# POSTCONVICTION RELIEF: NAVIGATING A NARROW CHANNEL FOR SAFE HARBOR

*by Anthony Drago, Jr. and Karl Krooth*[*]

## INTRODUCTION

Convictions that result from pleas of guilty or no contest (nolo contendere) may be subject to vacature or otherwise made legally null and void for constitutional or statutory violations in the underlying criminal proceedings. While vacature for legal cause prevents recognition of the disposition as a conviction, relief under rehabilitative statutes is generally ineffective to render a conviction innocuous except in an extremely narrow category of cases.[1]

Treatment of vacated convictions for immigration purposes impacts the lives of thousands of noncitizens vying for residence or the opportunity to retain their residence in the United States. For immigrants, nothing could be more important. Thus, postconviction relief (PCR) for noncitizens may be necessary in a myriad of situations to overcome inadmissibility or removability and avoid the harsh consequences associated with treatment of various crimes under the Immigration and Nationality Act (INA). Analysis of how, why, and when to vacate convictions can determine the ultimate fate of noncitizens facing permanent removal from the United States.[2]

These questions gain prominence in the context of immigration reform in the 110th Congress. This proposed legislation is likely to render the aggravated felony definition at INA §101(a)(43) broader and retroactive. If the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[3] is the model, then the devil will surely detail this expanded definition. In anticipation that PCR may become the exclusive relief available for an increasing number of foreign nationals, this article offers a few helpful ideas for immigration lawyers who wish to evaluate the possibility of PCR.

The key to PCR is informed communication with criminal counsel. Since original defense counsel may lack the objectivity to identify their own mistakes or other defects in the record, immigration attorneys may wish to steer clients to successor criminal counsel specializing in PCR. Given the possibility that original counsel may feel compromised professionally by the notion of PCR, the client needs successor counsel to persuade original counsel to cooperate and provide the original file. Accusations

---

[*] **Anthony Drago, Jr.** is the principal of Anthony Drago, Jr., P.C., located in the financial district of Boston. He was admitted to the Massachusetts bar in December 1988 and the New York bar in January 1989, and has been a member of the American Immigration Lawyers Association (AILA) since 1996. Mr. Drago has been a mentor for many years in the area of removal and practice before the Executive Office for Immigration Review (EOIR), and currently serves on AILA's Texas Service Center Liaison Committee.

**Karl Krooth** practices in the field of postconviction relief in San Francisco for Immigrant Crime and Justice, PC (*www.immigrantcrime.com*). Karl also represents foreign nationals in interviews for adjustment of status and naturalization before U.S. Citizenship and Immigration Services. Karl has a B.A. from U.C. Berkeley and a J.D. from Lewis and Clark. Before joining the immigration bar, Karl first prosecuted crime and then conducted criminal defense. Karl serves on the AILA Northern California Chapter board as criminal defense liaison, and is a board member of the National Lawyers Guild's San Francisco chapter.

[1] For example, a disposition under the Federal Juvenile Delinquency Act (FJDA), 18 USC §§5031–5042, or the Federal First Offenders Act (FFOA), 18 USC §3607(a), may not constitute a conviction as that term is defined under Immigration and Nationality Act (INA) §101(a)(48), despite the entry of a plea. The Board of Immigration Appeals (BIA) has also recognized state equivalents to FJDA. *In re Devison*, 22 I&N Dec. 1362 (BIA 2000). However, the BIA does not recognize state equivalents to FFOA, so the Ninth Circuit Court of Appeals is the only jurisdiction in which state FFOA equivalents may preclude recognition of first-offense simple possession under the Federal Controlled Substances Act as a conviction for INA purposes. *In re Salazar-Regino*, 23 I&N Dec. 223, 235 (BIA 2002); *Lujan-Armendariz v. INS* (9th Cir. 2000) 222 F.3d 728, 737.

[2] The premise of this article is that the noncitizen has already been "convicted" of a crime within the meaning of that term in INA §101(a)(48). Clearly, the optimal time to analyze a crime and its immigration consequences is prior to entry of the conviction by a criminal court. To the extent practitioners have the opportunity to work with criminal counsel at that time, every effort should be made to avoid immigration consequences associated with the criminal charge.

