jan. 1, 2004).
350. Id.
(d) At the time of the plea no defendant shall be required to disclose his or her legal status to the court.

The omitted section (b) of S.B. 43 essentially follows the California Penal Code section 1016.5(b).\(^{352}\) Significantly, both the California provision and S.B. 43 (as first introduced) provided for a presumption in favor of the defendant in cases where the record does not reflect that an advisory was given to the defendant by the court. As adopted, however, the Illinois provision omits the presumption language, which may result in a different approach to this issue in Illinois in situations where the record does not reflect that an advisory was given.

Unlike Maine Rule 11,\(^{353}\) which requires an inquiry into the defendant's immigration status prior to the acceptance of the plea, the new Illinois rule requires that the advisory concerning the immigration consequences of the plea be provided to every defendant entering a plea of guilty. Thus, while the Illinois rule provides the important "stop" in the process which will allow a defendant to further explore the immigration consequences of the plea, it rejects the Maine inquiry into the defendant's immigration status. In this respect, Illinois follows the approach of Maryland\(^{354}\) and Massachusetts,\(^{355}\) which similarly reject the requirement that the court inquire into a defendant's immigration status. Unlike these two states, however, the Illinois rejection of such an inquiry is not explicit, as it is not contained in the language of Public Act 39-0373. The general language of the provision, however, leaves little doubt that the advisory regarding the immigration consequences of the plea must be provided to every defendant entering a plea, irrespective of citizenship.

The recent amendments to the Illinois Code of Criminal Procedure evidence a legislative recognition that, in the vast majority of cases, negative immigration consequences are a "direct consequence" of pleading guilty to criminal charges in state court. This is evidenced by the Illinois legislature's failure to follow the Maryland approach to the issue, which expressly recognizes the "collateral" nature of immigration consequences of the plea. Furthermore, and despite the legislatures omission of section (b) of S.B. 43 in Public Act 93-0373, a trial court's failure to advise a non-citizen defendant pursuant to the statute is likely to cause the defendant to enter a plea that can be considered both involuntary and unknowing, which in turn may cause the vacation of the plea at a later time. This result is also likely because

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353. See ME. R. CRIM. P. 11.
the Illinois rule fails to explicitly note the requirements for vacating a plea in circumstances in which the advisory was not given. Thus, unlike the Florida rule which requires a showing of "prejudice to the defendant" as a prerequisite for allowing the withdrawal of the plea, the Illinois rule is silent on any prerequisites that would need to be shown prior to withdrawal.

The new amendment to the Code also changes the duties and responsibilities of defense counsel. Thus, a non-citizen's plea of guilty is no longer likely to be considered "voluntary and knowing" if the non-citizen defendant was not advised by defense counsel regarding the immigration consequences of the plea. This is especially likely in light of the ABA Standards of Criminal Justice (discussed supra) and the Seventh Circuit's recognition that states within its jurisdiction have determined that it is a breach of the code of professional responsibility for a defense attorney to fail to discuss the immigration consequences of a plea agreement with a non-citizen defendant. As a result, and in order to provide legally effective representation to their non-citizen clients, criminal defense attorneys are now required to consider both the immigration status of their clients, as well as any immigration consequences that may follow from the entry of a guilty, guilty but mentally ill, or nolo contendere plea. Due to the complexity of immigration laws in the United States, this will require defense counsel to become familiar with both the essentials of federal immigration law and the peculiarities of criminal removal statutes. This will not be an easy task, especially considering the ever-changing nature of federal immigration laws.

The adoption of Public Act 93-0373 also affects the validity of the Illinois Supreme Court decision in Huante. The adoption of language similar to Maine's Rule 11 in Illinois would have expressly recognized that the immigration consequences of a criminal conviction are "collateral" to the criminal proceedings. As a result, the adoption of that language would not have been inconsistent with Illinois case law and would not require the reversal of either the Correa or Huante cases.

356. See Fla. R. Crim. P. 3.172(c)(8).
357. See Jideonwo v. INS, 224 F.3d 692, 700 (7th Cir. 2000) (citing Williams v. Indiana, 641 N.E.2d 44, 48-49 (Ind. Ct. App. 1994). See also People v. Mehmedoski, 565 N.E.2d 735 (Ill. App. Ct. 1990). In addition, the U.S. Courts of Appeal for the Eleventh Circuit and for the District of Columbia have stated that a finding of ineffective assistance of counsel might be in order in the situation where the non-citizen defendant is affirmatively misled as to the immigration consequences of the conviction (see Downs-Morgan v. United States, 765 F.2d 15334 (11th Cir. 1985)), or if the non-citizen expressly requested information, but counsel remained silent as to the possibility of deportation. See United States v. Del Rosario, 902 F.2d 55 (D.C. Cir. 1990). See also United States v. Mora-Gomez, 875 F. Supp. 1208 (E.D. Va. 1995).
The failure to designate the immigration consequences as "collateral" in the Illinois provision, however, gives strong support to the proposition that immigration consequences are now recognized as "direct" in Illinois.

