

CHAPTER 8:

State Post-Conviction Relief

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Post-conviction relief generally seeks to correct a legal error in the underlying criminal proceedings. Post-conviction relief, if warranted, may also provide an avenue to mitigate the adverse immigration consequences that flow from the criminal disposition.

8.1

Authority for State Post-Conviction Relief

In North Carolina, the primary vehicle to collaterally challenge a conviction is a motion for appropriate relief (MAR), authorized by G.S. 15A-1411. An MAR is a post-trial motion made at the trial level to correct errors occurring prior to, during, or after a criminal trial. *See State v. Handy*, 326 N.C. 532 (1990). If filed within ten days of entry of judgment, an MAR can be used to address “any error committed during or prior to the trial.” *See* G.S. 15A-1414(a). After ten days of entry of judgment, an MAR can be used to address only specific errors, such as a violation of a defendant’s constitutional rights. *See* G.S. 15A-1415(b) for possible grounds.

8.2

Immigration-Related Challenges

A. Ineffective Assistance of Counsel

Ineffective assistance of counsel in violation of the Sixth Amendment is one of the most common grounds for a challenge relating to immigration consequences.

Standard of Proof. In North Carolina, the standard of proof for an ineffective assistance of counsel claim is governed by the two-prong test set out by the United States Supreme Court

in *Strickland v. Washington*, 466 U.S. 688 (1984). See *State v. Braswell*, 312 N.C. 533 (1985) (adopting the *Strickland* test as the standard for evaluating ineffective assistance of counsel claims under the North Carolina constitution). To establish ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial. To satisfy the second prong, or "prejudice" requirement, in the plea context, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty but instead would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Incorrect Advice about Immigration Consequences. There is no case law in North Carolina directly addressing whether misinformation about immigration consequences can constitute ineffective assistance of counsel. Generally, a conviction may be set aside where defense counsel erroneously advises the defendant about a collateral consequence, and the defendant relies on that advice in pleading guilty. See *State v. Goforth*, 130 N.C. App. 603 (1998) (finding that lawyer who misadvised defendant about collateral consequences of plea was deficient in his performance; in this case, attorney misadvised defendant about appealability of sentence). Under this case law, some noncitizens have argued that counsel was ineffective when he or she provided incorrect advice about the deportation consequences of the plea. Along with a number of state and federal courts, a few trial courts in North Carolina have vacated the conviction of a noncitizen defendant where defense counsel misstated the deportation consequences of the plea to the defendant, and the defendant relied on that incorrect advice in pleading guilty.

Examples of incorrect advice may include:

- *An aggravated felony conviction "may" result in adverse immigration consequences.* For most noncitizens, deportation is a certain, automatic, and unavoidable consequence of a conviction of an aggravated felony. Thus, when a defendant asks about the immigration consequences of an aggravated felony, and defense counsel advises that such a conviction may but does not necessarily result in deportation or other adverse immigration consequences, counsel is misinforming the defendant. See *State v. Paradez*, 101 P.3d 799 (New Mexico 2004) (finding that counsel's advice was deficient); but see *People v. Argueta*, 844 N.Y.S.2d 63 (N.Y. App. Div. 2007) (finding that advice was not deficient).
- *A deferral, diversion, or treatment court disposition is not a conviction.* Because these dispositions are often not considered convictions under state law, some counsel assume that the dispositions are not convictions under immigration law as well. However, for immigration law purposes an admission of guilt coupled with court imposed conditions or punishment constitutes a conviction. See *supra* §§ 4.1A, B (discussion of definition of conviction for immigration purposes). Thus, counsel provides erroneous advice when he or she advises a noncitizen defendant that a diversionary arrangement involving both an admission of guilt and some court ordered condition is not a conviction for immigration law purposes.

Failure to Provide Advice about Immigration Consequences. Trial courts in North Carolina have been reluctant to find that defense counsel's failure to research and advise a noncitizen defendant of the immigration consequences of the conviction constitutes ineffective assistance of counsel. These courts have reasoned that defense counsel does not have an affirmative obligation to advise defendants of collateral consequences such as deportation. *See generally State v. Goforth*, 130 N.C. App. 603 (1998) ("Generally, an attorney is not required to advise his client of the myriad 'collateral consequences' of pleading guilty").

