

IMMIGRATION FOR APPELLATE LAWYERS

WISCONSIN STATE PUBLIC DEFENDER CONFERENCE

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Because a criminal conviction can affect the legal status of a non-citizen in many ways, the only way to avoid severe consequences to the non-citizen often is to vacate the conviction. With very few exceptions, the two-fold challenge for the post-conviction or appellate attorney confronted with this task is the same as in any other challenge to a conviction:

1. Is there any legal error that would permit or require vacation of the conviction?
2. Is there a procedural mechanism for raising the legal claim?

The answers also generally are the same, regardless of whether the client is a citizen. The first question is one we deal with every day and turns on the facts of the case, while the second generally turns on the procedural status of the case and the custody status of the defendant.

Most Common, Generally Applicable Post-Conviction/Appellate Procedures

With limited exceptions involving waiver (by guilty plea or otherwise) or issues at the preliminary hearing, any legal challenge can be raised on **direct appeal**. The same is true whether one strictly followed the requirements of Wis. Stat. (Rule) 809.30 or whether the defendant succeeded in having his or her direct appeal rights reinstated.

After the direct appeal, however, one's options are more limited. If the defendant is in custody (generally meaning actual custody or supervision such as probation, parole, or extended supervision) due to the conviction he or she seeks to challenge, a **motion under Wis. Stat. §974.06** provides an opportunity to raise certain types of claims. However, those claims are limited to constitutional or jurisdictional challenges. Also, if the defendant pursued a direct appeal, he or she must demonstrate "sufficient reason" why the claims in the §974.06 motion were not raised on the direct appeal. What constitutes "sufficient reason" is beyond the scope of this presentation.

Where the defendant no longer is in custody and the time for a direct appeal has expired, the procedural options are much more limited. Generally, the only option at that

point for most defendants is a **petition for a writ of error coram nobis**. That procedure, however is *extremely* limited *See State ex rel. Patel v. State*, Appeal No. 2011AP2861, 2012 WL 3930409 (Opinion 9/11/12; Recommended for Publication).

Other procedures that may be available in a given circumstance include a petition for a writ of habeas corpus challenging the performance of or abandonment by appellate counsel in the Court of Appeals pursuant to *State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540 (1992).

Procedures and Grounds Applicable Solely to Non-Citizens

In addition to those grounds for relief and procedures available generally to any defendant who meets the requirements for the particular claim or procedure, certain grounds and procedures apply solely to non-citizens.

Court's Failure to Warn of Potential Immigration Consequences Upon Taking Plea - Wis. Stat. §971.08(2)

Wis. Stat. §971.08 provides general requirements for the entry of guilty or no-contest pleas. Section 971.08(1)(c) expressly requires the circuit court taking a plea to

(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.”

Pursuant to §971.08(2):

(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 ground.

Section 971.08 thus provides both a legal ground for withdrawing a plea and a procedure for raising that claim. Section 971.08(2) contains neither a deadline for filing the motion nor a requirement that the defendant be in custody. It is enough that the defendant shows that the identified consequences are “likely to result” from the conviction.

Important cases:

State v. Douangmala, 2002 WI 62, 253 Wis.2d 173, 646 N.W.2d 1 (defendant is entitled to automatic vacatur of judgment of conviction imposed on guilty plea if trial court did not orally tell defendant about immigration consequences of plea, even if the defendant knew what those consequences were)

State v. Lagundoya, 2004 WI 4, 268 Wis.2d 77, 674 N.W.2d 526 (*Douangmala* does

not apply retroactively)

State v. Vang, 2010 WI App 118, 328 Wis.2d 251, 789 N.W.2d 115 (Court must provide statutory advice at plea hearing; providing advice at arraignment legally insufficient)

State v. Negrete, 2012 WI 92, 343 Wis.2d 1, 819 N.W.2d 749 (to obtain evidentiary hearing on §971.08(2) motion, defendant must adequately allege both that the circuit court in fact did not provide the required advice and an adequate nexus between the guilty plea and one of the identified immigration consequences)

Counsel's Failure to Warn of Potential Immigration Consequences

Under *Padilla v. Kentucky*, ___ U.S. ___, 130 S.Ct. 1473 (2010), defense counsel is obligated to inform a non-citizen client where a plea to a particular charge would result in automatic exclusion or deportation from the United States. Where the likely consequences are less clear, counsel must inform the client that a plea to the charge *could* result in immigration consequences. The failure to do so can constitute ineffective assistance of counsel under the traditional “deficient performance and resulting prejudice” test of *Strickland v. Washington*, 466 U.S. 668 (1984), entitling the defendant to withdraw his or her guilty plea. Of course, resulting prejudice in such circumstances requires that the defendant allege and prove that, but for counsel’s erroneous or inadequate advice, he or she would not have pled guilty. *E.g. Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Although the Seventh Circuit has held that *Padilla* does not apply retroactively on collateral review, *Chaidez v. Holder*, 655 F.3d 684, 688, 693 (7th Cir.2011), the Supreme Court granted certiorari in that case. 80 U.S.L.W. 3429 (U.S. Apr. 30, 2012) (No. 11–820).

Although *Padilla* applies directly to cases in which counsel’s deficient advice leads to a guilty plea that risks immigration consequences, what about the circumstance in which defective advice leads to the defendant rejecting a plea offer that could have avoided immigration consequences, leading instead to conviction after trial for an offense that impacts the defendant’s status? In *Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376 (2012), the Supreme Court recently held that constitutionally deficient advice regarding the decision whether to enter a plea or to insist on a trial can satisfy the *Strickland* standards and require vacation of the conviction. It would seem that the Court’s requirement in *Padilla* of adequate advice regarding the immigration consequences of one’s choice whether to enter a plea should apply equally in the *Lafler* context where the erroneous advice resulted in a trial and conviction for an offense with negative immigration consequences.

Other Considerations

Regardless of what grounds or procedures may be available for challenging a non-citizen client’s conviction, keep in mind that withdrawing a plea or vacating a conviction following a trial does not mean that the case necessarily goes away. Absent some prior agreement with the state, vacating the conviction merely means that the defendant returns to the position he or she was in just prior to the plea or the trial, facing *all* of the original

charges and potential sentences. It therefore is critical that the attorney fully discuss with the defendant the risks of attempting to vacate the conviction as well as the potential benefits.