[3] Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724.

and subpoenas will probably serve the client less than collegial citation to a few rules of ethics.[4]

This article emphasizes the value of foundational relationship between immigration and criminal counsel to advance communication about PCR. However, it does not delve into the intricacies of litigating PCR motions or petitions for writ. Rather, it describes the role of the immigration lawyer to facilitate communication with defense counsel about whether or not a written order specifying constitutional or statutory error is necessary. This article also imparts basic notions of jurisdiction to remedy a constitutional or statutory violation by writ of habeas corpus or writ in the nature of error coram nobis.

## RECOGNIZING THE NEED FOR PCR RELIEF

The initial step by the attorney reviewing a criminal record for PCR is to analyze when and why a conviction must be vacated. Circumstances warranting vacature include defending against removal proceedings, returning to the United States after travel abroad, applying for naturalization, and applying for a replacement green card. Certain clients warrant particular attention to PCR, such as a legal permanent resident convicted of an aggravated felony by trial or post-April 1, 1997;[5] a legal permanent resident with a pre-April 1, 1997, conviction for an aggravated felony and a post-April 1, 1997, conviction for a crime involving moral turpitude;[6] a legal permanent resident convicted of an aggravated felony or who committed an offense referred to in INA §212(a)(2) rendering him or her inadmissible, or an offense under INA §237(a)(2) or (4) within seven years from the date of admission rendering him or her removable;[7] or a nonresident convicted of an aggravated felony.[8] In each scenario, PCR may be the only means of relief from removal. PCR for aliens in removal proceedings must be analyzed quickly and pursued immediately. In other instances, analysis of the legal implications of a criminal conviction must be done prior to filing applications with U.S. Citizenship and Immigration Services or prior to travel outside the United States.

## SENTENCE MODIFICATION

Certain crimes require a particular length of sentence before immigration consequences attach.[9] For these crimes, vacating the sentence may not even be necessary, as modification or vacation of the sentence imposed may be enough to eliminate the immigration consequences. In *Matter of Song*,[10] the BIA terminated removal proceedings based on reduction of the alien's sentence of one year in prison for a theft of-

---

[4] *See, e.g.*, Cal. R. Prof. C. 3-700(D) and Mass. R. Prof. C. 1.16(e), which require attorneys to provide former clients with their file upon request. These state rules also find support in the American Law Institute's *Restatement (Third) of the Law Governing Lawyers*: "On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse." *Restatement (Third) of the Law Governing Lawyers* §46(2) (2000). However, states that adhere to the American Bar Association's (ABA) limit on the client's right to the file have restricted access to work product. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1376 (1977).

[5] Other than relief from removal in the form of withholding of removal or relief under the Convention Against Torture (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987)), aliens with post-April 1, 1997, convictions for aggravated felonies are ineligible for relief. *See INS v. St. Cyr*, 533 U.S. 289 (2001).

[6] Aliens in this situation may be ineligible for relief from removal due to the aggravated felony. which, although waivable under former INA §212(c), prohibits relief in the form of cancel-

*continued*

lation of removal under INA §240A(a) or for a hardship waiver for the post-April 1, 1997, conviction under INA §212(h).

[7] This time period is measured from the date of commission of the offense, not the date of conviction. *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999).

[8] Some aggravated felonies can be waived through the adjustment process, depending on the noncitizen's status and the nature of the offense; *e.g.*, a conviction for assault and battery with a dangerous weapon with a sentence of one year or more, a crime involving moral turpitude, can be waived for a nonresident whose spouse files a visa petition and proves extreme hardship if the spouse is removed. INA §212(h)(1)(B).

[9] The following crimes require a corresponding sentence to meet the statutory definition of "aggravated felony": (1) crime of violence—term of imprisonment at least one year (INA §101(a)(F)); (2) theft offense—term of imprisonment at least one year (INA §101(a)(G)); (3) offense for falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument—term of imprisonment is at least 12 months (INA §101(a)(P)); (4) offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered identification numbers—term of imprisonment is at least one year (INA §101(a)(R)); and (5) offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness—term of imprisonment is at least one year (INA §101(a)(S)).