Finally, looking at the plain text of the Illinois advisory, it is immediately apparent that the legislature decided to use the term "deportation" as one of the consequences that may result from pleading guilty to a state criminal charge. Although this is technically and legally incorrect in light of the changes to immigration laws that have replaced the term "deportation" with a term "removal," the term deportation may have been used due to its pervasive use in the immigrant community and the continued frequency of use of the term "deportation" when referring to what amounts to "removal" under current immigration law. In this respect, the use of the term "deportation" should provide adequate warning to a non-citizen defendant of one of the consequences that may result from pleading guilty to a criminal charge in Illinois criminal courts. However, and in order to fully take into account the changes in federal immigration law, the Illinois legislature should amend the provision by replacing the term deportation with the term "removal," which is the current legal term used to describe what once was deportation. This amendment is also necessary to remove the potential legal uncertainty that arises with the use of this "out-of-date" legal term.

VIII. CONCLUSION

The adoption of Public Act 93-0373 represents a significant new protection to non-citizen defendants in Illinois. The advisory adopted by the legislature is consistent with the due process requirements of fair notice and the ABA Standards of Criminal Justice. Providing notice of the possible immigration consequences of a criminal conviction is also consistent with other advisories included in the arraignment section of the Illinois Code of Criminal Procedure, which provides that, in a case when a defendant pleads guilty, "such plea shall not be accepted until the court shall have fully explained to the defendant the consequences of such a plea . . . ." Although the advisory about immigration consequences is appropriately included in this section, an amendment to Illinois Supreme Court Rule 402 would have produced a similar result, considering that the purpose of Supreme Court Rule

358. See supra Part III.
402 is "to insure that [the defendant's] guilty plea is intelligently and understandingly made . . . ."\textsuperscript{360}

The amendment to Article 113 of the Illinois Code of Criminal Procedure is also constitutionally sound. Although the requirement of informing a defendant regarding the immigration consequences of a guilty plea is not mandated by the United States or Illinois constitutions, the Supreme Court has stated that "[s]tates are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake."\textsuperscript{361} The large number of non-citizens that are living in Illinois, coupled with the harsh immigration consequences of a criminal conviction recognized by twenty other states, strongly support the adoption of the amendment, which protects the rights of a significant part of the Illinois state population.

The adopted amendments are narrow in scope and serve primarily as a warning to counsel and non-citizen defendants in situations in which neither is aware of the serious immigration consequences that may follow the entry of a plea. Under the new provision, and as mandated by the ABA Criminal Justice Standards, the courts do not have a duty to investigate the precise immigration consequences that may follow because the duty of investigation essentially remains with counsel. Counsel's duty to investigate the immigration consequences will, in turn, continue to be defined by Illinois case law.

One of the main policy and management aims of a criminal justice system (including the one in Illinois) is to expeditiously progress a case through the system while insuring that the defendant's constitutional and other rights are protected in the process. The non-citizen defendant's understanding that immigration consequences will follow as a result of pleading guilty ensures that the plea is entered into intelligently, thereby helping to ensure the finality of a conviction at the trial stage of the proceedings. Considerations of fairness and finality support the notion that a guilty plea be made intelligently and carefully, reducing the likelihood of an unfair result which, in turn, may result in protracted efforts to seek post-conviction relief.\textsuperscript{362} The court advisory will, therefore, also cause a decrease in the number of post-conviction and other appellate petitions, which already overburden the Illinois justice system. Aimed at fairness and finality, Public Act 93-0373 is likely to prevent both the entry of an "improvident plea" by

\textsuperscript{360} ILL. S. CT. R. 402.
\textsuperscript{361} Lego v. Twomey, 404 U.S. 477, 489 (1972).
\textsuperscript{362} See Santos v. Kolb, 880 F.2d 941, 944 (7th Cir. 1989) (citing Johnson v. Duckworth, 793 F.2d 898, 900-902 (7th Cir.), cert. denied, 479 U.S. 937 (1986)).
a non-citizen defendant and the "burdens of post-conviction review."\textsuperscript{363}

As demonstrated above, for most non-citizen defendants, the ability to remain in the United States is far more important than other, more immediate consequences of the conviction such as incarceration or parole. Providing notice to a defendant, and indirectly to counsel who may not have realized that his or her client is a non-citizen (or who may not have considered the immigration consequences stemming from a plea) allows the defendant (and his or her counsel) the opportunity to consider the consequences of the plea and fashion a plea agreement that will avoid removal proceedings altogether, or place the non-citizen in a position that will make him or her eligible for certain forms of relief that remain available under the law.\textsuperscript{364} As noted by one commentator, "no intelligent plea decision can be made by either lawyer or client without full understanding of the possible consequences of a conviction . . . . In some defendants' cases the consequences of a conviction may be so devastating that even the faintest ray of hope offered by a trial is magnified in significance."\textsuperscript{365}


\textsuperscript{364} Although the fashioning of such plea agreements will differ from case to case (and is beyond the subject of this Article), it is important to note that, in many cases, a plea to a reduced charge, or a slightly different sentence, can make all the difference. For further discussion on this issue, see \textit{Law Office of the Cook County Public Defender, Manual on Representing Non-Citizen Criminal Defendants in Illinois} (2002).