

Immigration Law For the Everyday Practitioner

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Agenda

- Review of Nebraska “crimmigration” post-conviction cases
- ICE Directive Regarding Parental Interests
- Review of Special Immigrant Juvenile Status
- Review of affidavit of support requirements in family law context
- Q&A

Nebraska “Crimmigration” Post-Conviction Cases

1. Failure of counsel to advise
2. Statutory duty of courts to advise
3. Constitutional duty of courts to advise

Failure of Counsel to Advise

State v. Gonzalez, 285 Neb. 940
(2012)

- Common law right to withdraw plea exists in Nebraska under certain circumstances
- Implication is that *Padilla* requires advisement not only of direct removal consequences but also when affirmative relief might be imperiled

Failure of Counsel to Advise (cont.)

State v. Gonzalez (Gonzalez II), 285
Neb. 940 (2013)

--Rehearing of *Gonzalez I*

--Upshot of the holding: affirms the
part of *Gonzalez I* holding there exists
a common law motion to withdraw a
plea under certain circumstances

Failure of Counsel to Advise (cont.)

--Holdings of *Gonzalez II*:

- Three procedural mechanisms to withdraw pleas in IOC (immigration) cases:
 - 29-1819.02
 - Post-Conviction Act
 - Common law motion
- Last mechanism only available if one of first two is not
- All remedies available after conviction is final

Failure of Counsel to Advise (cont.)

- Common law remedy only available for constitutional violations
- In *Gonzalez*, advisement was given by court, so statute not available; also, Def. could have filed under PCA because she was “in [state] custody” during the time of her probation, or at least did not prove she was in federal custody; therefore, common law remedy not available to her

Failure of Counsel to Advise (cont.)

"The right Gonzalez and similarly situated defendants seek to vindicate is a right to the effective assistance of counsel, which is a right granted by the Sixth Amendment to the U.S. Constitution. When such a right is at issue and there is no other means of vindicating it, we refuse to deny a defendant due process of law."

Failure of Counsel to Advise (cont.)

State v. Diaz, 283 Neb. 414 (2012)

--Writ of error coram nobis not available in Nebraska as remedy for non-PCA ineffective assistance of counsel claim

State v. Yuma, 286 Neb. 244 (2013)

--Common law claim to withdraw plea available to defendants who have completed their criminal sentences

Failure of Counsel to Advise (cont.)

- *State v. Osorio*, 286 Neb. 284 (2013)
 - Common law motion to withdraw plea not available to Def. whose plea entered before March 30, 2010 because *Padilla* does not apply retroactively
 - No discussion by parties or Court of whether result might be different under a non-federal analysis

Statutory Duty of Courts to Advise

- Arises as the result of § 29-1819.02, which became effective on July 20, 2002
- Failure of courts to give advisement coupled with showing by Defendant there may be removal consequences allows Def. to vacate plea as a matter of right

Statutory Duty of Courts to Advise (cont.)

- Cases interpreting the statute
 - *State v. Rodriguez-Torres*, 275 Neb. 363 (2008)
 - Defendant can't use statute to vacate plea entered before 7/20/02 if Def. has already completed his sentence
 - *State v. Yos-Chiguil (Yos-Chiguil I)*, 278 Neb. 591 (2009)
 - Def. can use statute to vacate guilty plea entered after 7/20/02 even if judgment is final, where Def. has not completed his sentence

Statutory Duty of Courts to Advise (cont.)

- *State v. Mena-Rivera*, 280 Neb. 948 (2010)
 - Advisement must be given immediately before a guilty plea is accepted
 - ICE detainer lodged against Def. is sufficient evidence that there may be removal consequences

Statutory Duty of Courts to Advise (cont.)

- *State v. Yos-Chiguil (Yos-Chiguil II)*, 281 Neb. 618 (2011)
 - Dismissed as untimely appeal that advisement did not comply exactly with statutory language
 - Held, in dictum, that courts have no constitutional obligation to advise of possible immigration consequences

Statutory Duty of Courts to Advise (cont.)

- *State v. Medina-Liborio*, 285 Neb. 626 (2013)
 - Def. can't raise failure to comply with statute on direct appeal; must file motion to withdraw plea
 - Statute allows Def. to withdraw plea if statutory elements are met, even if Def. was aware from other sources that conviction might result in removal
 - Language in opinion about duty of both courts and prosecutors in this area (pp. 633-634)

Statutory Duty of Courts to Advise (cont.)

- *State v. Llerenas-Alvarado*, 20 Neb. App. 585 (2013)
 - Multi-phase advisement (6 weeks apart) approved where Def. indicated he did not want advisement re-read
 - Def. did not make showing of possible removal consequences of plea, and therefore failed under second prong of statute to show entitlement to withdraw plea

Constitutional Duty of Courts to Advise

- Nebraska Supreme Court has held a Def. does not have a constitutional right to be advised of possible immigration consequences by a trial court
 - *Yos-Chiguil II*, 281 Neb. 618, 626 (2011)
- Not sure arguments have been fully explored in this area

Lingering Issues

- Do courts have a constitutional duty to advise?
- If so, how is that duty carried out?
- What role should potential immigration consequences play at time of sentencing?
- What duty (ethical or otherwise) do prosecutors have to take possible immigration consequences into consideration?

Lingering Issues (cont.)

- Is *Padilla* retroactive under a state analysis?
- What does it mean that the PCA was “never available” to a Defendant?
- What, if any, effect does Court’s advisement have on ability to show *Strickland* prejudice in common law cases?
- What if client is in federal custody? Is she also “in custody” for purposes of PCA?