[10] 23 I&N Dec. 173 (BIA 2001).

fense to 360 days.[11] In 2005, the BIA affirmed its holding in *Matter of Song* and specifically held that a sentence modification is valid for immigration purposes regardless of the reason for the modification.[12] The rationale to treat a vacated conviction differently from a vacated or modified sentence may be due to the fact that the term "sentence" is not defined by the INA. Although this rationale may be inconsistent, modifying a sentence for any reason is an effective PCR tool for practitioners. Accordingly, for certain crimes, sentence modification should be pursued to remove the crime from the aggravated felony category.

Practitioners are advised that although sentence modification can be utilized in some instances to assist residents and nonresidents in avoiding the harsh consequences associated with convictions for aggravated felonies, aliens may remain removable, deportable, or inadmissible for the offense despite the sentence reduction. However, sentence modification may provide the opportunity to apply for a waiver or other relief. Prior to seeking postconviction relief, practitioners must completely analyze all aspects of the client's criminal history. Effective, and sometimes creative, representation and advice during the postconviction relief process is essential to alleviate the consequences associated with many criminal convictions.

## ANY ORDER GRANTING PCR SHOULD SPECIFY THE CONSTITUTIONAL OR STATUTORY BASIS

The issue of whether an alien's vacated conviction remains valid for immigration purposes is one of exceptional importance. Practitioners must be aware of the legal significance of a vacated conviction and take all steps necessary to ensure that any postconviction vacature is based on the proper legal grounds.

An alien has been "convicted" of a crime within the meaning of the INA if a formal judgment of guilt of the alien has been entered by a court or, "if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."[13]

Although many citizens and noncitizens enter into guilty pleas in order to resolve their criminal charges without trial, some states provide statutory safeguards in the criminal system to ensure that such plea agreements are constitutionally valid. Violations of such statutes can, in some instances, form the basis for PCR.

The Board of Immigration Appeals (BIA) has drawn a clear distinction between convictions vacated pursuant to constitutionally protected considerations on the one hand, and those vacated pursuant to rehabilitative statutes or specifically to avoid immigration consequences on the other. *Matter of Roldan*[14] was the first decision addressing the issue. The alien had his conviction for possession of a controlled substance vacated pursuant to a state rehabilitative statute. The BIA held, however, that the conviction remained valid for immigration purposes.[15] In so holding, the BIA expressed several policy reasons for its decision. First, to have consistent interpretation of the definition of "conviction," second, to eliminate having state laws control the definition of "conviction" for immigration purposes, and third, to avoid having convictions vacated for the sole purpose of avoiding immigration consequences.[16] Although the BIA held the alien's vacated conviction remained valid for immigration purposes, it specifically limited the scope of the decision:

> Our decision is limited to those circumstances where an alien has been the beneficiary of a state rehabilitative statute which purports to erase the record of guilt. It does not address the situation where the alien has had his or her conviction vacated by a state court on direct appeal, wherein the court determines that vacation of the conviction is war-

[11] *Id.* at 174.

[12] *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) ("[W]e see nothing in the language or stated purpose of section 101(a)(48)(B) that would authorize us to equate a sentence that has been modified or vacated by a court ab initio with one that has merely been suspended. Indeed, the importance of this distinction was implicitly acknowledged by our precedent decision in *Matter of Song*, … which was issued well after the promulgation of section 101(a)(48)(B) and which gave effect to a sentence modification under circumstances similar to those presented here.").

[13] INA §101(a)(48)(A).

[14] 22 I&N Dec. 512 (BIA 1999), *vacated by Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

[15] *Id.*

[16] *Id.*

> ranted on the merits, or on grounds relating to a violation of a fundamental statutory or constitutional right in the underlying criminal proceedings.[17]

Thus, the BIA clearly recognized a difference between convictions vacated pursuant to state rehabilitative statutes and those vacated for substantive and procedural flaws in the underlying criminal proceedings. Whether this distinction is correct and proper is certainly debatable. Nevertheless, the BIA has upheld this distinction, perhaps based on the notion that state and federal criminal courts should not interfere with the immigration consequences that flow from convictions entered in the first instance by a court.