There is legal authority for granting relief to noncitizens on this basis, however. A growing number of practice standards recognize that criminal defense counsel's role includes investigating and advising noncitizen clients about the potential immigration consequences of a criminal case. *See supra* § 1.2A (discussing standards). In addition, a few courts have recognized the duty of defense counsel to advise noncitizen defendants about the immigration consequences of criminal convictions. *See, e.g., State v. Paradox*, 101 P.3d 799, 801 (New Mexico 2004) (holding that a criminal defendant's attorney has "an affirmative duty to determine [the client's] immigration status and provide him with specific advice regarding the impact a guilty plea would have on his immigration status"). Although the U.S. Supreme Court has not ruled that immigration consequences are a direct consequence of a plea, it has noted that competent defense counsel would advise a client about the potential impact of a plea on eligibility for relief from deportation. *INS v. St. Cyr*, 533 U.S. 289, 322–23 & nn.48, 50 (2001).

B. Judge's Failure to Provide Immigration Advisement before Accepting Guilty Plea

G.S. 15A-1022(a)(7) requires judges to provide a general advisement to a defendant before accepting a guilty plea, warning the defendant that if he is a noncitizen the conviction may result in adverse immigration consequences. A failure to provide the general advisement is a violation of the statute.

There is an argument that the failure to provide the advisement might affect the voluntariness of the plea and thus constitute a violation of constitutional law as well. Immigration consequences are generally viewed as collateral; however, a few courts have suggested that under the more stringent immigration laws adopted in 1996, deportation may be a direct consequence of conviction because it is often an automatic and unavoidable result of conviction. *See, e.g., U.S. v. Couto*, 311 F.3d 179 (2d Cir. 2002); *U.S. v. Nobani*, 145 F. Supp.2d 906 (N.D. Ohio 2001), *rev'd*, 287 F.3d 417 (6th Cir. 2002). Under this rationale, a court's failure to give a noncitizen defendant an advisement about immigration consequences might violate the constitutional requirement that the plea be knowing and voluntary.

C. Other Errors

There may be other procedural defects or substantive violations present that may form a basis for an MAR. Other grounds relating to noncitizen defendants include:

- The defendant's failure to understand the nature of the proceedings

- The failure of the court to explain sufficiently the nature and right to a jury trial. (This requirement is particularly important for noncitizens who may have no previous experience with the United States legal system and may be unfamiliar with jury trials and other aspects of criminal justice and procedure in the United States.)
- Violations in the use or conduct of interpreters

8.3. Immigration Effect of Motion for Appropriate Relief

A conviction vacated on the basis of a procedural or legal defect will eliminate the conviction for immigration purposes. See *Matter of Rodrigues-Ruiz*, 22 I&N Dec. 1378 (BIA 2000). The immigration court may look to see if the vacating court had subject matter jurisdiction to vacate the judgment, but it may not look beyond the order to determine if such relief was proper under North Carolina law. *Id.* A conviction is not eliminated for immigration purposes, however, if it was vacated for reasons “solely related to rehabilitation or immigration hardships. . . .” *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); cf. *Yanez-Popp v. INS*, 998 F.2d 231, 235 (4th Cir.1993) (“[U]nless a conviction is vacated on its merits, a revoked state conviction is still a ‘conviction’ for federal immigration purposes.”).

Thus, a conviction vacated through an MAR based on the grounds of ineffective assistance, involuntariness of a guilty plea, or other constitutional or statutory violations will be accorded full faith and credit by immigration authorities and eliminate the conviction for immigration purposes. However, even though an MAR is used to correct legal error, an order of relief that cites primarily to the petitioner’s equities or immigration hardships may not be honored and may not eliminate the conviction for immigration purposes. The record of the proceedings—the motion papers, hearing, and order—should therefore reflect the legal errors justifying relief and should refer to immigration issues only as necessary to explain those errors (for example, prior counsel was ineffective for misadvising the petitioner about the possibility of removal and, but for counsel’s deficient performance, the petitioner would not have pled guilty).

8.4 Practical Considerations

The trend of cases indicates that an MAR is more likely to be granted if the prosecutor does not oppose the motion. Petitioners have also received more favorable results when they had already served any active portion of the sentence, were willing to enter a new plea to an alternative offense, and were long-term residents with significant ties to the U.S. The grounds for challenging the convictions in these cases primarily involved ineffective assistance of counsel based on incorrect advice about immigration consequences.¹

1. The information about cases in which relief has been granted to noncitizens was provided by Jennifer Foster, an attorney who regularly consults on immigration-related challenges in MARs. Ms. Foster practices in Asheville.