Lingering Issues (cont.)

- What if client is never told about immigration consequences? Does that toll the 1-year SOL of the PCA? If not, is the common law remedy available to vacate conviction?

Resources

- Nebraska state court – Ruser's Immigration Guide
<http://law.unl.edu/immigration-manual>
- Mary Kramer's book --
<http://agora.aila.org/product/detail/1148>
- Kara Hartzler's book --
<http://www.firrp.org/info/news/2011/06/21/surviving-padilla-book-criminal-defense-attorneys/>
- Practice advisories
 - Immigrant Defense Project (www.immigrantdefenseproject.org)
 - Immigrant Legal Resource Center (www.ilrc.org)
 - National Immigration Project of the National Lawyers Guild (www.nationalimmigrationproject.org)
 - Defending Immigrants Partnership (www.defendingimmigrants.org)

ICE Directive Regarding Facilitating Parental Interests

- Published by ICE on 8/23/13
- Purpose → to make certain accommodations to non-citizen parents/guardians involved in removal proceedings who are (1) primary caretakers of their kids (regardless of kids' status) or (2) have a direct interest in a family court proceeding involving kids

Parental Interests (cont.)

- Link to ICE website with details on this program:
- <https://www.ice.gov/about/offices/enforcement-removal-operations/parental-directive.htm>

Parental Interests (cont.)

- Policy adopted by Directive → to ensure ICE enforcement activities do not unnecessarily disrupt parental/guardianship rights
- Establish POC in each ICE Field Office to implement this policy/directive

Parental Interests (cont.)

- Contact information:

- National headquarters POC: Deputy Assistant Director Andrew R. Lorenzen-Strait

Andrew.R.Lorenzen.Strait@dhs.gov

202-732-4262

- Local field POC for 5-state area: Jason B. Sieving Jason.B.Sieving@ice.dhs.gov
612-843-8649

Parental Interests (cont.)

- Always include Mr. Sieving on all correspondence **AND**:
 - For Iowa cases, also include Assistant Field Office Director Greg Jensen (402) 536-4847 on correspondence
 - For Nebraska cases, also include Assistant Field Office Director Eric Ouellette (402) 536-4883 on correspondence

Parental Interests (cont.)

- Substantive provisions:
 - Enhanced consideration of prosecutorial discretion
 - Custody status re-evaluation
 - Initial placement and subsequent transfers should consider impact on kids
 - Information-sharing, outreach and training

Parental Interests (cont.)

- Court appearances in family court or child welfare proceedings:
 - ICE will attempt to facilitate in-person appearance of parent if necessary to maintain or regain custody of kids
 - Pre-requisites:
 - Evidence of court proceeding (notice of hearing, scheduling letter, court order, etc.)
 - Court within reasonable distance of ICE facility
 - Transportation not unduly burdensome on ICE
 - No security or public safety concerns

Parental Interests (cont.)

- If in-person transportation impractical, ICE will work to try to identify alternate means, such as video conferencing, teleconferencing, etc.
- Visitation
 - If visitation with kids required by family court or child welfare authority, ICE will try to facilitate such visitation (in-person visitation preferred)
- Facilitate contact between kids and parents pending removal of parents
- May even facilitate return of parents to US on limited basis if already removed

Special Immigrant Juvenile Status

- Available to certain juveniles present in U.S. who have no current immigration status
- If granted, juvenile becomes a LPR and can naturalize
- Sources of law:
 - 8 USC § 1101(a)(27)(J)
 - 8 CFR § 204.11

SIJS (cont.)

■ Elements:

- Immigrant present in U.S.
- Declared dependent on a “juvenile court” or placed under custody of agency of individual appointed by juv. court
- Reunification of one or both parents not viable due to abuse, neglect, abandonment or similar state law basis
- Whom juv. court has determined it would not be in best interest to be returned to home country

SIJS (cont.)

- “Juvenile court” → U.S. court having jurisdiction under state law to make custody and care determination(s)
 - Juvenile case
 - Guardianship case
 - Divorce case
 - Paternity/custody case

SIJS (cont.)

- State court involvement would come at predicate findings stage
- If immigrant juvenile gets predicate findings, then files application with USCIS for SIJS and USCIS decides whether to approve benefit
- *In re Erick M.*, 284 Neb. 340 (2012)

Affidavit of Support Issues

- Come into play in divorce or legal separation cases where non-citizen spouse has been “sponsored” by either USC or LPR spouse
- Have potential to turn non-alimony cases into cases where spousal support becomes an issue

Affidavit Of Support (cont.)

- Affidavit of support required in all family-based immigration cases
- I-864 is the USCIS form used to satisfy this requirement
<http://www.uscis.gov/i-864>
- It creates a contractual obligation on the part of the obligor to support the immigrant at a minimum of 125% of the poverty guidelines

Affidavit of Support (cont.)

- Obligation continues, for the most part, until immigrant spouse can be credited with 40 SSA-qualifying quarters or work, or until the immigrant spouse becomes a USC
- Divorce does not terminate the USC spouse's obligation under the I-864
- Cases are clear that immigrant spouse can sue to enforce the I-864

Affidavit of Support (cont.)

- Great articles on this issue by a former student of mine – Greg McLawsen – available for free on SSRN:
 - http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192275
 - http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412718
- He also has a blog:
 - <http://i-864.net/>

Affidavit of Support (cont.)

- Need to make certain to ascertain immigration status of your domestic clients to see if there is an I-864 issue present

QUESTIONS?