After *Roldan*, the next time the BIA dealt with a vacated conviction was in *Matter of Rodriguez-Ruiz*,[18] where the alien had his conviction for third-degree sexual abuse vacated pursuant to Article 440 of the New York Criminal Procedure Law. Pursuant to the New York Court's order, the alien's conviction was vacated "on the legal merits."[19] The BIA held that because Article 440 was "neither an expungement statute nor a rehabilitative statute," the conviction did not count for immigration purposes.[20]

Finally, in *Matter of Pickering*,[21] the BIA enunciated a bright-line rule regarding the immigration effect of vacating a conviction:

> [T]here is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of postconviction events, such as rehabilitation or immigration hardships. *Thus, if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A).* If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes.[22]

The Sixth Circuit affirmed the BIA's rationale regarding the legal basis required to properly vacate criminal convictions for immigration purposes.[23]

The BIA's interpretation of the effectiveness, for immigration purposes, of vacating a conviction is consistent with most federal circuit courts of appeals that have ruled on the issue.[24] It is clear from *Matter of Pickering* that any conviction vacated for constitutional violations in the underlying criminal proceedings is not a valid conviction for immigration purposes.[25] Constitutional violations may include failure by the criminal court to advise the alien of the deportation effect of the guilty plea in many states. However, vacating a criminal conviction solely to help the defendant avoid the immigration consequences that flow from the conviction will not be effective. Accordingly, immigration attorneys must act in concert with criminal attorneys during the postconviction relief process to substantiate the legal reason behind vacating the conviction through proper language in the motion to vacate. Failure to include evidence of the legal basis for the motion to the criminal court in the motion itself and the accompanying paperwork may result in the conviction remaining valid for immigration purposes.[26]

---

[17] *Id.*

[18] 22 I&N Dec. 1378 (BIA 2000).

[19] *Id.*

[20] *Id.* N.Y. Crim. Proc. Law §440 governs motions to vacate judgments. Unlike the Idaho statute at issue in *Roldan*, which is rehabilitative, the New York criminal law provision at issue in *Rodriguez-Ruiz* permits convictions to be vacated for legal error in the criminal proceeding.

[21] 23 I&N Dec. 621 (BIA 2003).

[22] *Id*. at 624 (emphasis added).

[23] *Pickering v. Gonzalez*, 465 F.3d 263, 266 (6th Cir. 2006).

[24] *See Sandoval v. INS*, 240 F.3d 577, 583 (7th Cir. 2001) (holding conviction vacated because of involuntary guilty plea not valid for immigration purposes); *Herrera-Inirio v. INS*, 208 F.3d 299, 305 (1st Cir. 2000) ("[S]tate rehabilitative programs that have the effect of vacating a conviction *other than on the merits or on a basis tied to the violation of a statutory or constitutional right in the underlying criminal case* have no bearing in determining whether an alien is to be considered 'convicted' under section 1101(a)(48)(A)."); *Murillo-Espinoza v. INA*, 261 F.3d 771 (9th Cir. 2001) (holding conviction vacated based on rehabilitative state statute not valid for immigration purposes).

[25] *But see Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002) (vacated federal conviction remains valid for purposes of the immigration laws irrespective of the reasons why the conviction was vacated).

[26] Since many criminal courts rule on motions to vacate by simply signing "allowed" or "granted" on the motion itself, the only documents available to convince an immigration court that the conviction was vacated in accordance with *Matter of Pickering* are the motion to vacate and the supporting documents. Therefore, language in the motion to vacate is critical to the outcome of the immigration case.

## GROUNDS FOR POSTCONVICTION RELIEF

### Affirmative Misrepresentation of Immigration Consequences by Criminal Counsel

In the interest of clarity and brevity, the authors have tailored the discussion in this article to whether the defendant was induced to plead guilty or no contest by an affirmative misrepresentation about the immigration consequences of the plea. A writ grounded in ineffective assistance of counsel (IAC) requires proof at a minimum that defense counsel induced the change of plea and that inducement prejudiced the defendant. In addition, some federal courts demand a showing that the defendant has not committed the federal offense at issue.

### Structural Error

Where there is little hope of establishing IAC due to difficulties in establishing prejudice, successor criminal counsel may wish to explore whether the district judge committed "structural" error.[27] The threshold showing for structural error is an inducement by the federal judge of defendant's plea by offering a benefit for waiver of the right to jury trial or threatening or expressly imposing a penalty for exercise of the right to jury trial. Structural error exempts a defendant from the requirement to show prejudice, since it is not amenable to "harmless error" analysis.[28]

### Methods of Obtaining Postconviction Relief: Writs

The only writ available in all federal and most state courts is habeas corpus. Federal courts have jurisdiction to consider habeas writs and writs in the nature of error coram nobis under the common law. While many practitioners lament the strict statute of limitations applicable in federal district court under the Antiterrorism and Effective Death Penalty Act (AEDPA),[29] state courts may impose even more rigorous jurisdictional bars for presentation of ineffective assistance of counsel claims. California is an example of a state in which trial courts lack jurisdiction to consider IAC claims under a writ of error coram nobis, so defendants may only raise an IAC claim under a writ of habeas corpus while subject to incarceration, probation, parole, or immigration detention solely on account of the California conviction.[30] In contrast to California's distinction of various writs, Pennsylvania has statutorily consolidated them in favor of a single "Post Conviction Relief Act" proceeding.[31]

The writ of audita querela merits brief discussion. Audita querela depends on the All Writs Act[32] as a vehicle to vacate a conviction if no other writ is available and the defendant demonstrates exceptional circumstances and rehabilitation. The authors discount the value of this writ because the threshold for exceptional circumstances is unreasonably high, and if it were only immigration consequences that created the exceptional circumstances, the resulting order would probably assist the government in satisfying its burden under *Pickering*.[33]

This article confines its discussion of federal remedies to habeas corpus under 28 USC §2255 and error coram nobis because any order granting one of these writs is unlikely to provide the government with grounds to meet its burden under *Pickering*. The primary distinction between these writs is timing, as prima facie eligibility under 28 USC §2255 requires a defendant to file his or her petition during incarceration or supervised release, and creates a statute of limitations of one year from the date of conviction unless equitable tolling applies. While a defendant has greater latitude in terms of timing for writ of error coram nobis, narrower bases for jurisdiction place a heavier burden on the defendant to show diligence.

While the substantive bases for habeas corpus under 28 USC §2255 and error coram nobis are similar in federal court, the latter requires "a complete miscarriage of justice."[34] The similarity derives from the waiver of other grounds in the plea agreement and Rule 11 colloquy.

### Writ of Habeas Corpus Before Federal District Courts

#### *Jurisdiction*

Jurisdiction turns on diligence in filing before expiration of the statute of limitations. For convictions that precede enactment of AEDPA, the statute of

---

[27] *See Arizona v. Fulminante*, 499 U.S. 279 (1991).

[28] *McGurk v. Stenberg*, 163 F.3d 470 (8th Cir. 1998).

[29] 28 USC §2255 (imposing one-year limit on prisoners' motions to apply for postconviction relief).

[30] *People v. Villa*, 148 Cal. App. 4th 473 (2007).

[31] 42 Pa. Cons. Stat. §9541 *et seq.*

[32] 28 USC §1651(a).

[33] *Pickering v. Gonzalez*, 465 F.3d 263, 266 (6th Cir. 2006).

[34] *U.S. v. Williamson*, 806 F.2d 216, 222 (10th Cir. 1986).

limitations turns on the date when the conviction became final under 28 USC §2244(d)(1). For pre-AEDPA convictions, the statute of limitations expired one year after AEDPA's effective date of April 26, 1997. There are two constraints on those defendants convicted after AEDPA's enactment: (1) Such defendants may only file habeas writs under 28 USC §2255 within one year of conviction, unless equitable tolling applies, and (2) Such defendants must be incarcerated or on supervised release at the time of filing.

While extraordinary circumstances may equitably toll the statute of limitations, such circumstances must (1) be the proximate cause of the petitioner's untimeliness, and (2) warrant a finding of diligence.[35] As to the first element, the petitioner bears the burden of demonstrating that he or she would have filed a habeas petition in a timely manner, but for the extraordinary circumstances. As to the second element, the petitioner bears the burden of showing that there were valid reasons for not attacking the conviction earlier. To date, no reported decision has credited a defendant with carrying this burden.

### *Misrepresentation of Immigration Consequences as IAC*

Habeas corpus petitions grounded on affirmative and material misrepresentations about immigration consequences require a substantive showing that the defendant is a foreign national; that the foreign national requested advice from his or her original criminal defense counsel about any immigration consequences of the proposed plea; that there is a causal connection between any immigration consequences and misadvice by original criminal defense counsel; and that the foreign national suffered prejudice.

#### *Material misrepresentations*

Federal district courts evaluate misrepresentations by considering "whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'"[36] This test subsumes the two-part analysis of *Strickland v. Washington.*[37] Under *Strickland*, a convicted defendant's claim that counsel's assistance was so defective as to require vacature of conviction requires that the defendant show that (1) counsel's representation was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Most federal circuit courts of appeals have recognized that affirmative misrepresentations of penal consequences compromise the Sixth Amendment right to effective assistance of counsel.

The Second, Ninth, and Eleventh Circuits have acknowledged ineffective assistance based on misrepresentations of immigration and other collateral consequences.[38] The First, Fourth, Fifth, and Seventh have not gone as far.[39]

If original counsel induced a defendant's plea by making affirmative misrepresentations about immigration consequences in a circuit that has not taken a position on collateral consequences, then successor counsel has a heavy burden in the context of postconviction proceedings to present nonbinding case law from sister circuits. Given the Supreme Court's deferential standard of review on such writs, the undecided circuits enjoy virtually unfettered discretion to determine whether affirmative misrepresentations of immigration consequences constitute IAC.

---

[35] *Melendez-Perez v. U.S.*, 467 F. Supp. 2d 169 (D. P.R. 2006); *Green v. U.S.*, 260 F.3d 78, 82 (2nd Cir. 2001); *Robinson v. Johnson*, 313 F.3d 128, 134 (3rd Cir. 2002); *In re Williams*, 444 F.3d 233, 237 (4th Cir. 2006); *U.S. v. Patterson*, 211 F.3d 927 (5th Cir. 2000); *Dunlap v. U.S.*, 250 F.3d 1001, 1004 (6th Cir. 2001); *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004); *U.S. v. Martin*, 408 F.3d 1089, 1092 (8th Cir. 2005); *U.S. v. Battles*, 362 F.3d 1195, 1196-1197 (9th Cir. 2004); *U.S. v. Willis*, 202 F.3d 1279 (10th Cir. 2000); *Johnson v. U.S.*, 340 F.3d 1219, 1226 (11th Cir. 2003) (affirmed on other grounds by *Johnson v. U.S.*, 544 U.S. 295 (2005)).

[36] *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

[37] *Strickland v. Washington*, 466 U.S. 668, 687–91 (1984).

[38] *U.S. v. Couto*, 311 F.3d 179 (2nd Cir. 2002) (28 USC §2255); *U.S. v. Kwan*, 407 F.3d 1005 (9th Cir. 2005) (writ of error coram nobis); *Downs-Morgan v. U.S.*, 765 F.2d 1534 (11th Cir. 1985) (28 USC §2255 claim justified evidentiary hearing because defendant made a colorable claim of innocence and the informed nature of his plea was compromised by his allegation that his attorney misadvised him about the consequence of deportation, which would subject him to imminent imprisonment and possible execution).

[39] These circuits only recognize ineffective assistance of counsel in the context of affirmative misrepresentation of penal consequences. *U.S. v. Giardino*, 797 F.2d 30, 32 (1st Cir. 1986) (28 USC §2255); *Hernandez-Hernandez v. U.S.*, 904 F.2d 758 (1st Cir. 1990) (28 USC §2255); *Hammond v. U.S.*, 528 F.2d 15 (4th Cir. 1975) (28 USC §2254); *Cooks v. U.S.*, 461 F.2d 530 (5th Cir. 1972) (28 USC §2255); *Colson v. Smith*, 438 F.2d 1075 (5th Cir. 1971) (28 USC §2254); *U.S. v. Healey*, 553 F.2d 1052 (7th Cir. 1977) (28 USC §2254 claim justified because unintelligent plea based on misinformation by trial counsel about right to appeal legal findings made prior to change of plea).

*Prejudice—the most significant hurdle*

Prejudice ranks as the most difficult element for a criminal defendant to overcome on a writ. The standard requires proof of a reasonable probability that the result would have been different but for counsel's unprofessional errors.

Where a criminal defendant has entered a plea of guilty or no contest, prejudice requires proof at an absolute minimum that the criminal defendant would not have entered his or her change of plea on the date it was entered. This inquiry often leads federal district courts to inquire about the merits of any defense at jury trial, so successor defense counsel should prepare arguments accordingly. Where the original criminal defense attorney has affirmatively misrepresented immigration consequences, an immigration practitioner has an important role to play; an affidavit about an immigration-safe disposition may demonstrate to the district court judge that the defendant would have moved for a continuance or exercised his or her right to jury trial in hopes of such a disposition.

**Writ of Coram Nobis Before Federal District Courts**

A writ of error coram nobis is a common law remedy.[40] Despite broader application of this writ traditionally, the PCR waiver in most federal plea agreements today renders this remedy narrower than habeas. Barring an incomplete Rule 11 colloquy or a defective plea agreement, most defendants waive the vast majority of writ claims at change of plea in district court. Assuming a complete Rule 11 colloquy and a standard plea agreement, IAC is one of the few remaining grounds for relief.

The primary jurisdictional questions for writs of error coram nobis are whether the defendant seeks to correct a common mistake "of the most fundamental character," and whether he or she has shown valid reasons for postponing attack on the conviction.[41] While a defendant may answer the former by claiming IAC and documenting affirmative misrepresentation of immigration consequences, the question of diligence can be more troublesome.[42]

The defendant has the burden of providing the district court with a good reason to exercise jurisdiction, given the lack of compliance with AEDPA's time deadlines.[43] While this bar is high, it is not impossible to overcome in the context of affirmative misrepresentations about immigration consequences.[44] The facts of *U.S. v. Kwan*[45] demonstrate that diligence may turn on immigration status and whether the defendant can justify delays in filing a petition with immigration court rulings that favored the defendant and led him or her to detrimental reliance on relief.

The lawful permanent resident in *Kwan* was indicted on two counts of bank fraud, which both constituted aggravated felonies.[46] This defendant expressed strong concerns prior to change of plea about the possibility of immigration consequences if the district court convicted him. Original counsel feigned expertise in immigration law and claimed "that although there was technically a possibility of deportation, 'it was not a serious possibility.'"

After the defendant entered a guilty plea, U.S. Immigration and Customs Enforcement served him with a poorly-drafted notice to appear in removal proceedings and charged him as an aggravated felon under INA §101(a)(43)(M) and (R). When his immigration attorney succeeded on a motion to terminate, the Office of Chief Counsel filed a new notice to appear (NTA) against him.[47] This new NTA charged him under INA §101(a)(43)(G), and gave him the first "reason to conclude that his criminal defense counsel had in fact erred and affirmatively misled him by advising him that there was 'no serious possibility' that his conviction would cause him to be deported."[48]

The defendant filed a petition for writ of error coram nobis and claimed that he had not filed a habeas petition under 28 USC §2255 previously in detrimental reliance on his immigration attorney. This delay was found reasonable because the defendant "retained immigration counsel, and that counsel advised him to challenge the INS's determination that Kwan's conviction was an aggravated felony."[49]

---

[40] *U.S. v. Morgan*, 346 U.S. 502, 506–07 (1954).

[41] *Id.* at 512.

[42] *See U.S. v. Kwan*, *supra* note 38, at 1011, 1014.

[43] *U.S. v. Esogbue*, 357 F.3d 532, 535 (5th Cir. 2004); *Godoski v. U.S.*, 304 F.3d 761, 763 (7th Cir. 2002); *Matus-Leva v. U.S.*, 287 F.3d 758, 760 (9th Cir. 2002).

[44] *U.S. v. Kwan*, *supra* note 38.

[45] *Id.*

[46] *Id.* at 1008.

[47] *Id.* at 1009.

[48] *Id.* at 1014.

[49] *Id.* at 1013.

While *Kwan* demonstrates the possibility of post-conviction relief based on affirmative misrepresentations of immigration consequences, the equities of *Kwan* were very strong. We caution against filing weaker cases that may undermine the possibility of a trend in sister circuits favoring *Kwan* as a strong precedent.

A claim of affirmative misrepresentation presented on a writ of error coram nobis is subject to the standards of IAC discussed above with respect to habeas corpus. Immigration counsel should review that discussion in preparing their clients to seek successor counsel on PCR.

### Writs of Habeas Corpus Before State Courts

To show affirmative misrepresentation of immigration consequences to a state court, the defendant bears the burden of proving that (1) original counsel made a statement about immigration consequences; (2) the defendant detrimentally relied on original counsel's characterization of immigration consequences by his or her waiver or exercise of the right to jury trial; (3) the defendant certainly faces immigration consequences that original counsel claimed were impossible or improbable; and (4) the defendant suffered prejudice. This final factor, prejudice, is the most difficult one to overcome. The defendant has the task of showing either that he or she would have exercised the right to jury trial if there was a waiver in fact; that he or she would have waived the right to trial if he or she exercised it in fact; or that the trial court committed structural error. The discussion of prejudice in the context of federal claims *supra* applies with equal force here.

### Writs of Coram Nobis Before State Courts

Certain state courts still exercise equitable jurisdiction under the common law to consider writs of error coram nobis. These courts act in equity, and thus limit jurisdiction to mistakes of fact. For example, the defendant may claim ignorance of an absolute defense on the charge to which he or she previously entered a plea of guilt or no contest. This standard of review forecloses mistakes of law, such as ineffective assistance by counsel's affirmative misrepresentations about immigration consequences.

The defendant may garner equitable relief by presenting a mistake of fact, such as a mistake about the defendant's age where the prosecutor mistakenly charged the defendant as an adult despite his or her minority. A prima facie case depends on the following factors: (1) whether the prosecution, defense counsel, judge, and the defendant held the mistake in common; (2) whether the defendant was at fault for the mistake; (3) whether the defendant diligently presented the mistake by timely filing a petition for writ; (4) whether the trial court already considered the mistake in entering judgment; (5) whether the mistake is independent of the merits of any issues subject to bench or jury trial; and (6) whether the mistake caused the defendant to suffer prejudice and prevented rendition of judgment.

### Motions to Vacate for Failure to Provide the Defendant with a General Admonishment About the Possibility of Immigration Consequences

#### *Jurisdiction*

Statutes in several states require the court to give a defendant a general admonishment about one or more immigration consequences.[50] Jurisdiction for post-conviction relief based on a failure to give the required warning generally turns on whether the statute prescribes a remedy and whether any presumption favors vacature of judgment.

If the state has not legislated a remedy, then successor counsel may need to develop a theory based on a habeas writ alleging ineffective assistance of counsel or a writ of error coram nobis alleging a mistake of fact. To the extent that there is a statutory presumption, state law may ease the prejudice requirement. However, the absence of a presumption may render prejudice arguments unavailing.

The majority of jurisdictions with advisement statutes specifically require admonishment about deportation (removal), exclusion (inadmissibility), and denial of naturalization. The remaining advisement states vary in their admonishments, but none requires original criminal counsel to provide the defendant with specific advice as to immigration consequences.

---

[50] *See, e.g.*, Mass. Gen. Laws ch. 278, §29D, which prohibits a court from accepting a guilty plea unless the defendant is advised, "[C]onviction of the offense for which you have been charged may have the consequences of deportation, exclusion of admission to the United States, or denial of naturalization, pursuant to the laws of the United States." Other jurisdictions with similar statutes include California, Connecticut, the District of Columbia, Hawaii, Illinois, Massachusetts, Minnesota, Montana, Nebraska, New York, North Carolina, Ohio, Oregon, Rhode Island, Texas, Washington, and Wisconsin.

***Prima Facie Case***

The defendant generally has the burden of proof to show that he or she did not receive an admonishment. Any written waiver and plea agreement and transcripts of the change of plea and sentencing will usually document the admonishments.

The defendant may wish to provide the state court with these documents as exhibits to a statutory motion to vacate judgment or petition for writ that tells a story about this defendant's life. Other documents that may demonstrate strong equities include those showing the family ties of the defendant to relatives who are legally present in the United States.

## CONCLUSION

Immigration attorneys and their client face ever-increasing obstacles to relief before the immigration courts, the various bureaus of the Department of Homeland Security, as well as the Department of State and foreign consulates. These hurdles prove especially difficult to surmount in the context of criminal convictions.

Any PCR starts with investigation of a legal basis as well as an advance proposal about alternative pleas in the event that PCR succeeds. Since the strength of the evidence is vastly more important than provoking an emotive response, the most significant support that the immigration attorney can provide is a great affidavit and a good referral. Such a referral should generally turn on whether successor counsel files writs for foreign nationals with regularity and understands that the reviewing court is unlikely to permit introduction of evidence beyond the exhibits submitted with the writ or motion. Foundational relationships between immigration and criminal counsel help mutual clients to advance the prospect of PCR.